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CALIFORNIA REPORTER REFERENCES

122 CALIFORNIA APPELLATE REPORTS, 2d SERIES

Cal.App.	P.2d	
Page	Vol.	Page
1	264	179
7	264	205
15	264	571
22	264	973
30	264	606
36	264	102
42	264	210
45	264	161
55	264	92
57	264	145
63	264	120
72	264	98
76	264	213
82	264	653
87	264	43
92	264	167
104	264	95
106	264	955
113	264	221
116	264	626
135	264	173
144	264	220
147	264	186
155	264	190
165	264	93
167	264	598
172	264	656
185	264	223
188	264	580
192	264	556
196	264	964
211	264	582
216	264	638
221	264	648
229	264	959
235	264	671
237	264	615
244	264	664
253	264	620
262	264	990
264	264	978
281	265	69
309	264	670
312	264	610
322	265	165
342	265	43
350	265	60
355	265	102
361	265	86
376	265	130
390	265	96
396	265	121
409	264	991
411	265	32
417	265	57
422	265	99
427	265	35
436	264	953
438	265	52
447	265	41
452	264	950
457	265	24
466	265	183
480	265	29
484	265	48
490	265	105
498	265	21
503	265	109
509	265	19
512	265	555
516	265	153
519	265	617
535	265	160
541	265	566
551	265	115
555	265	139
561	266	140
567	265	590
573	265	158
578	265	149
585	265	538
592	265	542
608	265	113
613	265	610
624	266	608
627	265	147
631	265	552
636	265	164
638	265	593
654	265	527
661	265	16
666	265	557
680	265	176
692	265	118
699	265	154
705	265	580
717	265	143
724	265	952
731	266	85
741	265	938
749	265	525
752	266	103
756	265	571
761	266	131
766	265	587
771	266	148
777	266	105
813	265	949
819	266	128
822	265	920
826	266	222
840	265	603
852	266	60
857	265	956
867	265	933
876	265	575
884	266	143
891	266	134
902	266	169
914	265	922
920	266	81
927	266	176
942	266	196
948	265	963
957	265	194
962	266	233
966	265	191

CALIFORNIA REPORTER

COVERING CASES REPORTED IN

PACIFIC REPORTER
SECOND SERIES

269 P.2d – 270 P.2d

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ST. PAUL, MINN.
WEST PUBLISHING CO.
1954

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Pacific Reporter, Second Series, Vol. 269, Nos. 1-3; Vol. 270, Nos. 1-4.

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Cal.Rep. 269-270 P.2d
4th Reprint—1980

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APPELLATE DEPARTMENT, SUPERIOR COURT —Continued

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CASES REPORTED

Vols. 269–270 P.2d

	P.2d	
	Vol.	Page
Acme Paper Co. v. Goffstein, App.	270	505
Acme Tool & Tester Co.; Hargrave v., App.	269	913
Adams v. Albany, App.	269	142
Agnew; John Paul Lumber Co. v., App.	270	1044
Ajax Const. Co. v. Martin, App.	269	132
Albany; Adams v., App.	269	142
Albaugh v. Moss Const. Co., App.	269	936
Allen's Estate, In re, App.	270	510
American Cas. Co.; Burns v., App.	269	656
American Cas. Co.; Burns v., App.	270	890
Angel; Nelson v., App.	269	626
Azvedo v. Benevolent Soc. of Cal., Super.	270	948
Babcock; Sibbett v., App.	269	42
Baird; Martin v., App.	269	54
Baldwin v. Fresno City Unified School Dist., App.	269	942
Baldwin; Pearson v., App.	270	866
Baldwin; People v., Sup.	270	1028
Bank of America Nat. Trust & Sav. Ass'n; Corotto v., App.	270	498
Banks; Wilkman v., App.	269	33
Barber v. Lewis & Kaufman, Inc., App.	269	929
Bares v. City of Portola, App.	269	239
Bartolacelli; Western Title Ins. & Guaranty Co. v., App.	269	165
Bartolo's Estate, In re, App.	269	30
Beagle v. Hanks, App.	270	113
Beagle; Hanks v., App.	270	115
Beal v. Superior Court In and For Los Angeles County, App.	270	568
Beavers; Carroll v., App.	270	23
Beckerman v. Huteson, App.	269	906
Beeler v. Beeler, App.	269	949
Benevolent Soc. of Cal.; Azvedo v., Super.	270	948
Benevolent Soc. of Cal.; Kelly v., Super.	270	948
Beverley v. Biscailuz, App.	270	522
Biscailuz; Beverley v., App.	270	522
Blair's Estate, In re, Sup.	269	612
Blotter v. Farrell, Sup.	270	481
Board of Ed. of City of Los Angeles v. Wilkinson, App.	270	82
Bonnen v. Ruoff, Sup.	269	612
Bridges v. Bridges, App.	270	69
Browand v. Scott Lumber Co., App.	269	891
Brown v. Cole, App.	269	73
Brown; Fowler v., App.	270	559
Brown; People v., App.	269	918
Bryant v. Monterey County, App.	270	897
Bryant v. Tulare Ice Co., App.	270	880
Buckner v. Vetterick, App.	269	67
Burke; Jackson v., App.	269	137
Burns v. American Cas. Co., App.	269	656

	P.2d Vol.	Page
Burns v. American Cas. Co., App.	270	890
Burns; Hall v., App.	269	888
Cagle; Light v., App.	270	900
California Pac. Title Ins. Co.; Sohn v., App.	269	223
Carroll v. Beavers, App.	270	23
Castello v. Linggi, App.	270	857
Chernabaeff; Martin v., App.	269	25
Church of Realization of Hollywood; Gering v., App.	269	127
Citizens Nat. Trust & Sav. Bank of Los Angeles; Kenny v., App.	269	641
City and County of San Francisco; Pootel v., App.	270	553
City and County of San Francisco v. Ross, App.	270	488
City and County of San Francisco; Sheehan v., App.	269	678
City of Burbank; Loewen v., App.	269	121
City of Long Beach; Foth v., App.	270	868
City of Long Beach; Jones v., App.	270	863
City of Los Altos; Ryder v., App.	270	532
City of Los Angeles; Pacific Tel. & Tel. Co. v., App.	270	903
City of Portola; Bares v., App.	269	239
City of San Bruno; Klevesahl v., App.	269	211
City of San Bruno; People ex rel. Klevesahl v., App.	269	211
Chosick v. Reilly, App.	270	547
Cole; Brown v., App.	269	73
Cole; People v., Super.	269	247
Cole's Estate, In re, App.	269	73
Conrad; People v., App.	270	31
Continental Nut Co.; Tas-T-Nut Co. v., App.	270	43
Corotto, In re, App.	270	498
Corotto v. Bank of America Nat. Trust & Sav. Ass'n, App.	270	498
Cotton Appliance v. Felton Aluminum Co., App.	269	64
Couser v. Couser, App.	270	496
Crary; Illers v., App.	269	638
Culver v. Superior Court In and For Los Angeles County, App.	270	78
Cumberpatch v. Nolan, App.	270	540
Dangerfield; Nelson v., App.	269	953
Daniels v. Williams, App.	270	556
Davis; People v., App.	269	897
Dean v. Krause, App.	270	29
De Bell; Vidler v., App.	270	120
Demetris v. Demetris, App.	270	891
Department of Cal., Veterans of Foreign Wars of U. S. v. Kunz, App.	269	882
Department of Employment; Haines v., App.	270	72
De Paula; People v., App.	269	901
Deutchman; Oppenheimer v., App.	270	52
Dike v. Golden State Co., App.	269	619
Doe and Roe; McIntyre v., App.	270	21
Dudley v. Thomas, App.	269	947
Dupray v. Marshall, App.	269	160
Dupray v. Marshall, App.	269	936
Duval v. Rowell, Super.	269	249
Dyer v. International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 542, App.	269	199
Ellichman; Gedstad v., App.	269	661
Ellsworth v. Ellsworth, Sup.	269	3
E. M. Cotton Appliance v. Felton Aluminum Co., App.	269	64
Emden v. Verdi, App.	269	47
Engleman v. Green, Super.	270	127

	P.2d Vol.	Page
Fallon; Wolff v., App.	269	630
Farrell; Blotter v., Sup.	270	481
Faucett; Pauley v., App.	269	89
Felton Aluminum Co.; E. M. Cotton Appliance v., App.	269	64
Finnegan v. Finnegan, Sup.	269	873
Foster; Hardy v., Super.	270	130
Foth v. City of Long Beach, App.	270	868
Fowler v. Brown, App.	270	559
Fresno City Unified School Dist.; Baldwin v., App.	269	942
Fresno County v. Roberson, Martin & Co., Super.	269	252
Fresno County; Tracy v., App.	270	57
Friis-Hansen; Petersen v., App.	269	636
Fritz; Kilfoy v., App.	270	579
Garcia; People v., App.	269	673
Gates; Hauger v., Sup.	269	609
Gedstad v. Ellichman, App.	269	661
Georgison v. Georgison, App.	269	177
Gering v. Church of Realization of Hollywood, App.	269	127
Gibson v. Stuck, App.	270	17
Gileo v. Southern Pac. Co., App.	269	150
Gladstone v. Matson Nav. Co., App.	269	37
Glogau; Kirkwood v., App.	270	875
Goffstein; Acme Paper Co. v., App.	270	505
Golden State Co.; Dike v., App.	269	619
Goodrich v. Tulare Ice Co., App.	270	880
Gould; People v., App.	270	551
Grant v. U. S. Electronics Corp., App.	270	64
Green; Engleman v., Super.	270	127
Greene; Wales v., App.	270	534
Griffin v. Lima, App.	269	191
Gross v. Superior Court of Los Angeles County, Sup.	270	1025
Guthman's Estate, In re, App.	270	875
Haines v. Department of Employment, App.	270	72
Hall v. Burns, App.	269	888
Hancock Oil Co.; Victory Oil Co. v., App.	270	604
Handelsman; Leiter v., App.	270	563
Hanks; Beagle v., App.	270	113
Hanks v. Beagle, App.	270	115
Hardy v. Foster, Super.	270	130
Hargrave v. Acme Tool & Tester Co., App.	269	913
Hauger v. Gates, Sup.	269	609
Haupt v. La Brea Heating & Air Conditioning Co., Super.	270	125
Hendershott v. Shipman, App.	269	113
Henderson; Martin v., App.	269	117
Henderson; Pete v., App.	269	78
Hendricks v. Hendricks, App.	270	80
Hinton v. State, App.	269	154
Hover; Kolodziejski v., App.	269	163
Hudson Lumber Co. v. U. S. Plywood Corp., App.	269	93
Hunt Mfg. Corp.; Thomas v., Sup.	269	12
Huteson; Beckerman v., App.	269	906
Illers v. Crary, App.	269	638
Industrial Acc. Commission; Industrial Indem. Co. v., Sup.	269	881
Industrial Acc. Commission; R. E. Spriggs, Inc. v., Sup.	269	876
Industrial Acc. Commission; State Compensation Ins. Fund v., App.	270	55
Industrial Indem. Co. v. Industrial Acc. Commission, Sup.	269	881

	P.2d Vol.	Page
International Broth. of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 542; Dyer v., App.	269	199
Jackson v. Burke, App.	269	137
Jackson; People v., App.	269	17
Jacquemart v. Jacquemart, App.	269	951
James v. James, App.	270	538
James v. Key System Transit Lines, App.	270	116
James v. Lowthian, App.	269	666
Jenkins v. Jenkins, two cases, App.	269	908
Jiffy-Stitcher Co.; Mollis v., App.	270	25
John Paul Lumber Co. v. Agnew, App.	270	1044
Jones v. City of Long Beach, App.	270	863
Jordan; Younger v., Sup.	269	616
Justice; People v., App.	270	859
Kantel; Sullivan v., App.	269	175
Kelly v. Benevolent Soc. of Cal., Super.	270	948
Kelly v. Kelly, Super.	270	947
Kemp; People v., App.	269	186
Kennedy v. Pacific Emp. Ins. Co., Super.	269	695
Kenny v. Citizens Nat. Trust & Sav. Bank of Los Angeles, App.	269	641
Key System Transit Lines; James v., App.	270	116
Kilfoy v. Fritz, App.	270	579
Killam v. Riley, App.	270	544
Kipp v. Kipp, Sup.	269	1
Kirkwood v. Glogau, App.	270	875
Kiss; People v., App.	269	924
Klevesahl v. City of San Bruno, App.	269	211
Klevesahl, People ex rel., v. City of San Bruno, App.	269	211
Koeper v. Koeper, App.	269	905
Kofoed; Poletti v., App.	269	30
Kolodziejski v. Hover, App.	269	163
Krause; Dean v., App.	270	29
Kuehn v. Lowthian, App.	269	666
Kunz; Department of Cal., Veterans of Foreign Wars of U. S. v., App.	269	882
La Boi; Marshall v., App.	270	99
La Brea Heating & Air Conditioning Co.; Haupt v., Super.	270	125
Lambe; People v., Super.	269	956
Leimert Co. v. Woodson, App.	270	95
Leiter v. Handelsman, App.	270	563
Lewis & Kaufman, Inc.; Barber v., App.	269	929
Light v. Cagle, App.	270	900
Lima; Griffin v., App.	269	191
Linggi; Castello v., App.	270	857
Linggi; Ramos v., App.	270	857
Loewen v. City of Burbank, App.	269	121
Los Angeles County Emp. Retirement Bd.; Stafford v., Sup.	270	12
Lowe; Sareussen v., App.	270	27
Lowenthal v. Mortimer, App.	270	942
Lowthian; James v., App.	269	666
Lowthian; Kuehn v., App.	269	666
Lyons v. Superior Court of State, In and For Los Angeles County, App.	269	148
MacArthur; People v., App.	270	37
McIntire v. Wasson, App.	270	32
McIntyre v. Doe and Roe, App.	270	21
McKenzie; Victory Oil Co. v., App.	270	604
Malcolm; People v., Super.	269	694

	P.2d Vol.	Page
Maloney; Pacific Mut. Life Ins. Co. of Cal. v., App.	270	584
Maloney; Pierce Ins. Co. v., App.	269	57
Marshall; Dupray v., App.	269	160
Marshall; Dupray v., App.	269	936
Marshall v. La Boi, App.	270	99
Marshall's Guardianship, In re, App.	269	160
Marshall's Guardianship, In re, App.	269	936
Martin v. Ajax Const. Co., App.	269	132
Martin v. Baird, App.	269	54
Martin v. Chernabaeff, App.	269	25
Martin v. Henderson, App.	269	117
Matoza v. Matoza, App.	269	51
Matson Nav. Co.; Gladstone v., App.	269	37
Meehan; People v., App.	269	70
Merola v. Superior Court In and For City and County of San Francisco, App.	269	664
Mollis v. Jiffy-Stitcher Co., App.	270	25
Monterey County; Bryant v., App.	270	897
Mortimer; Lowenthal v., App.	270	942
Morton; People v., App.	269	81
Morton v. Superior Court of State, In and For San Mateo County, App.	269	81
Moss Const. Co.; Albaugh v., App.	269	936
Mulligan v. Wales, App.	270	534
Myers v. Stevenson, App.	270	885
Nelson v. Angel, App.	269	626
Nelson v. Dangerfield, App.	269	953
Netherby; Snook v., App.	269	195
Nolan; Cumberpatch v., App.	270	540
Nordeste; People v., App.	270	530
Ohligschlager v. Ohligschlager, App.	270	577
Oppenheimer v. Deutchman, App.	270	52
Orlando, Application of, App.	269	45
Pacific Emp. Ins. Co.; Kennedy v., Super.	269	695
Pacific Lighting Gas Supply Co. v. Superior Court In and For Los Angeles County, App.	270	568
Pacific Mut. Life Ins. Co. of Cal. v. Maloney, App.	270	584
Pacific Tel. & Tel. Co. v. City of Los Angeles, App.	270	903
Paps; People v., App.	269	932
Pauley v. Faucett, App.	269	89
Paul Lumber Co. v. Agnew, App.	270	1044
Pearson v. Baldwin, App.	270	866
Pedroza; People v., App.	269	921
People v. Baldwin, Sup.	270	1028
People v. Brown, App.	269	918
People v. Cole, Super.	269	247
People v. Conrad, App.	270	31
People v. Davis, App.	269	897
People v. De Paula, App.	269	901
People v. Garcia, App.	269	673
People v. Gould, App.	270	551
People v. Jackson, App.	269	17
People v. Justice, App.	270	859
People v. Kemp, App.	269	186
People v. Kiss, App.	269	924
People v. Lambe, Super.	269	956
People v. MacArthur, App.	270	37

	P.2d Vol.	Page
People v. Malcolm, Super.	269	694
People v. Meehan, App.	269	70
People v. Morton, App.	269	81
People v. Nordeste, App.	270	530
People v. Paps, App.	269	932
People v. Pedroza, App.	269	921
People v. Pond, App.	269	216
People v. Ramos, App.	270	540
People v. Raquel, App.	270	528
People v. Robinson, Sup.	269	6
People v. Roll, App.	269	244
People v. Sears, App.	269	683
People v. Spreckels, App.	270	513
People v. Whalen, App.	269	181
People v. White, App.	269	19
People v. Wilson, App.	270	30
People ex rel. Klevesahl v. City of San Bruno, App.	269	211
Pete v. Henderson, App.	269	78
Pierce Ins. Co. v. Maloney, App.	269	57
Poletti v. Kofoed, App.	269	30
Pond; People v., App.	269	216
Petersen v. Friis-Hansen, App.	269	636
Pootel v. City and County of San Francisco, App.	270	553
Potter; Signorelli v., App.	270	88
Quiroz v. Stuzane, App.	269	103
Rakish v. Valerga, App.	270	50
Ramos v. Linggi, App.	270	857
Ramos; People v., App.	270	540
Raquel; People v., App.	270	528
Reilly; Chosick v., App.	270	547
Resler v. Roos, App.	269	105
Resler's Estate, In re, App.	269	105
R. E. Spriggs, Inc. v. Industrial Acc. Commission, Sup.	269	876
Riley; Killam v., App.	270	544
Roberson, Martin & Co.; Fresno County v., Super.	269	252
Robinson; People v., Sup.	269	6
Roll; People v., App.	269	244
Roos; Resler v., App.	269	105
Ross; City and County of San Francisco v., App.	270	488
Rowell; Duval v., Super.	269	249
Royal Indem. Co. v. Sherman, App.	269	123
Ruggles v. Ruggles, App.	269	899
Ruoff; Bonnen v., Sup.	269	612
Ryder v. City of Los Altos, App.	270	532
Sacramento and San Joaquin Drainage Dist. v. Truslow, App.	270	928
Sampson v. Sapoznik, App.	269	205
Sampson v. Sapoznik, App.	269	209
San Francisco, City and County of, v. Ross, App.	270	488
San Joaquin Exploration Co.; Schreiber v., App.	270	19
Sapoznik; Sampson v., App.	269	205
Sapoznik; Sampson v., App.	269	209
Sareussen v. Lowe, App.	270	27
Schilling; Wice v., App.	269	231
Schoener v. Waltman, App.	270	543
Schreiber v. San Joaquin Exploration Co., App.	270	19
Scott Lumber Co.; Browand v., App.	269	891

CASES REPORTED

	P.2d Vol.	Page
Sears; People v., App.	269	683
Sheehan v. City and County of San Francisco, App.	269	678
Shenson v. Shenson, App.	269	170
Shenson v. Shenson, App.	270	896
Sherman; Royal Indem. Co. v., App.	269	123
Shipman; Hendershott v., App.	269	113
Shulman v. Shulman, App.	269	923
Shultz; Stafford v., Sup.	270	1
Sibbett v. Babcock, App.	269	42
Signorelli v. Potter, App.	270	88
Sills v. Soto, App.	269	98
Smith, Ex parte, App.	269	45
Smith v. Smith, App.	270	613
Snook v. Netherby, App.	269	195
Sohn v. California Pac. Title Ins. Co., App.	269	223
Soto; Sills v., App.	269	98
Southern Pac. Co.; Gileo v., App.	269	150
Spreckels; People v., App.	270	513
Spriggs, Inc. v. Industrial Acc. Commission, Sup.	269	876
Stafford v. Los Angeles County Emp. Retirement Bd., Sup.	270	12
Stafford v. Shultz, Sup.	270	1
Stagliano v. Stagliano, App.	270	91
State; Hinton v., App.	269	154
State Bd. of Equalization; Swegle v., App.	270	518
State Compensation Ins. Fund v. Industrial Acc. Commission, App.	270	55
Stevenson; Myers v., App.	270	885
Stockton Unified School Dist. of San Joaquin County v. Trucco, App.	270	74
Stuck; Gibson v., App.	270	17
Stuzane; Quiroz v., App.	269	103
Sullivan v. Kantel, App.	269	175
Sullivan v. Wright, App.	269	671
Superior Court In and For City and County of San Francisco; Merola v., App.	269	664
Superior Court In and For Los Angeles County; Beal v., App.	270	568
Superior Court In and For Los Angeles County; Culver v., App.	270	78
Superior Court In and For Los Angeles County; Pacific Lighting Gas Supply Co. v., App.	270	568
Superior Court In and For Los Angeles County; Tide Water Associated Oil Co. v., App.	270	568
Superior Court of Los Angeles County; Gross v., Sup.	270	1025
Superior Court of State, In and For Los Angeles County; Lyons v., App.	269	148
Superior Court of State, In and For San Mateo County; Morton v., App.	269	81
Swegle v. State Bd. of Equalization, App.	270	518
Taliaferro v. Taliaferro, App.	270	1036
Tas-T-Nut Co. v. Continental Nut Co., App.	270	43
Thomas; Dudley v., App.	269	947
Thomas v. Hunt Mfg. Corp., Sup.	269	12
Thomas' Guardianship, In re, App.	269	947
Tide Water Associated Oil Co. v. Superior Court In and For Los Angeles County, App.	270	568
Tracy v. Fresno County, App.	270	57
Trucco; Stockton Unified School Dist. of San Joaquin County v., App.	270	74
Truslow; Sacramento and San Joaquin Drainage Dist. v., App.	270	928
Tulare Ice Co.; Bryant v., App.	270	880
Tulare Ice Co.; Goodrich v., App.	270	880
Tuolumne County; Turlock Irr. Dist. v., App.	269	129

CASES REPORTED

	P.2d Vol.	Page
Turlock Irr. Dist. v. Tuolumne County, two cases, App.	269	129
U. S. Electronics Corp.; Grant v., App.	270	64
U. S. Plywood Corp. v. Hudson Lumber Co., App.	269	93
Valerga; Rakish v., App.	270	50
Verdi; Emden v., App.	269	47
Vetterick; Buckner v., App.	269	67
Victory Oil Co. v. Hancock Oil Co., App.	270	604
Victory Oil Co. v. McKenzie, App.	270	604
Vidler v. De Bell, App.	270	120
Villafuerte v. Villafuerte, App.	270	526
Wales v. Greene, App.	270	534
Wales; Mulligan v., App.	270	534
Walter H. Leimert Co. v. Woodson, App.	270	95
Waltman; Schoener v., App.	270	543
Wasson; McIntire v., App.	270	32
Western Title Ins. & Guaranty Co. v. Bartolacelli, App.	269	165
Whalen; People v., App.	269	181
White; People v., App.	269	19
Wice v. Schilling, App.	269	231
Wilkinson; Board of Ed. of City of Los Angeles v., App.	270	82
Wilkman v. Banks, App.	269	33
Williams; Daniels v., App.	270	556
Wilson; People v., App.	270	30
Wolff v. Fallon, App.	269	630
Woodson; Walter H. Leimert Co. v., App.	270	95
Wright; Sullivan v., App.	269	671
Younger v. Jordan, Sup.	269	616
Zall v. Zall, App.	270	48

CALIFORNIA REPORTER

269 PACIFIC REPORTER
SECOND SERIES

CALIFORNIA REPORTER

269 PACIFIC REPORTER

SECOND SERIES

42 Cal.2d 724

KIPP et al.
v.
KIPP.
L. A. 22649.

Supreme Court of California, in Bank.
April 27, 1954.

Action for partition of real estate brought by holders under a commissioner's deed obtained after foreclosure of street assessment bond against holder of tax deed. The Superior Court, San Diego County, Robert B. Burch, J., entered judgment for plaintiffs and defendant appealed. The Supreme Court, Shenk, P. J., held that foreclosure action brought and carried to judgment by plaintiffs demonstrated an intent to assert and perfect the bond lien and such activity served to overcome the statutory presumption of abandonment or extinguishment by inaction.

Judgment affirmed.

Prior opinion, 260 P.2d 644.

1. Partition ⚿13

Interests of holders under a commissioner's deed pursuant to foreclosure of a bond lien and interest of holder under a tax deed from state based on title acquired for unpaid general taxes, were on a parity and remedy by partition was proper. Revenue and Taxation Code, § 3900; Civ. Code, § 2911.

2. Municipal Corporations ⚿519(5)

Where state issued to defendant a tax deed in August, 1945, but plaintiffs had filed action in 1943 to foreclose street improvement bond, and on December 31, 1946, decree of foreclosure was entered and plaintiffs obtained a commissioner's deed to the property, foreclosure action brought by plaintiffs demonstrated an intent to assert and perfect the lien and such activity served to overcome the statutory presumption of abandonment or extinguishment by inaction. Code Civ.Proc. § 1961; Civ.Code § 2911.

◆

Kipp & Gaskins, Virgil S. Kipp, Paul E. Gaskins, San Diego, for appellant.

Solon S. Kipp, W. E. Starke, San Diego, for respondents.

SHENK, Presiding Justice.

This is an appeal from a judgment for the plaintiffs ordering the sale of real property and the partition of the proceeds in an action brought pursuant to Section 752 of the Code of Civil Procedure, and denying relief to the defendant on his cross-complaint wherein he sought to quiet his title.

The defendant has a title to the property arising out of a tax deed from the state executed in August, 1945, and naming him as grantee. Under the provisions of Division 1, Part 6, of the Revenue and Taxation Code the state acquired the property in 1938 for tax delinquencies arising in 1932 and subsequent years.

The plaintiffs claim title through the lien of a street improvement bond issued by the City of San Diego in 1930 under the Improvement Act of 1911. The last coupon on the bond was due and became delinquent on January 2, 1940. On December 30, 1943, a complaint to foreclose the bond was filed in the plaintiffs' behalf against the owners of the property which was subject to the liens. Lis pendens was recorded at that time. On December 31, 1946, a decree of foreclosure was entered in the action, and in due course the plaintiffs obtained a commissioner's deed to the property.

[1] The plaintiffs assert that they are tenants in common with the defendant and that the property is subject to mutual liens to the extent of the respective purchase prices paid. If the interests asserted by the parties were properly established and preserved they are on a parity and the remedy by partition sought by the plaintiffs is proper. § 3900, Rev. & Tax. Code; Monheit v. Cigna, 28 Cal.2d 19, 168 P.2d 965, 167 A.L.R. 995.

The defendant resists the action in partition on the asserted ground that the plaintiffs have not sufficiently preserved their interest under the improvement bond, and that this interest was extinguished on January 1, 1947, by the operation of Section 2911 of the Civil Code. As amended in 1945 that section provides in its pertinent part: "* * * any lien heretofore existing or which may hereafter exist upon real property to secure the payment of a public improvement assessment * * * in the event bonds were or shall be issued to represent such assessment, * * * shall then be presumed to have been extinguished at the expiration of four years after the due date of said bonds or of the last installment thereof or of the last principal coupon attached thereto, or on January 1, 1947, whichever is later. The presumptions mentioned in this paragraph shall be conclusive in favor of a bona fide purchaser for value of said property after such dates." No contention is made that the defendant is entitled to the conclusive presumption, and the other presumptions contained in the section, not declared to be conclusive, are rebuttable under section 1961 of the Code of Civil Procedure. The question for decision is whether the disputable presumption of extinguishment was overcome by the commencement, maintenance and conclusion by judgment of the foreclosure proceedings before January 1, 1947.

In Scheas v. Robertson, 38 Cal.2d 119, 238 P.2d 982, this court passed on the constitutionality of the provisions of Section 2911. At page 126 of 38 Cal.2d, at page 986 of 238 P.2d the following quotation, with obvious approval of the legal effect thereof, from Rombotis v. Fink, 89 Cal.App.2d 378, 386, 201 P.2d 588, is pertinent as to the character of the evidence necessary to overcome a disputable presumption of extinguishment under this statute: "The only rights sought to be extinguished were those where the inference could reasonably be drawn from inaction that the rights had been abandoned. The extinguishment resulted, not from the legislation itself, but from the conduct of the bondholder in continuing to fail to assert his right after due notice. The legislation in question does no more than recognize the logical inference to be drawn from long inaction on the part of the bondholder—that the claim has been paid, abandoned or otherwise extinguished. * * *"

[2] In the present case there is no compelling evidence that the plaintiffs intended to abandon their lien right. On the contrary there is ample evidence that they intended to, and in fact did assert it by bringing the foreclosure action within the time specified and pursuing it to judgment within that time. See Missler v. Sommer, 92 Cal.App.2d 417, 206 P.2d 1116. It is true that remedies available through actions of a different character could have been effective in preserving the lien, see Sipe v. Correa, 38 Cal.2d 131, 134, 238 P.2d 989; Scheas v. Robertson, supra, 38 Cal.2d 119, 123, 238 P.2d 982; Elbert, Ltd. v. Nolan, 32 Cal.2d 610, 613, 615, 197 P.2d 537, but the foreclosure action brought and carried to judgment affirmatively demonstrated an intent to assert and perfect the lien. Such activity on the part of the plaintiffs served to overcome the disputable presumption of abandonment or extinguishment by inaction which might otherwise have been effective by the operation of Section 2911 on January 1, 1947.

Anything said in the case of Kipp v. Luberco, Ltd., 116 Cal.App.2d 656, 254 P.2d 150, which may be deemed contrary to the conclusions herein expressed is disapproved.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

42 Cal.2d 719

ELLSWORTH v. ELLSWORTH.

L. A. 22906.

Supreme Court of California.
In Bank.
April 20, 1954.

Proceeding on wife's motion to modify divorce decree which awarded custody of minor child to husband. After reference to Commissioner, who recommended that custody be given to the wife, the Superior Court, Los Angeles County, Daniel N. Stevens, J., entered an order following the recommendation, and thereafter entered an order sustaining husband's exceptions to report of Commissioner, and setting aside the order entered on the recommendation, and the wife appealed. On the husband's motion to dismiss the appeal, the Supreme Court, Edmonds, J., held that the order entered upon the recommendation was interlocutory pending determination to be made after consideration of exceptions timely filed by the husband, and the order appealed from was not appealable.

Appeal dismissed.

Prior opinion 262 P.2d 867.

1. Reference 🔑47

The provisions of Code of Civil Procedure relating to proceedings before referees and commissioners preserve traditional distinctions between general reference, that is, a trial before a referee upon all issues of fact or of law, and a special reference, in which he considers only part of the issues. Code Civ.Proc. §§ 259a, 638, subd. 1, 644, 656, 963, subd. 2.

2. Appeal and Error 🔑107

In case of general reference, decision of referee must be attacked in same manner as one made by court, and order vacating decision and directing rehearing is properly appealable as order granting new trial. Code Civ.Proc. §§ 638, subd. 1, 644.

3. Reference 🔑99(1)

In case of special reference, report of referee does not become decision of court without further action by trial judge. Code Civ.Proc. §§ 638, subd. 1, 644.

4. Reference 🔑103(1)

In case of special reference, without adoption of report of referee and filing of findings of fact and conclusions of law of trial court, report may be set aside without necessity of granting new trial. Code Civ. Proc. §§ 638, subd. 1, 644.

5. Appeal and Error 🔑78(5)

Order vacating referee's report on special reference is interlocutory only. Code Civ.Proc. §§ 638, subd. 1, 644.

6. Reference 🔑99(1)

Provision of Code of Civil Procedure authorizing court commissioner to take proof and make and report findings thereon as to any matter of fact upon which information is required by court does not contemplate hearing upon whole issue, within meaning of provisions relating to reference, and commissioner's findings are advisory only. Code Civ.Proc. § 259a.

7. Appeal and Error 🔑78(5)

Order, made by trial court upon commissioner's report recommending that custody of child of divorced parents be given to mother, was "interlocutory" pending determination to be made after consideration of exceptions timely filed by father, and order sustaining exceptions and setting aside order entered upon commissioner's recommendation was not "appealable." Code Civ.Proc. § 259a.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order" and "Interlocutory Order".

8. Appeal and Error 🔑78(5)

Legislature, by enacting provision of Code of Civil Procedure authorizing court commissioner to report findings as to matter of fact upon which court required information, and providing for exceptions to order entered upon commissioner's report, intended that the order remain interlocutory throughout period for filing and hearing exceptions to the report. Code Civ. Proc. § 259a.

◆

John C. Campbell and W. Floyd Cobb, Los Angeles, for appellant.

John U. Edwards, Glendale, for respondent.

EDMONDS, Presiding Justice.

Jack Howard Ellsworth has moved to dismiss the appeal taken by his former wife from an order vacating one which adopted the findings and recommendation of a commissioner of the court. The question presented for decision concerns the legal effect of the redetermination.

In a proceeding initiated by an order to show cause, Evelyn Ellsworth sought to modify the provisions of interlocutory and final decrees of divorce which award to Jack the custody of their minor son. Pursuant to section 259a of the Code of Civil Procedure, the matter was referred to a court commissioner who, after a hearing, made findings of fact upon which he based a recommendation that custody be given to Evelyn. The trial judge endorsed the report "So ordered" and, by a minute order, directed a modification of the decrees in accordance with the commissioner's recommendation.

Within the time allowed by the same section, Jack filed exceptions to the findings of fact and the subsequent order of the court, together with a notice of motion to have them set aside. After a hearing, the trial judge made the following order: "Plaintiff's exceptions to the findings and report of the commissioner are sustained and his motion to set aside the order based upon said findings and report is granted leaving the order for custody in effect as set forth in the interlocutory decree and as incorporated by reference in the final decree. Re Hearing is set for April 10–1953 at 9:45 A.M."

The ruling of the trial judge on the exceptions and motion was made under the authority of section 259a of the Code of Civil Procedure, which provides in part: "Subject to the supervision of the court, every court commissioner of a county or city and county having a population of nine hundred thousand inhabitants or more shall * * * have power:

* * * * * *

"2. To take proof and make and report his findings thereon as to any matter of fact upon which information is required by the court; but any party to any contested proceeding may except to such report and the subsequent order of the court made thereon within five days after written notice of the court's action, a copy of said exceptions to be filed and served upon opposing party or his counsel within said five days; and may argue his exceptions before the court on giving notice of motion for that purpose within ten days from entry thereof. After a hearing before the court on such exceptions, the court may sustain, or set aside, or modify its order theretofore made * * *."

Jack's position is that this section does not authorize an appeal from an order made pursuant to it, nor is there any other statutory basis for such an appeal. As he reads the statute, in the procedure specified by the legislature any order made by the trial court upon the commissioner's report is interlocutory pending a determination to be made after consideration of any exceptions timely filed.

Evelyn contends that the form of the order is immaterial if, in legal effect, it is one from which an appeal may be taken. Howe v. Key System Transit Co., 198 Cal. 525, 531, 246 P. 39. She argues that, under this section, an order sustaining exceptions to the commissioner's findings and making a different determination of the controversy is equivalent to one granting a new trial, which is specifically made appealable by section 963(2) of the Code of Civil Procedure.

No appellate court has considered the question of the legal effect of a ruling under section 259a. However, in Chiarodit v. Chiarodit, 218 Cal. 147, 21 P.2d 562, it was said that "the procedure which the commissioner is to follow is in all of its essential features the same as that to be followed by [a] referee, for which reason the rules of law ought to be the same." 218 Cal. at page 151, 21 P.2d at page 564. Counsel for Evelyn reads section 259a as prescribing a proceeding tantamount to a general reference, or to a special reference with an adoption of the referee's report. In either of these circumstances, the report of the referee is the decision of the court. Accordingly, it is argued, an order vacating the report of a referee or commissioner and directing a rehearing upon factual issues is within the statutory definition of an order granting a new trial.[1]

[1, 2] The provisions of the Code of Civil Procedure relating to proceedings before referees and commissioners preserve the traditional distinctions between a general reference, that is, a trial before a referee upon all the issues of fact or of law, and a special reference, in which he considers only part of the issues. A general reference may be had only with the consent of the parties. Code Civ.Proc. § 638(1); Estate of Hart, 11 Cal.2d 89, 91, 77 P.2d 1082. "The finding of the referee or commissioner upon the whole issue must stand as the finding of the court, and upon filing of the finding with the clerk of the court, or with the judge where there is no clerk, judgment may be entered thereon in the same manner as if the action had been tried by the court." Code Civ.Proc. § 644. In such a case, the decision of the referee must be attacked in the same manner as one made by the court, and an order vacating the decision and directing a rehearing is properly appealable as an order granting a new trial. Grayson v. Guild, 4 Cal. 122, 125; Peabody v. Phelps, 9 Cal. 213, 225; Lewis v. Grunberg, 205 Cal. 158, 162, 270 P. 181; see Baker v. Baker, 10 Cal. 527.

[3–5] A special reference, however, does not determine the whole issue, and the report of the referee does not become the decision of the court without further action by the trial judge. Peabody v. Phelps, supra, 9 Cal. 224; Chiarodit v. Chiarodit, supra, 218 Cal. 150, 21 P.2d 562. Without adoption of the report and the filing of the findings of fact and conclusions of law of the trial court, the report may be set aside without the necessity of granting a new trial. Clark v. Millsap, 197 Cal. 765, 785, 242 P. 918; Schefski v. Anker, 216 Cal. 624, 628, 15 P.2d 744; cf. Harris v. San Francisco Sugar Refining Co., 41 Cal. 393, 403–405. An order vacating such a report is interlocutory only. Johnston v. Dopkins, 6 Cal. 83, 84; Baker v. Baker, 10 Cal. 527, 528.

[6] The proceeding authorized by section 259a of the Code of Civil Procedure does not contemplate a hearing upon the whole issue within the meaning of the provisions relating to reference. By subsection 2, the commissioner is authorized to make and report findings "as to any matter of fact upon which information is required by the court". Under this provision as the hearing is not had upon the stipulation of the parties, the commissioner's findings are advisory only.

[7, 8] Evelyn takes the position, however, that because in the present case the commissioner's findings were adopted by the trial court in its order, there has been a decision. Upon that premise, she argues that the order vacating the decision is equivalent to one vacating a report of a referee made upon reference of the whole issue.

Prior to the amendment to section 259a in 1949, no order based upon the commissioner's findings was made until after exceptions were heard. The amendment to the section was enacted as an emergency measure, and the facts constituting the emergency were stated to be as follows:

"Under Section 259a of the Code of Civil Procedure as now written, it is provided that anyone can give notice that he is going to file exceptions to the findings of a commissioner and then the matter has to be heard by the judge. Unless this act is adopted, the court cannot sign the commissioner's recommendation until five days after the hearing to allow for the exceptions. Because of the tremendous volume of business it is necessary that the commissioner's findings be signed immediately as many of the commissioner's findings call for summary action and the lifting of restraining orders." Stats.1949, ch. 469, § 1, p. 817.

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1. "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, court or referee." Code Civ.Proc. § 656.

There is no indication that the legislature, by changing the time at which an order based upon the commissioner's report might become effective, intended to grant to the party against whom the exceptions are sustained an additional remedy for reviewing the trial court's determination. On the contrary, it appears that the legislature intended that the order remain interlocutory throughout the period for filing and hearing exceptions to the commissioner's report. At that time, instead of making an order for the first time, the trial court may "sustain, or set aside, or modify its order theretofore made." Such a construction of the section preserves the immediate effectiveness of the order without unnecessary delay occasioned by an appeal.

The appeal is dismissed.

SHENK, CARTER, TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro. tem., concur.

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42 Cal.2d 741

PEOPLE v. ROBINSON.

Cr. 5528.

Supreme Court of California.
In Bank.
April 27, 1954.

Defendant was convicted of robbery while armed with a deadly weapon. The Superior Court, Los Angeles County, Benjamin J. Scheinman, J., rendered judgment on the jury's verdict, and defendant appealed. The Supreme Court, Schauer J., held that the trial court's denial of a continuance to afford defendant a reasonable opportunity to obtain his own counsel and requirement that he be represented at the trial by a codefendant's counsel, though such counsel had informed appealing defendant and the trial judge that there might be a diversity of interests between defendants and suggested that appealing defendant secure other counsel, was error requiring a new trial.

Judgment reversed.

Spence and Edmonds, JJ., dissented.

Prior opinion 259 P.2d 683.

1. Criminal Law 🔑917(1)

The Superior Court's denial of request by one of two defendants for continuance to afford him reasonable opportunity to obtain his own counsel and requirement that he be represented at trial by codefendant's counsel, though such counsel had informed him and trial judge of possible diversity of interest between defendants and suggested that he secure other counsel, was error requiring new trial after conviction of robbery while armed with deadly weapon. Const. art. 1, § 13; U.S.C.A.Const. Amend. 6.

2. Criminal Law 🔑641(4)

Defendant's constitutional right to counsel includes right to undivided assistance of counsel of defendant's own choice, and such right is denied by forcing on him, over his and counsel's objections, an attorney employed to represent a codefendant. Const. art. 1, § 13; U.S.C.A.Const. Amend. 6.

3. Criminal Law 🔑641(4)

Diversity of interests of two defendants in sense of factual inconsistency between their defenses is not sole or necessarily controlling consideration underlying requirement that counsel for one defendant shall not be forced on other defendant, who is entitled to undivided loyalty and untrammeled assistance of his own counsel entirely apart from any factually apparent diversity of defendants' interests. Const. art. 1, § 13; U.S.C.A.Const. Amend. 6.

4. Criminal Law 🔑589(1)

Where defendant, seeking continuance to secure his own counsel, was confined in county jail when advised by codefendant's counsel two weeks or ten days before date set for trial that he should get another attorney, he was required under jail rules to seek new counsel by mail, which was slow process, and he made some attempts to obtain other counsel and did not know of public defender's availability or his personal opportunity to bring matter to trial judge's attention until case was called for trial, no dilatoriness chargeable to him was of sufficient substance to warrant court in requiring him to go to trial without further opportunity to secure counsel of his own choice. Const. art. 1, § 13; U.S.C.A. Const. Amend. 6.

◆

Howard S. Robinson in pro. per. and Joseph T. Forno, Los Angeles, under appointment by the Supreme Court.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] Defendants Howard S. Robinson and Therman B. Pratt were charged by information with two counts of robbery; Robinson was charged with having suffered three prior convictions of felony and Pratt with having suffered one such conviction; the information further alleges that at the time of the commission of the robbery charged in Count II defendants were armed with a deadly weapon. The defenses of the defendants were independent of each other; the evidence was sufficient to support either a conviction or an acquittal of either or both defendants on either or both counts. A jury found that Robinson was guilty of the offense charged in Count II; that he was armed as charged at the time of the commission of such offense; and that Pratt was not guilty of the offense charged in Count I. The jury were unable to reach verdicts as to the remaining issues and the trial court declared a mistrial as to such issues. Robinson's motion for new trial was denied and he did not appeal from the order of denial. On motion of the prosecuting attorney Count I of the information against Robinson was dismissed. Robinson appeals from the ensuing judgment of conviction of Count II. He contends that he was deprived of the right to counsel of his choice because, over his request for a continuance to enable him to secure independent counsel, he was required to go to trial represented by counsel for Pratt although such counsel had informed Robinson and the trial judge that there might be a diversity of interest between Robinson and Pratt and had suggested that Robinson should secure other counsel. It is our conclusion that under the circumstances shown the trial court's denial of a continuance to afford Robinson a reasonable opportunity to obtain his own counsel requires a new trial.

The crimes charged were committed in Los Angeles on June 4 and June 22, 1952. The circumstances relating to Robinson's opportunity to obtain counsel of his choice are as follows: Robinson and Pratt were arrested on June 22. Attorney A. P. Coviello represented both defendants at the preliminary hearing. The information was filed on July 17, 1952. On July 21 defendants, still represented by Mr. Coviello, were arraigned and pleaded not guilty. Trial was set for August 18. On August 18 the cause was called for trial and the following occurred:

"Mr. Coviello: Your Honor, in this case, unfortunately, I am not quite ready here. Mr. Robinson at least 10 days ago, or two weeks ago, had consulted other attorneys. I don't want to go into a lot of detail, but he did tell me in the attorneys' room that he didn't want me to represent him. I indicated that I wanted him to secure counsel. I felt that there might be a diversity of interest between my client, Mr. Pratt, and Mr. Robinson. I have known Mr. Pratt for some time.

"He has told me this morning here that he hasn't made definite arrangements with any attorney. I don't know if he has consulted a public defender or not. I want to assure your Honor I can't represent him in court if he doesn't want me to. As far as I am concerned, I am ready to defend both these men, and I did go originally on the assumption that I would defend both of them, but I say again at least two weeks ago, or 10 days ago, I told him in the attorneys' room I thought it would be wise for him to get another attorney so there would be no question of diversity of interests here. In view of what he said I think I would like to ask the Court to continue it for at least a week. I will leave it up to him here, if your Honor wants to interrogate him.

"Defendant Robinson: I would like to ask this case be continued for two weeks because I would like to get an attorney.

"The Court: What do you gentlemen want to do in this matter?

"Mr. Russell [deputy district attorney]: Well, we have quite a few witnesses here. It seems to me that the matter should have been put on the calendar when some question arose between counsel and his client as to the situation. I haven't been advised prior to this time that there was any contemplation of continuance.

"The Court: Is the public defender here?

"Mr. Russell: No, your Honor. I might state, so far as our calendar is concerned, it will have to go at least to the latter part of September.

"The Court: In view of the large number of witnesses here, I prefer not to continue the matter. Perhaps we could get a public defender at the last moment.

"Mr. Russell: The public defender wouldn't accept the case, if they had to go to trial today. I don't think it would be fair to them. They would require some opportunity to prepare for trial in the matter.

"The Court: Under the circumstances, I will pass this case for the moment. I would like to talk to Mr. Russell and Mr. Coviello in this Robinson and Pratt case.

"(Conference in chambers off the record.)

"(Other matters heard.)"

Later on August 18 a jury was impaneled and the trial proceeded with Mr. Coviello representing both defendants and without further comment by Mr. Coviello or defendant Robinson as to Coviello's representation of Robinson.

The victim of each crime identified defendants as its perpetrators. A passer-by who witnessed the second robbery noted the license number of a Chevrolet automobile which was used by the robbers. Shortly after the robbers fled from the scene of the second crime, police officers in a radio patrol car observed the Chevrolet (which was stolen and which bore stolen license plates of another car) outside a cafe. According to their testimony Robinson was then in the automobile and Pratt was in the cafe. They arrested the defendants. In the Chevrolet were a gun which the victim of the second robbery testified had been used in the commission of that crime and a bottle of wine on which was a thumb print which, in the opinion of an expert, was Pratt's; on the steering wheel was a finger print which, in the opinion of the expert, was Robinson's. The officers took the defendants to the City Hall in the patrol car. When they reached there, according to the testimony of one of the officers, he found between the back and the rear seat of the patrol car a wallet which had been taken from the second victim and another wallet which was not connected with this case.

On June 4 Robinson had attempted to cash a check which had been taken in the robbery of that day; the credit manager of the store where Robinson attempted to cash the check stated that it had been reported taken in a robbery and that he was summoning a policeman. Robinson thereupon went out of the store, leaving the check.

Each defendant took the stand and testified to an independent alibi for each crime. Each testified that he did not know how to operate an automobile. Each testified that he had entered the cafe alone. Pratt testified that he told the arresting officers that he had never seen Robinson before he entered the cafe; Robinson testified that the extent of his acquaintance with Pratt was that he had "seen him around * * * several times." Each defendant testified that he had not been in the Chevrolet automobile at the time of or prior to his arrest, that he had not seen the above mentioned gun, wallet of the second victim, or wine bottle until he was taken to the City Hall. Robinson testified that he acquired the check which he attempted to cash on June 4 in a gambling game.

That the jury considered that this was a close case factually appears from the following circumstances: Although, so far as the reporter's transcript shows, the witnesses were equally positive in their identification of each defendant, the jury, as previously stated, acquitted Pratt of the charge in Count I, convicted Robinson of the charge in Count II, and were unable to agree whether Pratt was guilty of Count II and Robinson of Count I. The jury retired to deliberate at 9:55 a. m. on August 22 and returned to court on two occasions to have certain testimony read (the record does not disclose what testimony was read); at 11 p. m. they were sent to a hotel for the night; at 10 a. m. on August 23 they resumed deliberations and at 2:45 p. m. they returned to the court room, returned verdicts on some of the issues, and the court declared a mistrial as to the other issues.

[2] The right to counsel assured in the federal courts by the Sixth Amendment to the United States Constitution and in the courts of this state by section 13 of article I of our Constitution includes the right to the undivided assistance of counsel of defendant's own choice and this right is denied by forcing upon a defendant, over his and counsel's objection, an attorney who has been employed to represent a co-defendant. In this connection the United States Supreme Court has held (in Glasser v. United States (1942), 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680),

"Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment [citation] so are we clear that the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests. If the right to the assistance of counsel means less than this, a valued constitutional safeguard is substantially impaired. [P. 70 of 315 U.S., p. 464 of 62 S.Ct.] * * *

"There is yet another consideration. Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected. Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness.

"To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citations.] Of equal importance with the duty of the court to see that an accused has the assistance of counsel is its duty to refrain from embarrassing counsel in the defense of an accused by insisting, or indeed, even suggesting, that counsel undertake to concurrently represent interests which might diverge from those of his first client, when the possibility of that divergence is brought home to the court. [Pp. 75–76 of 315 U.S., p. 467 of 62 S.Ct.]"

This court has held, with reference to the same problem (in People v. Lanigan (1943), 22 Cal.2d 569, 576–577, 140 P.2d 24, 148 A.L.R. 176),

"There are many reasons why the objections of Mr. Lavine and the defendants themselves should have been respected. Mr. Lavine had been employed by Giardano as his sole counsel. That employment carried with it a very definite professional obligation on the part of Mr. Lavine. The engagement required him to 'maintain inviolate the confidence, and at every peril to himself to preserve the secrets, of his client' (subd. (e) section 6068, State Bar Act, Business and Professions Code). That admonition to lawyers is as old as the canons of professional ethics. Undivided loyalty to the cause of his client is essential to the personal integrity of counsel and to the maintenance of the high standards of the legal profession. Under the circumstances here presented, fidelity to the client who first employed him would have foreclosed Mr. Lavine from voluntarily representing the co-defendant. Since voluntary employment in that behalf would have been improper, compulsory representation should not have been imposed. Mr. Lavine was therefore well within his rights in objecting to his appointment as counsel for Lanigan and Giardano was entitled to the undivided assistance of the counsel whom he had employed. * * * When the time came for the presentation of their defense Mr. Lavine was confronted with the delicate question whether to advise them to testify in their own behalf, for the failure of a defendant 'to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury' (Cal.Const. art. I, § 13, as amended in 1934). In criminal cases it frequently occurs that circumstances which make it advisable for one defendant to testify are not present when consideration is given to the question of offering another defendant as a witness. One may be vulnerable to impeaching questions and the other not. It might be highly desirable that the one not so vulnerable take the witness stand and the other not. If the former should do so and the other not, the circumstance might weigh heavily against the latter in the minds of the jury. A like prejudice might not occur if the defendants were represented by separate counsel. Each of the defendants was entitled to have questions of this nature considered and decided by counsel independently of the interests of the other. And counsel should not be hampered or embarrassed by being compelled to choose one course as against the other because of the action taken by the court."

[3] The People urge that the record does not disclose any diversity of interest on the part of the defendants here. But, as indicated in the above quotations, a diversity of interest in the sense of any factual inconsistency between the defenses advanced is not the sole or necessarily the controlling consideration underlying the requirement that counsel for a co-defendant not be forced upon another defendant. It is not necessary for Robinson to show that he had some diversity of interest from Pratt (e. g., that he might have wished to attempt to strengthen his own case by casting blame for the crimes upon Pratt); entirely apart from any factually apparent diversity of interests Robinson was entitled to the undivided loyalty and untrammeled assistance of his own counsel. As stated by the supreme court in the Glasser case, quoted more fully above, "Irrespective of any conflict of interest, the additional burden of representing another party may conceivably impair counsel's effectiveness. * * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Upon the facts of this case we are impelled to conclude that a miscarriage of justice is shown. (See People v. Sarazzawski (1945), 27 Cal.2d 7, 11, 161 P.2d 934.)

[4] The People suggest that Robinson was attempting improperly to delay the proceedings by seeking a last minute change in counsel. Robinson, at the time Mr. Coviello advised him two weeks or ten days before the date set for trial that "it would be wise for him to get another attorney so there would be no question of diversity of interests here," was confined in the county jail and his opportunities to communicate with other attorneys were limited. According to his statement he "was required, under the rules of the county jail, to seek new counsel by mail * * * It is a slow process * * *." He did make some attempts to obtain other counsel; it does not appear that he knew of the availability of the public defender or that he personally had opportunity to bring the matter to the attention of the trial judge until the case was called for trial. In the circumstances it does not appear that any dilatoriness chargeable to him was of sufficient substance to warrant the grave consequence of being required to go to trial without further opportunity to secure counsel of his choice.

For the reasons above stated the judgment is reversed.

GIBSON, C. J., and SHENK and TRAYNOR, JJ., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion and generally in the reasoning upon which it is based, as it appears to be in full accord with the views expressed by me in my dissenting opinion in People v. Dorman, 28 Cal.2d 846, 855, 172 P.2d 686. However, in the Dorman case there was no claim of a conflict of interest between the two defendants, the sole claim there being the right of defendant Smith to be represented by counsel of his own choice. Here the claim of conflict of interest does not appear to be of very great moment and the majority opinion does not point out wherein the defendant was prejudiced by the alleged conflict of interest between himself and the other defendant. However, defendant Robinson did express a desire to be represented by counsel of his own choice and Mr. Coviello expressed his willingness to withdraw as counsel for said defendant and permit him to employ other counsel. The court, however, denied these requests and refused to grant a continuance to enable defendant Robinson to obtain counsel of his own choice. Under the facts as disclosed by the majority opinion, it is my view that this constituted an abuse of discretion, because it had the effect of denying defendant Robinson an opportunity to employ counsel of his own choice.

For the reasons above stated and those expressed at length in my dissenting opinion in the Dorman case, supra, I am of the opinion that the ruling of the trial court was prejudicial to the rights of defendant Robinson and he should be granted a new trial.

SPENCE, Justice.

I dissent.

While the majority opinion relies upon certain broad language found in the cited cases, such language must be read in the light of the facts which were under consideration. I find nothing in these cases nor in reason to justify the reversal of the judgment in the present case, and I believe that such reversal will have the effect of seriously interfering with the efficient and orderly administration of justice in our trial courts.

This is not a case in which a trial court has assumed to appoint counsel of one co-defendant to represent another defendant over objection on the ground of diversity of interest between the co-defendants. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680; People v. Lanigan, 22 Cal.2d 569, 140 P.2d 24, 148 A.L.R. 176. Neither is it a case in which a defendant has been forced to go to trial with unprepared counsel, People v. Manchetti, 29 Cal. 2d 452, 175 P.2d 533, or without representation by any counsel. In re Masching, 41 Cal.2d 530, 261 P.2d 251.

The present record presents a case in which one of two co-defendants, who had been jointly represented by counsel of their own choice during the preliminary hearing, arraignment, and in preparation for the trial, appears with such counsel on the day set for trial, which is over thirty days after arraignment; and without previous indication or appropriate motion, Pen.Code, § 1050, informally requests a continuance for the purpose of obtaining other counsel, upon the mere suggestion that "there might be a diversity of interest." Appellant's counsel stated, "as far as I am concerned, I am ready to defend both these men, and I did go originally on the assumption that I would defend both of them * * *." It is patent from this and the rest of the colloquy that counsel did not believe that any conflict of interest existed, and that he felt that he could continue to represent both without any violation of his duty to either of his clients. Rules Prof. Conduct, rule 5. During the colloquy, the prosecution interposed an objection to the continuance, the case was passed, and the attorneys for both sides conferred with the trial judge in chambers. The proceedings at this conference are not to be found in the record. It may be assumed, however, that the trial judge performed his official duty, and that he satisfied himself, as counsel had previously indicated, that counsel could represent both defendants fairly and without prejudice. The trial judge then called the case for trial. Counsel answered "ready" on behalf of both defendants, and the trial proceeded without any objection by defendant or his counsel. The record reveals that counsel vigorously and ably represented the co-defendants, and there is not the slightest indication of any conflict of interest. It thus appears that defendant, without making a proper motion for continuance, Penal Code, § 1050, and without interposing any proper objection, took the chance of obtaining a favorable verdict; and being disappointed in the result, now seeks a reversal upon the claim that the trial court abused its discretion in denying a continuance under the circumstances. No case has been cited to sustain such a claim.

While our courts should jealously guard the rights of a person accused of crime, there is no absolute right on the part of the accused to insist upon a continuance of his trial for the purpose of permitting him to change from representation by one counsel of his choice to another. People v. Dowell, 204 Cal. 109, 113, 266 P. 807; People v. Whinnery, 55 Cal.App.2d 794, 798–799, 131 P.2d 33; People v. Shaw, 46 Cal.App.2d 768, 772–775, 117 P.2d 34; Berger v. Mantle, 18 Cal.App.2d 245, 248–249, 63 P.2d 335. I am in accord with the following language employed by Mr. Justice Schauer, while presiding in the District Court of Appeal, in People v. Whinnery, supra, 55 Cal.App.2d at page 799, 131 P.2d at page 35, in quoting approvingly from People v. Shaw, supra: " 'To hold that a defendant charged with crime has an absolute right to counsel of his own selection, with unlimited right to insist upon continuances of his trial, would be subversive of the prompt administration and execution of the laws—upon which depends largely their effectiveness. It is at once apparent that the trial court must in the nature of things have some control over such matters, to the end that judicial business may be dispatched in an orderly manner; and if it has any discretion it is apparent to us that such discretion was not abused in this particular instance'."

But, as I read the majority opinion in the instant case, if the accused and his co-defendant have been jointly represented by counsel of their own choice and the accused merely suggests informally for the first time on the day of trial that there *might* be a diversity of interest between the co-defendants, the trial may not proceed and a continuance must be granted, unless perchance the accused may subsequently expressly consent to going to trial with such joint representation. See People v. Rocco, 209 Cal. 68, 285 P. 704. If this be the rule, then trial courts are powerless to prevent dilatory tactics on the part of those accused of crime or to prevent the disruption of the orderly dispatch of the work of our busy courts. I cannot subscribe to such a rule.

For the above reasons and those stated by Mr. Presiding Justice Moore when the case was before the District Court of Appeal, People v. Robinson, 259 P.2d 683, I would affirm the judgment.

EDMONDS, J., concurs.

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42 Cal.2d 734

THOMAS

v.

HUNT MFG. CORP. et al.

L. A. 23066.

Supreme Court of California, in Bank.

April 27, 1954.

Suit to foreclose mortgages on real and personal property and recover on written contract for repayment of money advanced by plaintiff. Defendants filed a counterclaim, alleging that loan agreements were usurious. The Superior Court, Orange County, Kenneth E. Morrison, J., entered judgment crediting treble the amount of usurious payments on unpaid balance owing on obligations sued on, and from such judgment and order denying motion for new trial plaintiff appealed. The Supreme Court, Schauer, J., held that finding that provision in agreement, drawn by plaintiff, for payment to plaintiff of $100 per month for services rendered to corporation in addition to principal indebtedness and interest was a subterfuge for the purpose of evading usury laws, to which defendants had agreed under duress and coercion, was supported by the evidence and warranted judgment for defendants.

Judgment affirmed and appeal from order denying motion for new trial dismissed.

Prior opinion, 263 P.2d 22.

1. Appeal and Error ⚿110

Appeal would not lie from order denying a motion for new trial. Code Civ.Prac. § 963.

2. Appeal and Error ⚿931(1)

On appeal from judgment favorable to defendants, reviewing court must consider that trial court resolved all substantial conflicts in the evidence and drew all reasonable inferences in favor of defendants.

3. Usury ⚿117

In suit to recover on written agreement for repayment of money advanced by plaintiff, wherein defendants contended that provision in agreement for payment of $100 per month to plaintiff for services rendered to defendant corporation in addition to principal indebtedness and interest thereon rendered transaction usurious, evidence supported finding that plaintiff had never rendered any services to defendant corporation. Const. art. 20, § 22.

4. Usury ⚿117

In suit to recover on written agreement for repayment of money advanced by plaintiff, finding that provision in agreement drawn by plaintiff for payment to plaintiff of $100 per month for services rendered to defendant corporation in addition to payment of principal indebtedness and interest thereon was a subterfuge made for the purpose of evading usury laws was supported by the evidence. Const. art. 20, § 22.

5. Usury ⚿137

Where provision in agreement for payment of $100 per month to plaintiff for services rendered to defendant corporation in addition to payment of principal indebtedness and interest thereon was a subterfuge for the purpose of evading usury laws, to which defendants had agreed under duress and coercion, crediting on defendants' indebtedness treble the amount of usurious payments made was proper. Gen. Laws, Act 3757, § 3; Const. art. 20, § 22.

6. Contracts ⚿155

Any ambiguity in terms of written contract should be resolved against party by whom it was drawn.

7. Usury ⚿15, 142(4)

The conscious and voluntary taking of more than the legal rate of interest constitutes "usury", and proof of a conscious attempt, with knowledge of the law, to evade usury law is not essential to recovery of treble the amount of usurious interest paid. Gen.Laws, Act 3757, § 3; Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Usury".

8. Usury ⚿119

Existence of the intent required to constitute exaction of usury is always a question of fact. Gen.Laws, Act 3757, § 3; Const. art. 20, § 22.

9. Usury ⚿114

In ascertaining existence of the intent required to constitute exaction of usury, court may consider all the circumstances surrounding transaction. Gen.Laws, Act 3757, § 3; Const. art. 20, § 22.

10. Usury ⚿11

In determining whether payments are usurious, substance is more important than form, and the name by which excessive payments were labeled or the guise under which they were exacted is immaterial, if in fact they were for the forbearance of money. Gen.Laws, Act 3757, § 3; Const. art. 20, § 22.

◆

Donald C. McGovern, Todd W. Johnson, Edward D. Robertson, Gilbert E. Harris, and Thomas C. Cannan, Los Angeles, for appellant.

Desser, Rau, Christensen & Hoffman and Robert Haves, Beverly Hills, for respondents.

SCHAUER, Justice.

Plaintiff brought suit to recover an alleged unpaid balance ($3,894.51 principal plus interest and attorneys' fees) on a promissory note (original principal $15,000) and a written contract for the payment of money, and to foreclose a mortgage and a chattel mortgage securing the obligations, all documents, together with a $5,000 note hereinafter mentioned, forming parts of the same transaction. Defendants, who had paid approximately four-fifths of the principal sums, together with accruing interest, by way of answer and counterclaim allege in detail the terms of the notes and the contract, set out the amounts paid by them and the dates of the several payments, and aver that of the amounts they had paid, the sum of $1,119.48 was usurious interest.[1] The trial court found in favor of defendants and entered judgment crediting them with $3,358.44 (treble the amount of the usurious payments) on the balance unpaid on the principal of the obligations sued on.

[1] Plaintiff appeals from the judgment and from the order denying his motion for a new trial. An order denying a motion for a new trial is a non-appealable order and will be dismissed. (Code Civ.Proc., § 963; Clemons v. City of Los Angeles (1950), 36 Cal.2d 95, 98, 222 P.2d 439.) The controlling question requiring determination is the sufficiency of the evidence to support the trial court's finding and conclusion that the contract called for the payment of usury. The evidence hereinafter epitomized amply supports the essential finding and, hence, requires affirmance of the judgment.

[2] It is, of course, to be understood that in stating the evidence we are bound to consider that the trial court resolved all substantial conflicts and drew all reasonable inferences in favor of the defendants. (Pewitt v. Riley (1945), 27 Cal.2d 310, 313, 163 P.2d 873.) The defendant Hunt Manufacturing Corporation, wholly owned by defendant Willis E. Hunt, had a substantial business in Costa Mesa, California, where it was engaged in building plastic boats. More cash working capital was needed and in about February or March of 1950 defendant Hunt began negotiating with the plaintiff, hoping to interest him in the business to the end of augmenting the cash available. It was first proposed that plaintiff should contribute $20,000 and receive 50% of the stock of defendant corporation. Early in May plaintiff inspected the plant and the corporate books and records; he then told Hunt that the deal did not look good but after further talks Thomas offered to pay $15,000 for 55% of the corporate stock and to loan the corporation $5,000. To carry out that plan the corporation, on May 24, 1950, executed its note in favor of Thomas for $5,000 and on May 30, 1950, another note in his favor for $15,000 and, on the same date, a contract providing that upon approval by the Commissioner of Corporations the corporation would issue to Thomas enough of its stock to give him 55% of all outstanding stock in return for cancellation of the $15,000 note. Presumably the entire $20,000 was advanced by Thomas. The contract further provided that "Hunt and Thomas shall receive such salaries as the Board of Directors may from time to time determine." It is important to note that the board never approved a salary for Thomas.

In the middle of June, 1950, Hunt left on a trip to Texas to deliver some unfinished hulls and to set up a distributorship for business in Texas, Louisiana and Oklahoma. While on this trip he received a telephone call from plaintiff to the effect that the latter wanted to get out of the deal and that defendant Hunt should return immediately. Soon after this conversation, plaintiff told Mr. Hawley, the plant manager, that he had discovered some irregularities, that he didn't believe that there was a wilful intent to defraud, but that he would deny his lack of belief in that respect if ever asked. When defendant Hunt arrived back in California plaintiff told him substantially the same story he had already told Hawley. Once again he said in substance that he would deny his lack of belief that there was wilful intent to defraud if he was ever asked. At this time it appeared that the business, financially, was in a precarious condition. During Hunt's absence plaintiff had taken $4,305.49 of the corporation funds out of the corporation's bank account and placed it in his own name, assertedly as trustee for the corporation, leaving the corporation with a balance in its own account of less than $200; he had stopped all production; and he had reduced the production staff of 15 or 18 men to a skeleton crew of four or five men.

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[1] Cal.Const., art. XX, § 22, provides: "No person * * * shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 per cent per annum upon any loan or forbearance of any money * * *"

Deering's General Laws, Act 3757, § 3, provides that "Every person * * * who for any loan or forbearance of money * * * shall have paid * * * any greater sum * * * than is allowed * * * may * * * recover * * * treble the amount of the money so paid * * * providing * * * action shall be brought within one year after such payment * * *"

At this time, and under the related conditions, plaintiff demanded that all the money he had loaned or otherwise advanced to the corporation be returned immediately. Defendant Hunt pleaded for time and thereupon plaintiff had the agreement, which forms the basis for the finding of usury, drawn up. The agreement was executed on June 30, 1950. It provides that plaintiff shall keep the $4,305.49 which he had taken from the corporate bank account; that $10,000 was to be repaid to him over the next ten weeks at the rate of $1,000 a week; and that beginning September 15, 1950, payments of $200 a month, plus 6% interest on any unpaid balance, be made until the $20,000 which plaintiff had lent defendant corporation was repaid. Following this, in paragraph four of the agreement is the provision which the court found to be by way of subterfuge, and to be usurious. It provides "That Hunt and the corporation do hereby jointly and severally promise to pay Thomas [plaintiff] beginning September 15, 1950, $100 per month as a fee for Business Management Engineering services *which have been rendered to the corporation,* and this $100 per month payment is to continue until Thomas has received his $20,000 principal plus interest provided for in paragraph 3, above. *However, this Engineering service payment will not enter into the computations for reimbursement of the $20,000 principal.*" (Italics added.) In an amendment to the agreement it was further provided that if payments were made "as stipulated herein, there will be no interest on said loans except the interest commencing September 15th, 1950 as provided in paragraph No. 3. * * *" When defendant Hunt objected to the terms of the agreement plaintiff told him that if the agreement was not signed, legal proceedings would be commenced and the plant would be closed, and that a man was standing by in Santa Ana (the county seat) to file the papers.

Under the above related circumstances the contract was executed by defendant for himself and for the corporation and mortgages were executed to secure the payment of the total indebtedness to plaintiff of $20,000. All the payments due under the terms of the contract were made by defendants to and including June 15, 1951. Thereafter defendant Hunt, having been advised by counsel that the agreement in his opinion was usurious, refused on that ground to make further payments and the present action was then filed by plaintiff.

The trial court found that the agreement was a usurious transaction and that "in truth and in fact said plaintiff did not, had not, has not, and at no time did he ever render any services of any kind or nature whatsoever to said defendant corporation * * * that said provision for alleged services was a subterfuge made for the purpose of evading the Usury laws of the State of California, and the defendants did agree to said demands of the plaintiff under duress and coercion and threats by the plaintiff to destroy the defendants' business if defendants did not accede to plaintiff's demand, and the defendants would not have entered into such an agreement to pay such usurious interest if the plaintiff had not so coerced and threatened the defendants with destruction of the defendants' business."

[3-5] Plaintiff argues strongly that the portion of the above quoted finding reading that "plaintiff did not, had not, has not, and at no time did he ever render any services

of any kind or nature whatsoever to said defendant" is not supported by the evidence and that, in consequence, the entire finding must fall. This contention is without substantial merit. The evidence would amply sustain inferences that any acts done by plaintiff in connection with or in relation to the defendant's business were done not to benefit the corporation defendant but to secure personal benefits and advantages to plaintiff. Furthermore, regardless of whether plaintiff did or did not render services of some nature for the defendant corporation, that part of the finding is not essential to the further part determining "that said provision for alleged services was a subterfuge made for the purpose of evading the Usury laws of the State of California, and the defendants did agree to said demands of the plaintiff under duress and coercion * * *."

[6] The quoted agreement was drawn by plaintiff. If there be ambiguity in its terms the doubt was properly resolved against him. There is not the slightest proof that Thomas was ever employed by the corporation to render services for a salary or fee. The agreement of May 30, 1950, it will be remembered, provided that "Hunt and Thomas shall receive such salaries as the Board of Directors may from time to time determine." The June 30 agreement made one month later after plaintiff's appropriation, assertedly as "trustee," of nearly all of the corporation's cash on hand, and under other circumstances which strongly indicate an attempt at coercion, gives advantages to plaintiff which go far beyond the contemplation of the parties as indicated in their agreements of May 24 and May 30. The provision of the June 30 agreement that "Hunt and the corporation * * * promise to pay Thomas beginning September 15, 1950, $100 per month as a fee for Business Management Engineering services *which have been rendered to the corporation,* and this $100 per month payment *is to continue* until Thomas has received his $20,000 principal plus interest * * * However, this Engineering service payment will not enter into the computations for reimbursement of the $20,000 principal," (italics added), on its very face is supportive of the trial court's finding that it was a subterfuge and was designed not to pay for engineering services which had been rendered but, rather, to constitute additional compensation for the loan and forbearance of money. Furthermore there was evidence that Hunt and Thomas orally agreed that their salaries would be equal, that neither would be paid any salary until the corporation made enough money to warrant payments to both of them, that the corporation never had reached such a stage, that Hunt received no salary and that Thomas had claimed none until he presented the June 30 agreement.

[7-10] Plaintiff argues further that intent is an element of usury and that since neither Hunt nor Thomas, according to their testimonies, had a conscious intent to evade the usury law, the finding of usury cannot be sustained. But the intent sufficient to support the judgment does not require a conscious attempt, with knowledge of the law, to evade it. The conscious and voluntary taking of more than the legal rate of interest constitutes usury and the only intent necessary on the part of the lender is to take the amount of interest which he receives; if that amount is more than the law allows, the offense is complete. (Klett v. Security Acceptance Co. (1952), 38 Cal.2d 770, 786, 242 P.2d 873.) The existence of the requisite intent is always a question of fact and in ascertaining the fact the court may look to all the circumstances surrounding the transaction. Substance is more important than form and the name with which excessive payments be labeled or the guise under which they be exacted is quite immaterial if in truth they be for the forbearance of money. (Terry Trading Corp. v. Barsky (1930), 210 Cal. 428, 432, 292 P. 474.)

Plaintiff's contentions, although avowedly addressed to the proposition that the evidence as a matter of law does not support certain findings, actually resolve into arguments on the weight of the evidence. From what has been elaborated above it appears that the evidence amply supports the trial court in all essential findings and that no miscarriage of justice is shown.

For the reasons above stated, the judgment is affirmed and the appeal from the order denying plaintiff's motion for a new trial is dismissed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., and BRAY, Justice pro tem., concur.

124 Cal.App.2d 787

PEOPLE v. JACKSON.

Cr. 963.

District Court of Appeal, Fourth District, California.

April 27, 1954.

Defendant was convicted of statutory rape. From a judgment of the Superior Court of Orange County, John Shea, J., sentencing defendant to the county jail on the jury's recommendation, he appealed. The District Court of Appeal, Mussell, J., held that prosecutrix' testimony was sufficient to support the conviction.

Judgment affirmed.

1. Criminal Law 🔑1170½(1)
Witnesses 🔑240(2), 246(3)

In prosecution for statutory rape, trial judge did not abuse his discretion or commit reversible error in asking and allowing deputy district attorney to ask prosecutrix leading questions on her direct examination as to particulars of alleged acts of sexual intercourse in interests of justice and to lead witness more quickly to matters material to issues. Pen.Code, § 261, subd. 1.

2. Witnesses 🔑240(1)

Suggestive questions, asked prosecutrix in statutory rape case on her direct examination to remove ambiguity from expressions used, are proper. Pen.Code, § 261, subd. 1.

3. Witnesses 🔑246(2)

The trial judge owes duty to examine witnesses, if he sees fit and examination is without prejudice to parties' rights.

4. Criminal Law 🔑656(2), 1166½(12)

In prosecution for statutory rape, trial judge's remarks to prosecutrix during her cross-examination that "counsel has the right to inquire on those things" and "just answer the question as best you can," were not abuse of discretion or reversible error, where remarks were clearly made for purpose of ascertaining facts, not to indicate judge's belief in defendant's guilt. Pen. Code, § 261, subd. 1.

5. Indictment and Information 🔑176

In prosecution for statutory rape, prosecutrix' positive testimony as to her acts of sexual intercourse with defendant on or about dates charged in information was sufficient to support conviction, though she was not positive as to exact dates of such acts. Pen.Code, § 261, subd. 1.

6. Rape 🔑44

In prosecution for statutory rape, love letters admittedly written by defendant to prosecutrix were properly admitted in evidence. Pen.Code, § 261, subd. 1.

◆

Lloyd S. Verry, Fullerton, for appellant.

Edmund G. Brown, Atty. Gen., and James D. Leobl, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was found guilty by a jury of the crime of statutory rape in violation of section 261, subd. 1 of the Penal Code as charged in an information filed by the district attorney of Orange county. In the first count of the information the offense was alleged to have been committed on or about January 15, 1953, with one Barbara Jean Kelly, then under the age of eighteen years, and in the second count defendant was charged with the commission of the same offense with Barbara Jean Kelly on or about April 15, 1953. A motion for a new trial was made and denied and defendant was sentenced to the Orange county jail in accordance with the recommendation of the jury.

Barbara Jean Kelly was sixteen years of age at the time the offenses were committed and lived in Anaheim, California. She was a "baby sitter" in the home of defendant for a period of almost four years, sitting with defendant's three small boys.

Barbara testified that defendant had sexual intercourse with her on or about the dates specified in the information; that the first act took place in the bedroom of defendant's home and the second one took place in defendant's automobile; that she had sexual relations with defendant approximately twenty times and that the first time was around January 15, 1953; that on this occasion Mrs. Jackson was not at home and the act took place at approximately 9:00 or 10:00 o'clock in the evening; that she had dinner with defendant and the three children and, with defendant's help, did the dishes, picked up the children's clothing and cleaned the bathroom; that she then went into the bedroom and had sexual intercourse with the defendant; that the second alleged act took place around 11:30 o'clock or midnight in defendant's car after they had returned from a ride.

Defendant testified on his own behalf at the trial and admitted having written letters to Barbara Jean Kelly, which letters were found in the Kelly home and were read to the jury. In them defendant expressed his love for Miss Kelly, his intention to marry her and to share his bed with her. He admitted that occasionally he had taken her out in his car at night, alone, but denied that he had had sexual intercourse with her.

A reversal of the judgment is sought herein on the ground that the trial court erred in allowing leading questions on direct examination; that there is insufficient evidence to sustain the verdicts; that the court erred in ruling on the admission of evidence, in taking over the examination of the complaining witness, and in remarks made concerning her testimony.

[1–4] The record shows that the questions objected to by the appellant were asked by the trial judge and the deputy district attorney in relation to the particulars of the acts of sexual intercourse charged and were proper in the interests of justice, People v. Sparks, 44 Cal.App.2d 748, 750, 112 P.2d 974, and to lead the witness more quickly to matters which were material to the issues. People v. Orona, 79 Cal.App.2d 820, 827, 180 P.2d 694. Suggestive questions asked the prosecutrix in a rape case to remove ambiguity from the expressions used were held to be proper in People v. Murphy, 53 Cal.App. 474, 482, 200 P. 484. In People v. Van Wyke, 91 Cal.App.2d 839, 844, 206 P.2d 53, it was held that it is the duty of the trial judge to examine witnesses if he sees fit to do so, and if the examination is without prejudice to the rights of the parties. During the cross-examination of the prosecutrix the trial court stated to her "I know it is difficult, but counsel has the right to inquire on those things. Just answer the question as best you can. You are doing a very good job, just keep it up." It clearly appears that these remarks of the trial judge were made for the purpose of ascertaining the facts and not to indicate a belief in the defendant's guilt, as contended by appellant. There was no abuse of discretion shown and no reversible error in the questioning of the prosecutrix or in the remarks made to her by the trial court.

[5] There is ample and substantial evidence to support the verdicts and conviction of the defendant. The prosecuting witness gave positive testimony as to the acts of sexual intercourse with the defendant. People v. Conterno, 51 Cal.App.2d 167, 168, 124 P.2d 610; People v. Harlan, 133 Cal. 16, 19, 65 P. 9. While she was not positive as to the exact dates on which the offenses occurred, she testified they occurred on or about the dates charged in the information and with sufficient certainty to support the verdict of the jury in that respect.

[6] Defendant contends that certain letters found in the home of the prosecuting witness were improperly admitted in evidence. This contention is without merit. There was proof that the letters were in the defendant's handwriting and he admitted having written them to the prosecutrix.

The judgment and order are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

PEOPLE v. WHITE.*

Cr. 953.

District Court of Appeal, Fourth District, California.

April 27, 1954.

Defendant was convicted of, inter alia, rape. The Superior Court, San Bernardino County, Martin Coughlin, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Barnard, P. J., held that procecuting witness' testimony was not so inherently improbable as to preclude its acceptance by jury.

Order affirmed.

1. Criminal Law 🔑1166½(5)

Where there was no showing of intentional discrimination against any group, in selection of jury panel, and it appeared that no person had been excluded because of his economic status or age, that panel, from which jury which tried defendant was drawn, did not contain a proportionate representation of hourly wage earners, the economic group to which defendant belonged was not prejudicial.

2. Criminal Law 🔑1166½(5)

Where panel, from which jury which tried defendant was drawn, represented a cross-section of community in which defendant lived, no prejudice attached to fact that no persons from outlying section of the county were included.

3. Criminal Law 🔑1170½(5)

That deputy district attorney in prosecution for rape and violation of Pen. Code, § 286, in good faith asked witness, who had testified to defendant's reputation for good character, whether witness had heard reports of homosexual activity on defendant's part, was not prejudicial misconduct.

4. Criminal Law 🔑824(5)

Absent a request for proper instruction, failure to instruct, in prosecution for, inter alia, rape, that questions, which were posed to witness who had testified to defendant's good character and which asked whether witness knew of alleged reports of defendant's previous misconduct, were not proof of facts contained therein and not to be considered evidence, was not prejudicial, especially where answer was negative.

5. Criminal Law 🔑683(1)

Where defendant, on cross-examination, denied having answered questions posed by Youth Authority officer after arrest, officer's testimony concerning the questions and answers given was properly admitted as rebuttal.

6. Criminal Law 🔑1170½(1)

Where Youth Authority officer testified, from memory, as to defendant's answers to questions posed to him after arrest, fact that district attorney used, in questioning this officer, a memorandum of the questions and answers prepared five months after the event, was not reversible error.

7. Criminal Law 🔑1170½(5)

Where prosecution witness was subsequently permitted to answer questions, posed on cross-examination, requesting explanation of her reasons for giving certain testimony, sustaining objection to the question when first posed was not prejudicial limitation of cross-examination.

8. Criminal Law 🔑778(4)

In prosecution for, inter alia, rape, instruction on presumption of innocence was not subject to objection of suggesting a distinction between objective evidence and presumption of innocence and taking away defendant's right to have all of the evidence, including the presumption, considered until a verdict was reached. Pen. Code, §§ 286, 1906.

9. Criminal Law 🔑1172(2)

In prosecution for, inter alia, rape, instruction on circumstantial evidence was not prejudicially erroneous for failure to instruct that circumstances alone are sufficient to convict only where irreconcilable with any "other rational conclusion," rather than "any rational conclusion," especially where circumstantial evidence played small part in state's case. Pen. Code, § 286.

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* Subsequent opinion 278 P.2d 9.

10. Criminal Law 🔑1172(1)

Where defendant, who had been charged with assault to commit rape upon one victim and, with, inter alia, rape upon another victim, requested and was granted a severance of the first count, charge informing jury that it might bring in verdicts of either guilty or not guilty "as charged" on counts two and three did not constitute a prejudicial reference to an unmentioned count. Pen.Code, § 286.

11. Rape 🔑51(1)

In prosecution for, inter alia, rape, prosecuting witness' testimony was not so inherently improbable as to preclude its acceptance by jury.

12. Criminal Law 🔑1165(1)

Cumulative effect of claimed errors in prosecution for, inter alia, rape, were insufficient to establish that there had been a miscarriage of justice or that defendant had been denied constitutional rights. Pen. Code, § 286.

William B. Esterman, Hollywood, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in Count I of an information with assault to commit rape upon Velma Gonzales on November 17, 1952. In Counts II and III he was charged with the rape of Agapita Gallegas, and with a violation of section 286 of the Penal Code committed upon her, both on October 27, 1952. He pleaded not guilty to each count. Upon his motion for a severance the court ordered separate trials with respect to each victim, and ordered that the charges in Count II and III be tried first. A jury found him guilty on both counts and he was sentenced to prison on each, the sentences to run concurrently. He has appealed from an order denying his motion for a new trial.

About 5:35 p. m. on October 27, Mrs. Gallegas left a store in downtown San Bernardino, where she was employed, and started to walk toward her home. As she was going along a street near a junk yard someone grabbed her from behind, put his hand on her mouth when she started to scream, and threatened to kill her. Her assailant choked her so she could not scream, and pushed and dragged her into a secluded spot behind some trees and shrubs. Her testimony as to what there occurred fully supports the charges made in Counts II and III.

She then went to her home and told her husband what had happened. Her husband went to the scene of the attack and Mrs. Gallegas and a relative went there in a car. Police officers, who were at the scene, questioned her and then sent her to a hospital where she was examined by a doctor. So far as material here the doctor's report reads:

> "Head: Straw in hair back of head.
>
> "Neck: Negative * * *.
>
> "Skin: 3 millimeter abrasion lateral right knee, appearing recent in origin with recently coagulated blood on surface. * * * No blood or tears. No evidence of trauma. * * * No sperm seen in multiple field * * *. No evidence of intromission or recent trauma."

About a week prior to November 18, 1952, a man was shown to Mrs. Gallegas by the police and she told them he was not the person who had attacked her. On November 18, she was again taken to the police station where she identified the defendant as her assailant. She again identified him at the trial as the man who had attacked her, and whom she had seen at the police station on November 18.

After the defendant's arrest on November 18, a police officer had a conversation with him in which the officer read the "offense report" to him, line by line, and asked him if it was true. The officer made a note of his answers on the offense report. On the morning of November 19, a parole officer for the Youth Authority had a conversation with the defendant in which he admitted in detail facts showing that he committed these offenses. On the afternoon of November 19, he was taken to the office of a deputy district attorney and, in the presence of the police officer who had first questioned him, the district attorney asked him many questions. These questions and the defendant's answers were taken down in shorthand by a court reporter who was present, and were later written up by him. These questions covered all details of the story told by the woman as to what had occurred on this occasion and the defendant's answers, being a full admission of all of these facts, fully corroborated the victim's story and covered every element involved in the commission of both of these offenses. He also admitted that these statements had been freely and voluntarily made by him, and that no force or violence or promise of immunity had been used or made either when he was questioned at the police department or on this occasion.

At the trial the defendant denied that he had been present at the scene of the attack on October 27, or that he had done any of the things testified to by Mrs. Gallegas; denied that he had discussed the Gallegas case with the officer on the evening of November 18; denied that he had admitted anything to the officer for the Youth Authority; and denied that he had been in the district attorney's office in the presence of a court reporter on November 19. He testified that he was in the district attorney's office with a reporter present on November 20, at which time the deputy district attorney would read three or four sentences and then ask him if he had done it, but that he had made no replies to the questions except once when he was asked his name, and twice when he said he had not committed the crime on October 27. The defendant attempted to establish an alibi for the time in question, produced character witnesses, and claimed that the complaining witness had seen him so many times on the bus and in the store where she worked that she had identified him because he was familiar to her.

[1, 2] The appellant's first contention is that the court committed prejudicial error in denying his motion to dismiss the jury panel, from which this jury was selected. He contends that he was denied his constitutional right to a trial by an impartial jury because the method used in selecting this panel resulted in the systematic inclusion thereon of limited classes of persons who did not represent a cross-section of the community, and discriminated against the class to which he belonged, i. e., hourly workers. This panel consisted of 525 people, all of whom came from a number of townships in the southwest corner of the county. It appears that persons from beyond the mountains had not been included because of previous difficulties in securing their attendance. In a sampling taken of a part of this panel, 58 were business men, 5 hourly workers, 68 salary workers, 209 housewives, 14 ranchers, 39 retired businessmen, and 18 retired workers, and 176 of them were from the city of San Bernardino, where the appellant lived. On an age basis, 34% were under 40 years old and 67% were under 50.

The jury commissioner testified that each year questionnaires were sent to persons whose names were on the membership lists of various service clubs, women's clubs and the Chamber of Commerce; that any person who volunteered was given a questionnaire and placed on the panel if they qualified; that questionnaires were sent to persons recommended by individuals and placed on the panel if qualified; that persons who had previously served as jurors were placed on the panel if they so desired; that an effort was made to get as many business people on the panel as possible; that the persons to whom questionnaires were sent included persons of Mexican and Negro descent; and that no one was excluded from the list because he was an hourly wage earner. No contention was, or is, made that any class of persons was intentionally excluded, the contention being that because of the limited classes which were included the panel did not represent a cross-section of the community, and the number of hourly workers thereon was not proportionate to the number of such workers in the community. If there was any lack of proportionate representation there was no evidence of any purpose to discriminate against any group of persons, and the uncontradicted evidence shows that no person was excluded because of his economic status or age. No prejudicial error appears in this connection. People v. Hess, 104 Cal.App.2d 642, 234 P.2d 65; People v. Hartwell, 39 Cal.App. 24, 177 P. 885; Fay v. People of State of New York, 332 U.S. 261, 67 S.Ct. 1613, 91 L.Ed. 2043. The persons on this panel represented a cross-section of the community in which the appellant lived, and we see neither violation of law nor any possible prejudice in the fact that no persons from outlying sections of the county were included.

[3, 4] It is next contended that the deputy district attorney committed prejudicial misconduct "in placing indirectly before the jury inadmissible evidence with respect to a nonexistent reputation of the defendant for homosexuality". It is argued that there was no factual foundation for one question asked; and that it was asked in bad faith and with knowledge that the matter was inadmissible. After a character witness had testified that she knew the appellant's reputation in the community for chastity, virtue and morality, and that it was good, she was asked on cross-examination "Had you heard that reports had been given to the San Bernardino police department that Joe White carried on homosexual activities in Meadowbrook Park?" An objection was overruled, and a ruling was reserved on a motion to strike the question. The witness first answered that she had heard of it, but after the meaning of "homosexual" was explained to her she said that she had not heard of it. Later, a hearing was had, outside the presence of the jury, with respect to the good faith of the deputy district attorney in asking this question. The facts produced at that hearing support the court's finding that the question was asked in good faith, and its refusal to strike the question. In this connection it is also contended that the court erred in failing to give, of his own motion, an instruction to the effect that questions concerning such reports are not proof of the facts therein contained and are not to be considered as evidence. Not only was such instruction not asked for, People v. Stevens, 5 Cal.2d 92, 53 P.2d 133, but a negative answer was given by the witness. Under the circumstances it could not reasonably be held that any possible prejudice resulted which could have affected the verdict.

[5, 6] It is next contended that the court erred in receiving testimony from the officer for the Youth Authority because no proper foundation was laid, and because it was improper rebuttal evidence. It is argued that this testimony was received on the theory of impeachment; that the witness responded to typed questions and answers read to him by the prosecutor and purporting to be the substance of a conversation with the defendant; that while this conversation took place on November 19, the memorandum used by the prosecutor was written by the witness about five months later and then typed by his secretary; that there was a failure to lay a foundation as required by section 2047 of the Code of Civil Procedure; and that this testimony was withheld from the prosecution's case in chief and improperly brought in as rebuttal for the purpose of emphasis.

The appellant testified that he was employed at Norton Air Base during October, 1952; that on the date in question he returned home at 4:30 p. m. and remained there until about 6:30 p. m.; that he had never assaulted Mrs. Gallegas or had any contact with her at the time in question; and that he had talked to the officer for the Youth Authority on the morning of November 19, telling him that he had been at home on October 27. On cross-examination he testified that on the morning of November 19, he did not answer that officer's questions except that he told him that he had been at home. On further cross-examination he was asked if he had not, on the morning of November 19, been asked certain questions by this officer and given certain answers to those questions. He denied that he had done so, and the officer was then called and testified that on that occasion he had asked those questions of the defendant and received those replies. These questions and answers covered essentially the same ground as those asked and answered in the presence of the court reporter, and covered admissions to most of the material facts in this case. Not only was this testimony proper rebuttal but no lack of foundation appears. While the district attorney used a memorandum, prepared by this officer, in asking whether such questions were asked and such answers given, the witness testified from his own recollection. He testified that it had not been necessary to memorize the memorandum because he remembers the conversation. No reversible error appears in this connection.

[7] It is next contended that the court erred in limiting the cross-examination of the prosecutrix. During her cross-examination she testified that she "punched out" at 5:30 on October 27 and left the store about 5:35. She was shown her time card which showed she had punched out at 4:37 on that day, and was asked where she had been between 4:37 and 5:30. She testified that she had been at the store and had kept on working after she punched out, as she sometimes did. Counsel then asked her "And the reason you said to me that you worked an hour after you punched out was that you realized that you had to account for that hour some way, isn't that right?" The court then said: "The objection to that will be sustained. The question was asked how she accounted for the difference between the time she punched out and 5:35, and she gave you her answer." Counsel then asked "Have I not the right to inquire", and the court replied "You have not the right to argue with the witness." The cross-examination then proceeded (over five pages of the transcript) on this same matter and she was allowed to answer at least three questions as to why she had testified that she had punched out at 5:35. No prejudicial limitation of the cross-examination of this witness appears.

[8] It is next contended that the court erred in instructing the jury (1) on the presumption of innocence; (2) on circumstantial evidence; and (3) "in unexplained references to Counts II and III." With respect to the presumption of innocence the court gave the exact language of section 1096 of the Penal Code and added the following:

> "If, when considering all the evidence, the jury are satisfied to a moral certainty and beyond a reasonable doubt that the defendant is guilty, then the presumption of innocence no longer prevails and you should find the defendant guilty."

It is argued that the words thus added suggested a distinction between the objective evidence and the presumption of innocence and took away appellant's right to have all of the evidence, including the presumption, considered until a verdict was reached. These added words sufficiently told the jury that the presumption should be considered as a part of the evidence and that it remained until their deliberations upon the evidence as a whole convinced the jurors of his guilt. People v. Arlington, 131 Cal. 231, 63 P. 347.

[9] With respect to circumstantial evidence, the court gave these instructions:

> "You are not permitted on circumstantial evidence alone, to find the defendant guilty of any crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with *any rational* conclusion. (Emphasis ours.)
>
> "When the case which has been made out by the People against a defendant rests entirely or chiefly on circumstantial evidence, and in any case before the jury may find a defendant guilty basing its finding solely on such evidence, each fact which is essential to complete a chain of circumstances that will establish the defendant's guilt must be proved beyond a reasonable doubt."

It is argued that the omission of the word "other" before the word "rational" rendered the instructions ambiguous and meaningless, with the effect of depriving the appellant of his right to a jury trial. The first part of this instruction could not have misled the jury and the second part was more favorable to the appellant than otherwise, in requiring that each fact in a chain of circumstances be proved beyond a reasonable doubt. Moreover, the People's case rested chiefly on direct evidence and was merely corroborated by some circumstantial evidence. No prejudicial error appears.

[10] The only reference to Counts II and III were in the instructions as to the form of the verdicts, informing the jury that it might bring in verdicts of either guilty or not guilty "as charged" in these counts of the information. It is argued that this reference to these counts could not have failed to arouse the curiosity, and even the prejudice, of the jury as to the existence and nature of another unmentioned count. Count I had been severed for the purpose of trial, at appellant's request, and the court merely instructed the jury with respect to the form of possible verdicts on the remaining counts. There is nothing to indicate any possible prejudice.

[11] It is next contended that the testimony of the prosecutrix was inherently improbable. It is argued that she testified that she was choked to keep her from screaming; that she was dragged some distance and her stockings were torn; that after the attack her assailant helped her pick up the contents of her purse; that she kissed the assailant at his request; that she did not see a doctor after the attack; that she went to work the next day; and that she did not mention this attack to two officers who came to see her the next day about another matter. It is argued that it is unbelievable that her assailant would help her pick up things, thus giving her a better opportunity to identify him, or that she would fail to consult a doctor; that the picture taken of her does not show any tear in her stockings; and that the medical report refers to no sign of choking, and shows that she was not hurt. The complaining witness did see a doctor shortly after the attack and the doctor's report contained some matters which tend to support her story. The picture, taken from the rear, did not show the front of her stockings. She testified that she kissed her assailant because he refused to let her go until she did so. While all of the matters relied on could be argued to the jury, they are far from sufficient to justify a reversal on the ground that the testimony of this witness was so inherently improbable and unbelievable that it could not be accepted by the jury. People v. Huston, 21 Cal.2d 690, 134 P.2d 758; People v. Fremont, 47 Cal. App.2d 341, 117 P.2d 891.

[12] Finally, it is contended that a review of the evidence, with the cumulative effect of these errors, must lead to the conclusion that there was a miscarriage of justice. It is argued that the appellant was first identified by the prosecutrix in a half-lighted room with a flashlight thrown upon him; that he must have been familiar to her since he and his mother testified that they had frequently seen her at the store and on a bus; that the appellant's admissions were obtained by asking leading questions; that the transcript of the November 19 statement was not written up by the court reporter until in January; that some of the pages in that reporter's loose-leaf notebook had been moved out of position; that someone had changed that notebook to indicate that this statement was taken at 3:20 p. m., and not at 3:30 p. m., that the doctor's report was ignored by the prosecution until it was brought in by the appellant; that there was a conflict between two officers as to when they first talked to the appellant; that there are "strange overtones" in connection with the admissions made by the appellant which justify the greatest suspicion; and that a comparison of the appellant's answers in the November 19 statement with his testimony at the trial shows that in replying to questions on the first occasion he used the word "Sir" 82% of the time, while in a much larger number of replies at the trial he did not use that word at all. These arguments and such conflicts as appear in the evidence were matters for the jury, and we find nothing therein which tends to indicate any miscarriage of justice or any denial of the constitutional rights of the appellant.

The order appealed from is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

121 Cal.App.2d 648

MARTIN v. CHERNABAEFF et al.

Civ. 4693.

District Court of Appeal, Fourth District, California.

April 20, 1954.

Action against purchasers for broker's commission. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment for the broker, and purchasers appealed. The District Court of Appeal, Griffin, J., held, inter alia, that where broker alleged performance of contract on his part and purchasers alleged that obligation to pay commission was contingent upon broker's obtaining loan for purchasers, which broker had failed to do, absence on findings as to whether purchasers' liability was so conditioned, and whether broker was prevented from performing his part of agreement by unauthorized actions of purchasers, and other issues, required reversal.

Reversed.

1. Brokers ⟹43(3)

Where real estate broker's receipt for purchasers' deposit recited terms of sale, and vendor signed attached agreement to sell on condition that purchasers pay broker's commission, and escrow instructions, signed by purchasers, authorized payment of commission from proceeds of sale, purchasers, in effect, ratified written agency agreement, and there were sufficient memoranda to satisfy statute of frauds. Civ. Code, §§ 1624, subd. 5, 2310, 2311.

2. Brokers ⟹54

Generally, broker, in absence of specific agreement to contrary, has earned his commission when, within life of his contract, he has produced person ready, willing and able to buy or sell on terms satisfying contract of his employer.

3. Escrows ⟹15

Where time within which vendor was obligated to sell had expired, vendor, having fully complied with his part of the agreement, and no purchaser having been produced by agent, was authorized to withdraw his deed and to cancel the escrow.

4. Contracts ⟹346(11)

Recovery may not be had on allegation of performance of contract where proof shows merely prevention or excuse of performance.

5. Appeal and Error ⟹1071(6)

In action by broker against purchasers for commission, wherein broker alleged performance of contract on his part and purchasers alleged obligation to pay commission was contingent upon broker's obtaining loan for purchasers, which broker failed to do, absence of findings as to whether purchasers' liability was so conditioned, and whether broker was prevented from performing his part of agreement by unauthorized actions of purchasers, and other issues, required reversal of judgment for broker.

6. Appeal and Error ⟹1178(8)

Where real estate broker, in action for commission allegedly due from purchasers, pleaded full performance of agreement on his part, and action was tried, over objections of purchasers, on theory that broker was prevented from performing his agreement by purchasers, and judgment for broker was reversed because of absence of findings on material issues, pleadings would be permitted to be amended to allege matters raised in first trial.

◆

Siemon & Siemon, Bakersfield, for appellants.

Mack, Bianco & King, Bakersfield, for respondent.

GRIFFIN, Justice.

Plaintiff brought this action to recover a real estate commission. The complaint alleges that on November 22, 1950, plaintiff, as a real estate agent, entered into the services of defendants, at their request, to negotiate for them the purchase of a 300 acre tract of land owned by one Doberstein, at $35,000 cash; that defendants were to pay plaintiff a commission in the sum of $1,750; that plaintiff procured the agreement of all parties on the terms set forth and defendants signed a certain writing attached to the complaint as an exhibit, entitled: "Amended Buyer's Escrow Instructions", dated January 5, 1951, reciting: "We will hand you $36,750.00 ($1,750.00 of said amount is to be paid to Elmer Martin as Commission, balance to be paid to sellers in consideration for deed, which you will deliver when you obtain sufficient deed to the property herein described)"; that the sellers on the same day, signed similar instructions reciting: "I have read and approve the foregoing instructions. We hand you deed called for, which you will deliver when you can issue the policy of title insurance called for and hold for us the sum of $35,000.00. Commission of $1750.00 to Elmer Martin to be paid by the buyers as herein provided."

It is then alleged that plaintiff duly performed all the conditions of the said agreement on his part to be performed, and that $1,750 is now due and unpaid. Judgment for that amount is sought.

By answer, defendants denied generally the allegations of the complaint and specifically alleged as a defense thereto that they never, at any time, entered into any agreement in writing, authorizing or employing plaintiff as agent or broker to purchase said real estate for them for a commission or otherwise; that the writing relied upon by plaintiff was never executed by defendants or delivered to plaintiff and did not, by its terms, constitute a contract of employment; that the sum of $1,750 mentioned in the writing was to become payable only upon the purchase by defendants of the property described; that defendants did not purchase it but it was subsequently sold to defendants' son, Alex Chernabaeff, by Doberstein; that defendants did agree to purchase the property but that it was orally agreed between plaintiff and defendants that defendant would pay said commission *only* upon the condition that plaintiff procure a loan for the defendants, with which proceeds defendants were to pay the purchase price; that defendants never procured such a loan or any loan, and the transaction failed because of such fact; that since the writing provided that the escrow was only binding until February 5, 1951, and plaintiff failed to secure the loan, the sellers, on February 5, 1951, withdrew and countermanded their escrow and sold the property to defendants' son; that since there was a cancellation of the escrow after the expiration of its time limit by reason of plaintiff's failure to complete the deal, no real estate commission was due to plaintiff.

The court made findings generally in accord with the allegations and prayer of plaintiff's complaint without any specific finding as to whether the allegations contained in defendants' answer were true or untrue.

Plaintiff concedes that there was no written agreement employing him as agent or agreeing to pay him a commission, other than the writings herein mentioned.

Section 1624 of the Civil Code provides that "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 5. An agreement authorizing or employing an agent or broker to purchase or sell real estate for compensation or a commission; * * *."

The main question here involved is whether the writings here relied upon bring plaintiff within the exception noted. Originally, Doberstein listed these 300 acres for sale at $39,500 with plaintiff in March, 1950, and in April of that year plaintiff contacted defendants, who then had a lease on the property, about buying it. On November 22, 1950, after some negotiations, defendants made a deposit of $1,000 with plaintiff and he signed a receipt for that amount on a standard real estate association form, as real estate broker, reciting that defendants would pay $35,000 (all cash to seller) and subject to approval by seller. Defendants therein agreed to purchase the property on the terms therein set forth. Doberstein signed an attached agreement in which he agreed to sell the property upon the terms and conditions stated and agreed "to pay said broker as commission the sum of ——— dollars." He then wrote across the face of the instrument: "We will accept this deal provided the purchaser pays the commission", and signed his name.

Subsequently, defendants orally agreed to pay the commission and said: "Let's put it in escrow". The escrow instructions above mentioned were then signed by defendants, which authorized the payment of the commission *from the proceeds of the sale.*

[1] As between the plaintiff Martin and the seller Doberstein, there was sufficient evidence, by written memoranda, that Martin was acting as his duly authorized agent in effecting the sale. That authorization was qualified only to the extent that he would not be liable for the payment of the commission. It clearly appears from the evidence that defendants orally agreed to make that payment and this agreement was corroborated by the writing of the parties to be charged, i. e., defendants. It appears from the escrow agreement lodged in the escrow, when considered in connection with the real estate broker's receipt, the acknowledgment thereon by the parties to be charged, and the escrow instructions, that defendants, in effect, ratified the written agency agreement and authorized the agent to buy or sell the real estate for a commission, and they directed the escrow agent to pay the commission from *the proceeds of the sale.* Sections 2310 and 2311 Civ.Code.

There appears to be a sufficient compliance with section 1624, subdivision 5 of the Civil Code in this respect. Coulter v. Howard, 203 Cal. 17, 262 P. 751; Johnson v. Krier, 59 Cal.App. 330, 332, 210 P. 966, 967. In the Johnson case the agreement to pay the commission was not reduced to writing before the rendition of the services. It was held, however, that after plaintiff had procured the purchasers, the oral agreement was ratified in writing by reason of a writing on the back of the contract of sale reading: "'I hereby agree to pay to Johnson and Temple a commission of $2,000 for the making of the within sale'". See, also, Fritz v. Frost, 114 Cal.App. 602, 300 P. 454, where a similar contention as here made was there advanced. The escrow instructions recited: "You are authorized and instructed to pay at close of escrow. * * * Commission of $6875.00 (naming agents) at close of this escrow as a commission". This court, after quoting from the cases above cited, held that that memorandum was a sufficient memorandum in writing to charge defendant with the debt under the statute of frauds. To the same effect is Corvin v. Smead Investment Company, 115 Cal.App. 175, 1 P.2d 507.

It appears that in the instant case the written agreement of defendants to pay the commission was conditioned upon the payment into escrow of $36,750 by defendants, the delivery of a deed by the seller, and compliance with the terms of the escrow. Defendants also claim that in their oral agreement to pay the commission to plaintiff, an additional condition was attached, i. e., that plaintiff was to secure a loan for defendants so that the purchase price could be paid to the seller in cash; that defendants were to offer as security for such loan certain described property which defendants claimed they owned (there is a dispute between plaintiff and defendants as to what property was offered); that defendants orally agreed to pay plaintiff a commission of 3 per cent for such a loan and when secured, to pay that amount, plus one-half of the real estate commission, i. e., $875, totaling approximately $1,900. It is then averred that plaintiff found a Mr. Del Papa who agreed to make the loan upon the security represented by plaintiff, and he signed escrow instructions so indicating; that thereafter defendants made and delivered to plaintiff their promissory note in the approximate sum of $1,900, and in accordance with their oral agreement, and that plaintiff accepted it; (one-half of the full commission was earned by another agent and he assigned his interest therein to plaintiff.)

Although the evidence might well have supported the finding that this condition was attached, plaintiff denies that the payment of any real estate commission was conditioned on his ability to secure a loan. He testified that defendants said to him in this connection that "if I could secure him (defendant) a loan for $35,000 it would be a big help to him."

It appears from the Del Papa escrow instructions that plaintiff included as security for a $35,000 loan, the 300 acres here involved, a trust deed for $55,000 on other property, and an additional 100 acres adjoining the 300 acres here involved, and that Del Papa placed that amount in escrow.

According to plaintiff, defendants wanted to withdraw the 100 acres from that escrow because clear title thereto could not be given. Apparently, amended instructions were signed by defendants to this effect. Del Papa would not then loan the money without the additional security first indicated.

Defendants' story is that they never intended offering the 300 acres as part of the security; that when plaintiff informed Del Papa of this fact on February 23, 1951, Del Papa cancelled the escrow and refused to make the loan; that thereafter they went to plaintiff and asked for the return of the note because the transaction had failed; that plaintiff returned the note to defendants and it was torn up and plaintiff then said: "I guess I didn't earn it". (Plaintiff testified he returned the note because defendants had made arrangements for payment of the real estate commission from the escrow). They claim that plaintiff endeavored to obtain another loan from one Sullivan; that Sullivan demanded 8 per cent interest plus a bonus of $4,000, and defendants were unwilling to pay that sum; that they heard nothing more from Martin after that.

Defendant William Chernabaeff testified he then went to a bank to see if he could borrow money on his own account and found that the bank would loan him up to $25,000; that he then went to the escrow company and that he and Doberstein, the seller, on April 16, 1951, cancelled the escrow. The escrow agreement provided: "Time is of the essence of these instructions. If this escrow is not in condition to close by February 5, 1951, any party who then shall have fully complied with his instructions may, in writing, demand the return of his money and/or property; but if none have complied, no demand for return thereof shall be recognized until five days after the escrow holder shall have mailed copies of such demand to all other parties at their respective addresses shown in the escrow instructions. If no such demand is made, close this escrow as soon as possible."

It appears that on April 14, 1951, defendants deposited $10,000 in cash with Doberstein and on April 16, defendant William Chernabaeff made formal application for a commercial loan of $20,000 from the bank and gave as security assignments of the trust deed note heretofore mentioned in the former escrow, and other securities enumerated in the application. The reason assigned for the loan was "purchase of farm realty". On that same day escrow instructions were deposited with another title company wherein Doberstein agreed to sell the 300 acres to defendants' son, *Alex W. Chernabaeff*, for $35,000. William Chernabaeff transferred to Alex the 100 acres adjoining the 300 acres, and on May 1, 1951, William received back a note and trust deed for $60,000 from Alex and his wife covering the 100 acres and the 300 acres in escrow. William paid into the escrow, on the purchase price, the proceeds from a $10,000 check which was received on account of some trust deed payment not here involved. From his bank account, to which the proceeds of the loan had been deposited, William Chernabaeff paid to the title company an additional $15,330.20. Title to the property was taken and recorded in the name of Alex and his wife and they farmed the property and paid for improvements by way of a well drilled thereon costing approximately $22,000. Nothing was heard from plaintiff Martin until he discovered that on February 1, 1952, about 9 months after the son had taken title to the property, that the son deeded the 100 acres and the property here involved back to defendants. William Chernabaeff testified that in consideration for this he deeded his son 80 acres and cancelled the trust deed. Demand was then made by plaintiff for his real estate commission and payment was refused.

There is no direct finding on any of the issues raised by the answer as to whether they are true or untrue. As to many of these facts there is no conflict in the evidence. The only finding is that plaintiff entered into the services of defendants, as agent, to negotiate for them the purchase of the property on the terms stated in the escrow agreement; that they agreed to pay a commission of $1,750 for such service; that he secured a written agreement of the parties to buy and sell, according to the agreement; that plaintiff fully performed his part of the agreement; and accordingly was entitled to his commission.

The complaint and findings are predicated upon the theory that plaintiff fully performed his duty.

[2, 3] It is the general rule that a broker, in the absence of a specific agreement to the contrary, has earned his commission when, within the life of his contract, he has produced a person ready, willing and able to buy or sell on terms satisfying the contract of his employer. Twogood v. Monnette, 191 Cal. 103, 215 P. 542. Since the time within which the seller Doberstein was obligated to sell to defendant had expired, he having fully complied with his part of the agreement, and no buyer having been produced by the agent who deposited the amount agreed upon, the seller was authorized to withdraw his deed and cancel the escrow. Apparently this was done and no money was placed in escrow by the purchasers *out of which the commission was to be paid.* The seller was no longer obligated to sell the property to the purchasers and he was at liberty to make such disposition of the property thereafter as he might see fit. Accordingly, the transaction, insofar as the seller was concerned, was never completed nor performed at the time the escrow agreement was canceled by him.

The evidence is in conflict as to the reason the buyers were unable to perform their part of the agreement. Defendants testified it was because of the failure of plaintiff to negotiate a loan, as agreed upon. Plaintiff claims that such is not the case and that he was prevented from fulfilling his agreement by the actions of defendants in withdrawing certain securities and preventing plaintiff from securing a loan for them and by reason of defendants' action in dealing with the seller otherwise than through the escrow agent as originally planned. In either case plaintiff could not recover upon the ground that he furnished a buyer and seller ready, willing and able to buy and sell the property *upon the terms specified* which would entitle him to the payment of his commission from the proceeds of the escrow. His right, if any, in such case, to a commission, must be predicated upon the theory that performance was prevented by reason of the actions of defendants or that plaintiff was excused from performing his part of the agreement by reason of the claimed fraud of the defendants.

[4] It is settled law that recovery may not be had on an allegation of performance on proof of prevention or excuse of performance. Barnhart v. Blackburn, 137 Cal. App. 240, 30 P.2d 424; Kirk v. Culley, 202 Cal. 501, 506, 261 P. 994, and cases cited.

[5] No findings were made on the issues as to whether there was a condition attached to the liability of defendants to pay a commission; whether plaintiff, in fact, did cancel any agreement to pay a commission by failure to obtain the loan and by surrendering the note given for this purpose; whether the time limit prescribed in the escrow instructions for the performance of the agreement of the parties had been extended; whether plaintiff was prevented from performing his part of the agreement by the unauthorized actions of defendants; and whether a fraud was in fact perpetrated upon plaintiff which prevented him from performing. These were clearly factual questions presented by defendants' pleadings and definite findings should have been made thereon, particularly where, as here, there is substantial evidence which would have sustained a finding for the defendants on these grounds. Bardeen v. Commander Oil Co., Ltd., 48 Cal.App.2d 355, 119 P.2d 967; Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 325, 74 P.2d 761; Hagge v. Drew, 73 Cal.App.2d 739, 741, 167 P.2d 263; Parker v. Shell Oil Co., 29 Cal.2d 503, 175 P.2d 838; Powell v. Johnson, 50 Cal.App.2d 680, 123 P.2d 875. Accordingly the judgment must be reversed

[6] Since the plaintiff pleaded full performance of the agreement and since the action was tried, over strenuous objections of defendants, upon the theory that plaintiff was prevented from performing his agreement by reason of nonperformance of defendants and by reason of their fraud, on a retrial, the pleadings may be amended accordingly and findings entered in accordance with the pleadings and evidence produced.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

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124 Cal.App.2d 727

In re BARTOLO'S ESTATE.

POLETTI et al. v. KOFOED et al.

Civ. 20000.

District Court of Appeal, Second District, Division 2, California.

April 26, 1954.

Will contest proceeding. The Superior Court, Los Angeles County, Newcomb Condee, J., entered order admitting will to probate. Contestants appealed. The District Court of Appeal, McComb, J., held that holographic will providing that wife should be sole heir though parties should be divorced or separated, was not revoked by subsequent property settlement agreement, purporting to be full, complete and final settlement agreement binding upon heirs, executors, administrators and assigns, which provided that neither party waived any right "which may accrue" except as specifically set out.

Order affirmed and appeal from judgment sustaining demurrer to the second amended contest dismissed.

1. Wills 🔑186

The mere execution of property settlement agreement between husband and wife whereby they adjust their property rights does not revoke previous will executed by one spouse under terms of which the other is named as beneficiary.

2. Courts 🔑95(1)

Where rule of law is clearly established by decisions of California courts, those courts are not at liberty to overrule it in favor of one followed in decisions of other states.

3. Evidence 🔑448

Parol evidence is inadmissible to vary or contradict written agreement if agreement is not ambiguous.

4. Wills 🔑186

Where holographic will provided that wife would remain sole heir though parties should be divorced or separated, subsequent property settlement agreement, providing that neither party waived any right "which may accrue" to either party except as specifically set out, was not inconsistent with terms of will and did not operate as revocation of will. Probate Code, § 73.

5. Wills 🔑358

An order sustaining demurrer to will contest is not appealable. Probate Code, § 1240.

Harold J. Ackerman, Los Angeles, Leo Geffner, Los Angeles, of counsel, for contestants and appellants.

Cyril A. Walton, Los Angeles, for petitioner and respondent.

McCOMB, Justice.

Appellants have appealed from an order admitting the holographic will of Louis Bartolo to probate. There is also a purported appeal from the judgment sustaining without leave to amend a demurrer to the second amended contest of respondent.

Facts: Appellants are the living brothers and sisters of decedent. Respondent is the divorced wife of decedent and the named beneficiary of an holographic will executed by decedent the 11th of January, 1946, by which he bequeathed all of his possessions to respondent, and which included this statement, "If we are divorced or separated she still is to receive the forementioned benefits—to be the sole heir." At such time respondent was decedent's wife.

On January 16, 1946, respondent and decedent executed a property settlement agreement, which, after reciting that they were living separate and apart from each other and agreed to so live in the future, contained, among others, the following paragraphs:

"* * * Whereas, it is the desire and intention of the parties hereto that their relations with respect to property and financial matters shall be settled and finally established by this agreement in order to determine and settle once and for all time the present and future property rights, claims, and demands of a pecuniary nature between the parties hereto in such manner that any action with respect to the rights and obligations of the one to the other which may now exist or which may or can hereafter arise shall be finally and conclusively settled and determined by this agreement; * * *

"* * * It is the intent and understanding of this agreement that all claims of whatever nature or extent which may be asserted against either party hereto are intended to be included herein and each party shall take the property set apart to him or her by the terms of this agreement, free and clear of all debt or obligations of the other, present or future, except as otherwise expressly provided herein.

"* * * Second Party hereto, as the husband of the First Party, and First Party hereto, as wife of Second Party, each does hereby relinquish all right in law, or in equity, or by descent or inheritance in and to all property or rights in property which the other now has or may hereafter acquire of whatever nature, including community rights in property acquired or to be hereafter acquired during the continuance of the marriage of the parties hereto, or now in the possession of said parties. Each party hereby releases and relinquishes all right to act as executor, administrator or personal representative of the estate of the other.

"This agreement is intended to be and is a full, complete and final property settlement agreement between the parties hereto. It is specifically agreed that all property rights arising out of the marriage contract or from any source whatever, have been and now are settled, once and forever, and that the provisions hereof shall extend to and include the executors, administrators, heirs and successors in interest of the parties hereto. Each party shall, upon the request of the other, execute or cause to be executed, good and sufficient releases of community right or rights or other alleged rights of each in the property herein set apart to the other and will deliver the same to the other, or his or her heirs or assigns, and each party shall join, upon request, with the other in executing deeds and instruments of release or conveyance of any property, real or personal, now owned or hereafter acquired by the other.

"* * * The parties hereto are further agreed that this agreement shall be binding upon each of their heirs, executors, administrators and assigns and that said agreement is fair and equitable.

"Neither party hereto by the execution of this agreement acknowledges any fault on the part of either, or waives any rights which may accrue to either party hereto, except such as are herein specifically set out."

Question: Did the property settlement agreement contain terms and provisions clearly inconsistent with the terms of decedent's will?

No. Section 73 of the California Probate Code reads in part as follows: "If the instrument by which an alteration is made in the testator's interest in any property previously disposed of by his will expresses his intent that it shall be a revocation, or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect."

[1, 2] Appellants contend that applying the foregoing code section to the terms of

the property settlement, decedent's will was revoked. This contention is not sound. The law is settled in California that the mere execution of a property settlement agreement between a husband and wife whereby they adjust their property rights does not revoke a previous will executed by one of the spouses under the terms of which the other is named as a beneficiary.* (Estate of Crane, 6 Cal.2d 218, 219[1] et seq., 57 P.2d 476, 104 A.L.R. 1101. Cf. Grimm v. Grimm, 26 Cal.2d 173, 177[7] et seq., 157 P.2d 841; Estate of Patterson, 64 Cal.App. 643, 646, 222 P. 374.)

[3] It is likewise settled that parol evidence is inadmissible to vary or contradict a written agreeement if it is not ambiguous. (Hutchinson v. Hutchinson, 48 Cal.App.2d 12, 20[4], 119 P.2d 214.)

Applying the foregoing rules to the facts in the present case it is apparent there is no ambiguity either in the property settlement agreement or in decedent's will. Thus it would have been improper for the trial court to receive parol evidence as contended by appellants.

[4] A reading of the property settlement agreement fails to show any intention upon the part of decedent to revoke his previous will which named his wife as his beneficiary nor is there anything inconsistent in the property settlement with the terms of his will and the matter of the disposition of his property made thereby. On the contrary the property settlement contains this provision: "Neither party hereto by the execution of this agreement acknowledges any fault on the part of either, or waives any right which may accrue to either party hereto, except such as are herein specifically set out," which makes the property settlement agreement thoroughly consistent with the terms of decedent's will and the provision therein reading as follows: "If we are divorced or separated she still is to receive the forementioned benefits—to be the sole heir."

It thus appears that section 73 of the California Probate Code has no application to the case at bar, and the judge's admission of the will to probate was correct.

[5] Since an order sustaining a demurrer to a will contest is not designated as an appealable order in section 1240 of the Probate Code such an order is nonappealable. (Cf. Estate of Patterson, 220 Cal. 370, 31 P.2d 197; Estate of Stierlen, 199 Cal. 140, 142[1], 248 P. 509.)

The order admitting the will to probate is affirmed and the purported appeal from the judgment sustaining the demurrer to the second amended contest is dismissed.

MOORE, P. J., and FOX, J., concur.

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* Where a rule of law is clearly established by decisions of the courts of this state, we are not at liberty to overrule it in favor of one followed in decisions of other states. (Estate of Perez, 98 Cal. App.2d 121, 122 [2], 219 P.2d 35.) Therefore In re Gilmour's Estate, 146 Misc. 113, 260 N.Y.S. 761, In re Bartlett's Estate, 108 Neb. 681, 189 N.W. 390, 190 N.W. 869, 25 A.L.R. 39, In re Martin's Estate, 109 Neb. 289, 190 N.W. 872 and Lansing v. Haynes, 95 Mich. 16, 54 N.W. 699, relied on by appellants, are inapplicable to the present case because the holdings in such cases are contrary to the decisions of the appellate courts of this state.

124 Cal.App.2d 451

WILKMAN et al.
v.
BANKS et al.
Civ. 20022.

District Court of Appeal, Second District,
Division 2, California.
April 8, 1954.

Action to enjoin maintenance of a sanitarium on lot in tract subject to general plan of restrictions in violation of restrictive covenants of record. The Superior Court, Los Angeles County, William R. Gallagher, J., entered judgment granting an injunction, and defendants appealed. The District Court of Appeal, Moore, P. J., held that findings on which injunction was based were supported by the evidence.

Judgment affirmed.

See also 261 P.2d 299.

1. Covenants 🔑108(1)

The rezoning of tract by city so as to allow construction of hospitals and sanitariums therein did not authorize violation of restrictive covenants of record prohibiting maintenance of hospital or sanitarium on any parcel of tract. U.S.C.A. Const. art. 1, § 10.

2. Covenants 🔑108(1)

An act of sovereignty with respect to lands already restricted by a general plan against specified uses confers no authority to violate existing restrictive covenants as to use. U.S.C.A.Const. art. 1, § 10.

3. Constitutional Law 🔑145

Restrictive covenants of record prohibiting specified uses of land in tract subject to general plan of restrictions create contractual rights protected by the federal constitution and not subject to modification by rezoning of tract by city so as to permit prohibited uses. U.S.C.A. Const. art. 1, § 10.

4. Covenants 🔑103(3)

Visible repairs and alterations and posting of sign "Colonial House" did not charge owners and occupants of other residential property in the vicinity with notice that a sanitarium for alcoholics was being conducted in violation of restrictive covenants of record or require them to ascertain, at the risk of waiving a violation of restrictions, whether such restrictions were being violated. Civ.Code, § 19.

5. Injunction 🔑130

Where trial court found that right to enjoin violation of restrictive covenants of record was not barred by laches, court impliedly found that nothing had occurred to put plaintiffs on notice of a violation. Civ.Code, § 19.

6. Injunction 🔑113, 128

In action by owners and occupants of other residential property in tract subject to general plan of restrictions to enjoin operation of a sanitarium on a parcel of tract in violation of restrictive covenants of record, evidence sustained findings that plaintiffs would suffer irreparable harm as a result of maintenance of sanitarium and that they were not guilty of laches barring enforcement of covenants.

7. Appeal and Error 🔑931(1)

On appeal the evidence must be so construed as to support findings of trial court and every favorable and reasonable inference must be drawn from the facts to support judgment.

8. Appeal and Error 🔑1010(1)

To justify reversal of judgment on ground that findings are unsupported by the evidence, appellant must show such a lack of substantial facts that reviewing court may say as a matter of law that there is no ground upon which trial court could have based a reasonable inference in support of its findings.

9. Injunction 🔑130

Maintenance of sanitarium by defendants on lot in tract subject to general plan of restrictions in violation of restrictive covenants of record could not be justified on ground that enforcement of restrictive covenants would bear heavily on defendants without substantial benefit to owners and occupants of other residential property in the tract, in view of findings supported by the evidence that violation of restrictions was detrimental to other owners and occupants and operated to the unlawful benefit of defendants.

◆

Don Lake and Val Linton, Los Angeles, for appellants.

Robert H. Green, Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the facts in evidence equitably justify the enforcement of the restrictions against the maintenance of a sanitarium on the city lot of appellants.

The Findings

The court below made findings that defendants own lot A in tract 9854; that plaintiffs own lots in the same tract, and that without contradiction plaintiffs occupy their property as a home. A general plan of restriction inhibits the maintenance of a hospital or sanitarium on any parcel of the tract. Such restrictions were in full force at the time defendants acquired lot A and are still in effect. Defendants have violated such restrictions in that they established and now conduct an alcoholic sanitarium on lot A. The character of the tract has not changed. Lot A is still usable as residential property. While the tract had been rezoned as C–2 prior to appellants' acquisition of lot A, it would not be unjust or unreasonable to enforce the restrictions. Neither plaintiff has been guilty of laches or of unreasonable delay. While defendants have made additions to and alterations of the structure on lot A, it is still conformable to and suitable for the general plan.

Upon such findings, judgment was entered enjoining defendants from maintaining a hospital, a sanitarium or an institution of like nature upon tract 9854. Appellants now demand reversal of the judgment on the ground that the evidence does not support the findings. A review of the entire record is required in order to demonstrate the fallacy of such contention.

The Proof

The facts established by the adopted evidence show that in 1928 and in 1932 a general plan of restrictions was imposed upon tract 9854 of which lot A is a parcel. The plan prohibits the operation of a hospital or sanitarium on any portion of such tract. In 1948, the Los Angeles City Planning Commission rezoned the tract to zone C–2 which authorizes the maintenance of a sanitarium. Two years after such change had been made appellants purchased lot A; and before the acquisition they learned from their inquiries that a C–2 zone permits the operation of a sanitarium. At the time of purchase, appellants had no actual knowledge of the deed restrictions but learned of them from respondents about two weeks prior to the filing of this action, August 7, 1952. It was stipulated that (1) appellants acquired their title in October 1950 while the general plan of restrictions was in full force and effect and a part of the public records in the office of the county recorder; and (2) appellants were conducting a sanitarium as prohibited by the general plan. It was proved that respondent Wilkman owns lot 3 which is so near lot A that only one vacant lot lies between 3 and A; that appellants Banks and Hague own lot A; that the latter had, on June 23, 1952 completed substantial improvements on the premises at a cost of $11,000 with a view to increasing its serviceability as a sanitarium; that on July 1, 1952 they obtained an annual license from the State Department of Mental Hygiene. They made no change in the interior walls, but in November 1950 posted a sign, "Colonial House," otherwise exhibiting nothing to indicate that it was a boarding house or "rest home."

The deed of conveyance to appellants contains the provision that their title is "subject to covenants, conditions, restrictions, reservations, rights and easements." Such language was clearly intelligible and Mr. Banks was an experienced and intelligent man. He had operated as a real estate broker or salesman for ten years with a prominent firm of brokers for whom he had bought or sold more than 100 parcels of property. He had discussed with his vendors the plan of operating a sanitarium. They told him that such an institution could not be kept if liquor were dispensed or used on the premises. He could not explain why he had not read the restrictions. But he did recall that he had told his vendors that he was going to operate an old people's boarding house which, in fact he did for more than twenty months prior to the date of his license from the Department of Mental Hygiene. But after learning of the restriction against dispensing alcohol on the premises, Mr. Banks made no inquiry as to whether the maintenance of a sanitarium on lot A was forbidden by his deed. Both appellants testified that they had made no examination of the restrictions as to the use of the property prior to their receipt of respondents' letter advising them of appellants' violation and of the intended action to enforce the restrictions. Although Miss Hague paid $35,000 for lot A and its improvements and read the conveyance prior to close of escrow with its "restrictions, reservations," etc., she made no inquiry about the restrictive contents of the deed, but during her first month as a licensee of the Department of Mental Hygiene, she received her first alcoholic patient. She has been a registered nurse since 1926, specialized in alcoholics, and is licensed to care for 21 patients.

Respondent Wilkman is a licensed architect. As such, on behalf of the former owner of lot A, he made a survey of the entire building for the purpose of determining its availability as an apartment house. He concluded that the structure could be converted to bachelor apartment units: five single units on the first floor, three on the second floor and that the garage could be so reconstructed as to add two additional units. He had no knowledge as to the operation of an alcoholic sanitarium in the Colonial House prior to May or June 1953 when he was apprised of the fact by his wife.

Appellants conceive that because they have made substantial alterations and improvements on the property they would suffer unjustly to be now deprived of the right to use it. They cite the testimony of their witness Thompson, an experienced real estate operator, that as a residence the Colonial House is worth only $26,500, whereas if used as a sanitarium it is worth practically double that sum. Also, they argue "there cannot be any real dispute as to the fact that defendants will suffer irreparable and great damage if they be enjoined from operating a sanitarium." In such event, they argue, "not only will they lose a valuable, going business, which was built with incessant diligence over a period of years, but defendants will also lose the only use of their property to which it is presently suitable" and its value would be reduced by more than $26,500. But does that answer the charge of violating a solemn contract with the owners of the tract? Why should appellants assert their zeal to make money and to enhance the financial value of their property by operating an objectionable business to the detriment of their neighbors? Is not the peace of mind, the quietude of one's home, freedom from scenes of horror, from noises of boisterous, drunken men worth more than fine gold?

[1–3] Appellants cry with alarm against the enforcement of an agreement they and their predecessors had made to preserve the home-like character of their community and make the novel plea that it is unreasonable and unjust for a court to enforce the compact. We know of no authority to warrant the ruthless renouncement of a contract made to preserve and protect the rights of the contracting parties. The fact that the City of Los Angeles had rezoned tract 9854 to allow the construction of hospitals and sanitariums therein is not authority to violate the restrictive covenants. An act of sovereignty with respect to lands already restricted by a general plan against specified uses confers no authority to violate the existing restrictive covenants as to use. One is a legislative enactment for the general good, authorized by the police power and confers a merely permissive right; the other is a contract of individuals made for their own enjoyment, is protected by the federal constitution, Art. 1, sec. 10, and in no sense interferes with a zoning ordinance. The latter becomes effective for tract 9854 only after the restrictive covenants in the deeds of the lot owners shall have expired.

Moreover, appellants suffer no hardship by virtue of the judgment. They still have their property. Other than the installation of an automatic sprinkler system, the fire apparatus and the fire door, no substantial changes have been made in the house. Not a wall was removed. Also, its potential for becoming a complaint and conforming structure with excellent earning power is not to be disregarded. The building can be converted into an apartment house which could utilize to advantage the improvements already effected.

Laches

[4, 5] Appellants assert the finding that respondents have not been guilty of laches is not supported. They say that they purchased lot A on October 20, 1950, commenced at once the alterations, completed the changes in January 1951 and since then have operated a sanitarium. They argue that inasmuch as respondent Wilkman lived near lot A, that because he as an architect was familiar with their house and daily saw the additions and alterations in the making, "he could not help but be aware" of the nature of the occupancy of appellants shortly after January 1951, but filed this action in August 1952. No such deduction is to be necessarily drawn from the evidences visible to Mr. Wilkman. A busy man who does not remain at home on work days is not likely to observe the occurrences on a neighbor's premises. Had not the tradesman on the beat imparted news of the presence of the alcoholic sanitarium to Mrs. Wilkman in the summer of 1952, further delays in filing suit might have resulted. No neighbor appears to have made the discovery sooner. Appellants' witness Devine who lives across the street from lot A "wasn't even aware that there was an operation of any kind. The place looks the same to me as before." He learned of the sanitarium there "about a week" prior to the first day of trial, December 11, 1952. Although the registered name of the place is "Colonial House Rest Home," appellants maintained a sign, "Colonial House." Such sign could not reasonably be said to constitute a notice that an alcoholic sanitarium was there. Neither the sign nor the visible repairs and alterations could, at the risk of waiving a violation of restrictions, have required respondents to scrutinize the activities of appellants to ascertain whether they were violating the restrictions. Morgan v. Veach, 59 Cal.App.2d 682, 689, 139 P.2d 976. The contents of section 19 of the Civil Code that "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact" do not mean that the "circumstances" are to be interpreted by the party who relies upon them. The trial court who heard the evidence was in a position to determine whether the circumstances in evidence were sufficient to constitute notice of the presence of an alcoholic sanitarium. By its finding of no laches, the court impliedly found that nothing had occurred to put respondents on notice of a violation.

Appellants contend that there is not one iota of proof in the entire transcript to support the finding that respondents will suffer irreparable harm by appellants' maintenance of a sanitarium on lot A. But after hearing from appellants that they received, kept and treated alcoholic patients, administered to them morphine, demerol and kindred narcotics, the trial judge, not without good reason, found that "plaintiffs will suffer irreparable harm." Is there any means of measuring the baneful influence upon a tender child of the wails, the moans, the shuffling of a drunken man? or the hours of anxiety of a mother who constantly fears that at any hour a miserable alcoholic may walk into her home. "Stone walls do not a prison make."

[6] But as to every finding there is some fact proved which in itself or by the natural inference to be drawn from it, reasonably supports such finding.

The Law

[7, 8] This brings us to declare again the law respecting findings and attacks made upon them as unsupported. The evidence must be so construed as to support the finding, Patten & Davies Lumber Com-

pany v. McConville, 219 Cal. 161, 164, 25 P.2d 429; every favorable and reasonable inference must be drawn from the facts to support the judgment. Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689. It is incumbent upon the appellant to show such a lack of substantial facts that the reviewing court may say as a matter of law that there is no ground upon which the trial court could have based a reasonable inference in support of its finding. Unless such showing is made, reversal cannot be had. Richards v. Plumbe, 116 Cal.App.2d 132, 134, 253 P.2d 126. Under the doctrines thus announced, no basis exists for reversing the judgment.

A New Tack

[9] Appellants assert that the judgment is error in that the injunction bears heavily upon them without benefitting respondents. In the first place, preventing appellants from using the property as a sanitarium is not unduly oppressive. They knew its use for a sanitarium was not lawful when they acquired it and when they made the improvements and additions to equip it for hospital operations. Their disregard for their contract and their contempt for the law are not to be rewarded by a judicial declaration that an injunction would hurt them and effect no benefit for respondents. That the latter are aided by the judgment can hardly be denied. It restores their community to the status quo, assures them of peaceful days and silent nights and drives away the fears and visions of unpleasant visitors upon their premises or in their environs.

The authorities cited by appellants, Downs v. Kroeger, 1927, 200 Cal. 743, 748, 254 P. 1101; Bickell v. Moraio, 1933, 117 Conn. 176, 167 A. 722; Forstmann v. Joray Holding Co., 1926, 244 N.Y. 22, 154 N.E. 652; McClure v. Leaycraft, 1905, 183 N.Y. 36, 75 N.E. 961, are not apropos where, as in this action, the court on substantial evidence has found the violation of the restrictions to be detrimental to respondents and to operate to the unlawful benefit of appellants.

Judgment affirmed.

FOX and McCOMB, JJ., concur.

GLADSTONE
v.
MATSON NAV. CO.
No. 15377.

District Court of Appeal, First District,
Division 1, California.
April 12, 1954.
Rehearing Denied May 12, 1954.
Hearing Denied June 9, 1954.

Action for injuries sustained by stewardess who was injured when she fell down a stairway due to the presence of an alleged slippery substance thereon. Judgment for plaintiff for $8000 in the Superior Court in and for the City & County of San Francisco, Edward Molkenbuhr, J., and the defendant appeals. The District Court of Appeal, Bray, J., held that while the evidence was sufficient to sustain the finding in the favor of plaintiff both under the Jones Act and the unseaworthy cause of action, a reversal was required where the jury under the instruction could have understood, that to apply the unseaworthy cause, they must find notice of the slippery condition, but to hold the owner negligent under the Jones Act they were merely required to apply the ordinary rules of negligence.

Judgment reversed.

1. Seamen ⚷29(5.2)

In action for injuries sustained by stewardess while performing her duty as such on board ship, action must be determined by federal law.

2. Seamen ⚷29(5.10)

A stewardess seeking to recover for injuries sustained when falling down a stairway allegedly due to oily substance thereon either under the Jones Act or the general maritime law, must prove notice to the shipowner of the slippery condition of the stairway, and the failure of the owner within a reasonable time thereafter to remove such condition. Jones Act, 46 U.S.C.A. § 688.

3. Seamen ⚷29(1)

Liability under the Jones Act rests wholly on negligence. Jones Act, 46 U.S.C.A. § 688.

4. Seamen ⚷29(1)

In action under the Jones Act for injuries sustained by stewardess when falling down a stairway due to the alleged slippery condition thereof, where there was no evidence how the slippery condition occurred, the negligence of the defendant would be the failure to remove the substance within a reasonable time after defendant knew of its existence, or after it had been there such a length of time that in ordinary care defendant ought to have known of it and removed it, and the same rule would apply to the unseaworthiness cause of action of the stewardess. Jones Act, 46 U.S.C.A. § 688.

5. Seamen 29(1)

While generally there is an absolute liability of a shipowner regardless of notice for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness and no failure of appliance or equipment, the shipowner's liability arises only from failure to remove the transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from such unseaworthiness.

6. Appeal and Error ⚷930(1)

On appeal from judgment for plaintiff, the reviewing court must take the evidence and reasonable inferences therefrom in favor of plaintiff.

7. Seamen ⚷29(5.14)

In action for injuries sustained by a stewardess who fell down stairway allegedly due to a slippery condition thereof, evidence sustained finding of the substance on the stairway, that defendant had knowledge of the condition thereof at least 10 to 15 minutes before the accident and did not clean it up, and that defendant reasonably should have freed the stairway from the condition between the time when the chef ordered it cleaned and the fall of the stewardess. Jones Act, 46 U.S.C.A. § 688.

8. Seamen ⚷29(5.17)

In action for injuries sustained by stewardess aboard the ship from a fall on the stairway due to the alleged slippery condition thereof brought under the Jones Act and for unseaworthiness, where as instructed, the jury could have understood that to apply the unseaworthy cause, it must find notice of the condition to the owner but to hold the owner negligent under the Jones Act they were merely required to apply the ordinary rules of negligence, instructions were error. Jones Act, 46 U.S.C.A. § 688.

9. Appeal and Error ⚷1064(1)

Where the appellate court was unable to say that a different result would not have been obtained with the elimination of the erroneous instruction, a reversal was required.

◆

Brobeck, Phleger & Harrison, San Francisco, for appellant.

Gladstein, Andersen & Leonard, San Francisco, for respondent.

BRAY, Justice.

Defendant appeals from a judgment for $8000 in favor of plaintiff.

Questions Presented.

1. Sufficiency of the evidence.
2. Correctness of instructions.

Record.

Plaintiff was employed as a stewardess on board defendant's S. S. Lurline, and was injured while performing her duty as such stewardess. Of the three causes of action in the first amended complaint, the first is for negligence under the Jones Act, 41 Stat. 1007, 46 U.S.C.A. § 688 for injuries. The second is for maintenance. The third is for injuries due to the unseaworthiness of the ship under the general maritime law. Motions for directed verdict, judgment notwithstanding the verdict, and new trial were denied.

Evidence.

Plaintiff's job was to give room service to persons occupying certain staterooms on D deck which was one deck above the galley, located on E deck, where she filled her orders. She was entitled to use and customarily used a certain stairway (ladder is the seagoing term) between decks. This stairway was used likewise by all members of the crew including those from the engine room. Plaintiff had last used it from 20 to 45 minutes before the accident. Plaintiff was proceeding down the stairway carrying a tray (measuring 3 x 5 feet) stacked with empty dishes which she was taking to the galley. When she had taken 2 to 4 steps down the stairway (whose angle was 40–45 degrees) she felt one of her feet "slide out from under" her and then the other did so. She fell to the bottom of the stairway, receiving the injuries complained of. She saw some kind of black grease or oil "all over" her legs and uniform. It was mostly on her back and side and was on her shoes. She saw something shiny on the stairway which looked like oil which comes out of a crankcase. A seaman who saw her sliding down the steps said there was grease on the side and back of her uniform. He saw on the stairway a shiny substance which looked like grease to him. A utility man who saw plaintiff lying at the foot of the stairway saw oil on her uniform and legs and saw oil on the steps. The ship's nurse testified that plaintiff's uniform was soiled with what had the appearance of muddy water,—it did not look like grease. The ship's doctor stated there was a wet "brownish discoloration" on her uniform over her left hip but he did not recall any discoloration on her stockings. The executive chef stated in his deposition that about 10 to 15 minutes before plaintiff fell someone pointed out to him that there were broken dishes and liquids on the stairway and he immediately ordered one of the scullions to clean it up. He did not remember whether he saw the stairway between that time and when plaintiff fell. He received no report that the stairway had been cleaned. The normal way to clean it would be to remove the broken dishes and clean it with a wet mop. He reached plaintiff after her fall as she was being helped to her feet by members of the crew. She stated to him "it is pretty slick" or something like that. At that time the stairway was wet from spilled orange juice, coffee, cream and Danish pastry which had fallen from plaintiff's tray and there was coffee and orange juice all over her uniform. Plaintiff testified she did not remember whether there was any orange juice or coffee on her uniform. Plaintiff testified that the executive chef in her presence ordered that the steps be cleaned "before somebody gets killed."

Applicable Law.

[1–6] It is conceded that this action must be determined by federal law. See Intagliata v. Shipowners & Merchants etc. Co., 26 Cal.2d 365, 371, 159 P.2d 1. Either under the Jones Act or the general maritime law plaintiff must prove notice to defendant of the slippery condition of the stairway (such notice to be either actual or constructive) and the failure of defendant within a reasonable time thereafter to remove such condition. Liability under the Jones Act rests wholly on negligence and where, as here, there is no evidence of how the slippery condition occurred, the negligence of defendant would be the failure of defendant to remove it within a reasonable time after defendant knew of its existence, or after it had been there such a length of time that in the exercise of ordinary care defendant ought to have known of it and removed it. See Pietryzk v. Dollar Steamship Lines, 31 Cal.App.2d 584, 88 P.2d 783; Seaboard Air Line v. Horton, 233 U.S. 492, 34 S.Ct. 635, 58 L.Ed. 1062; Cookingham v. United States, 3 Cir., 184 F.2d 213, certiorari denied 340 U.S. 935, 71 S.Ct. 495, 95 L.Ed. 675. The same rule applies to the unseaworthiness cause of action. While generally there is an absolute liability on a shipowner regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness, and no fault or failure of appliance or equipment, the shipowner's liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness. Thus either under the Jones Act or the general maritime law pertaining to transitory conditions the rule is practically the same in requiring notice of the condition. See Cookingham v. United States, supra, 184 F.2d 213.

The cases cited by plaintiff as contrary to the transitory unseaworthiness rule of the Cookingham case are not so. Haywood v. Jones & Laughlin Steel Corp., 3 Cir., 205 F.2d 775, concerned a rail on a barge which gave way. Brabazon v. Belships Co., 3 Cir., 202 F.2d 904, dealt with a board used as a walkway which broke from the plaintiff's weight. In Read v. United States, 3 Cir., 201 F.2d 758, the plaintiff fell off a walkway due to the failure of the ship to supply sufficient lighting. In Hawn v. Pope & Talbot, Inc., 3 Cir., 198 F.2d 800, the court expressly recognized the Cookingham rule by stating, 198 F.2d at page 803, "The absence of the hatch covers in the 'tween deck * * * with the facts justifying an inference of the existence of that situation for such a period as to remove it from the type of transitory conditions exemplified in Cookingham v. United States * * * was sufficient to allow submission of that question to the jury." In Lauro v. United States, 2 Cir., 162 F.2d 32, the trial court found that the oil on which the plaintiff slipped had been there " 'at the time of the commencement of the work.' " 162 F.2d at page 34. The reviewing court stated that it was not clear whether this meant when the plaintiff commenced work that morning or commenced work on the particular hatch which was approximately two hours before the accident. There is no discussion of the question of notice and the case was decided prior to the Cookingham case. Cervo v. Isbrandtsen Co., 2 Cir., 178 F.2d 919, also decided before the Cookingham case, actually supports its rule, for the court said "The questions whether there was grease on the floor and whether the defendant should have removed it in order to afford the plaintiff a safe place to work were matters for the consideration of the jury." 178 F.2d at pages 919–920. In Becker v. Waterman S. S. Corp., 2 Cir., 179 F.2d 713, the plaintiff was injured because of "the negligence of the assistant engineer in failing to pump the oil out of the rose boxes as he had said he would do." 179 F.2d at page 715. In Interocean S. S. Co. v. Topolofsky, 6 Cir., 165 F.2d 783, the plaintiff's injuries were due to a defective step due to the absence of certain bolts. It would appear that this was a condition of definite unseaworthiness rather than of the transitory type and yet the court applied the same rule as was later applied in the Cookingham case, for the court said "Whether such defect existed, and, if it did, whether appellant [shipowner] knew of, or should have known of, or discovered, this dangerous defect in the step, was a question for the jury." 165 F.2d at page 784. In Bachman v. United States, D.C., 72 F.Supp. 298, 300, where libellant slipped on oil slick metal floor plates on a ship, the court stated without detailing the evidence that it preponderantly showed that the plates "were in an unseaworthy and negligent condition by reason of the failure of the ship and shipowner to keep the oil slick wiped up with a proper and suitable instrument such as a dry mop * * *." Whether this oil slick was an unusual condition, and if so, how long it had been there when the libellant slipped, is not discussed. In Giacalone v. U. S. A., D.C.N.Y., 1946 A.M.C. 1219 the discussion of the facts is not sufficient to determine how long the oil upon which the libellant stepped was there. The court stated that the evidence did not show that the libellant was told of danger from the oil, but it did show that it was present in sufficient quantity to cause him to fall and that the shipowner failed to provide him with a safe place to work "or to safeguard him from enough of such oil as caused or to cause him to fall." 1946 A.M.C. at page 1220. Even more fragmentary is the statement of evidence in Hollis v. Grace Line, D.C.Cal., 1952 A.M.C. 1609. All the opinion discloses is that there "was oil on the deck * * * at the time the libellant slipped and fell upon it." 1952 A.M.C. at page 1609. Certainly in such fragmentary portrayals of evidence there is nothing conflicting with the rule in the Cookingham case. Plaintiff has cited other cases such as The Osceola, 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760, where the unseaworthiness of the ship definitely was not of the transitory type.

1. Sufficiency of Evidence.

[7] Taking the evidence and the reasonable inferences therefrom, as we are required to do, there is ample evidence to support the jury's implied findings that (1) plaintiff slipped on some slippery substance on the stairway (whether oil or grease, as the jury could have determined from the testimony of plaintiff and certain of her witnesses, or coffee or orange juice, which they could have determined from the testimony of the executive chef, the ship's

doctor and ship's nurse), and (2) that defendant through its executive chef had knowledge of the condition at least 10 to 15 minutes before the accident and did not clean it up, and (3) that with the constant use of the stairway by crew and plaintiff as testified, defendant reasonably should have freed the stairway from the condition between the time when the chef ordered it cleaned and plaintiff's fall.

2. Instructions.

(a) Jones Act Count.

[8, 9] Defendant contends that the court did not instruct concerning the Jones Act count that for defendant to be liable for negligence it must have had notice of the foreign substance and failed reasonably to remove it. The court did not specifically so instruct nor were the instructions on negligence sufficient to inform the jury that such was required by the Jones Act. It instructed that the first count was for damages under the Jones Act for injuries sustained as a result of the alleged negligence of defendant and its employees. As to negligence it instructed that the burden of proving negligence by a preponderance of the evidence was on plaintiff; that for the evidence to preponderate, it had to be of a substantial and convincing quality; that negligence was not to be presumed from the mere happening of the accident; that negligence was the doing of an act which a reasonably prudent person would not do or the failure to do an act which a reasonably prudent person would do under the circumstances presented by the evidence; that the circumstances to be considered were "those which may reasonably be supposed to have been known to such person and to have influenced his mind and actions at that time"; that a helpful test in determining whether a person was negligent was to ask and answer whether "if a person of ordinary prudence had been in the same situation and possessed of the same knowledge, he would have foreseen or anticipated" the injury; and that if the injury was foreseeable by a prudent person "with like knowledge and in a like situation," and if the conduct could reasonably have been avoided, then not to avoid it would be negligence; that under the Jones Act a seaman may maintain an action for injury if the injury results from the negligence of any of the agents, officers or employees of the employer; that it was the obligation of defendant to use ordinary care at all times to furnish plaintiff with a reasonably safe place to work; that if defendant negligently failed to use ordinary care to provide plaintiff with a reasonably safe place to work, and such negligence proximately caused her injuries, their verdict should be for plaintiff. Plaintiff contends that these instructions concerning negligence were sufficient to apprise the jury that to hold defendant liable they must find notice and a failure to remove after a reasonable time, but there is nowhere a statement that under the circumstances of this case the actionable negligence is not the slippery condition of the stairway, but the failure to cure the condition after notice, express or implied. Particularly is this so, in view of the fact that when discussing the requirements under the unseaworthy count the court stressed the necessity of notice. While the court instructed the jury that they must consider the instructions as a whole, the instructions concerning notice were clearly limited to the unseaworthy cause of action and could not reasonably have been considered by the jury to apply to the Jones Act questions. Defendant offered proper instructions which the court refused to give. As instructed the jury could have understood that to apply the unseaworthy cause they must find notice but to hold defendant negligent under the Jones Act they were merely required to apply the ordinary rules of negligence. The failure to instruct properly in this respect constituted error in this case. While it is true that the jury under the evidence could have found for defendant on the unseaworthiness count, we have no way of knowing whether they did so or whether they found under the Jones Act theory as they could have understood it from the instructions, namely, eliminating one of the necessary elements. Particularly is this so when it is remembered that the time between notice of the condition to the executive chef and plaintiff's fall was so brief. While it was long enough so that the jury could have considered it a reasonable time for re-

moval of the condition, it was not long enough to compel such a conclusion. We cannot tell whether the jury so found or erroneously determined that the presence of the slippery substance itself, without anything more, constituted negligence. In such a situation proper instructions on one cause of action and improper ones on another require a reversal. As said in Clary v. Lindley, 30 Cal.App.2d 571, 575, 86 P.2d 920, 921, "We are not able to say that a different result would not have been obtained with the elimination of the erroneous instructions * * *." To the same effect, Intagliata v. Shipowners & Merchants etc. Co., supra, 26 Cal.2d 365, 382, 159 P.2d 1.

As the judgment will have to be reversed, we deem it unnecessary to consider the other questions raised by defendant.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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124 Cal.App.2d 567

SIBBETT et al. v. BABCOCK et al.

Civ. 8369.

District Court of Appeal, Third District,
California.
April 15, 1954.

Action by lower riparian owners to quiet their title to one half the water flowing in a small stream from May 1st to October 31st each year, and to enjoin diversion thereof by upper riparian owners and for declaratory relief. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment from which the lower riparian owners appealed. The District Court of Appeal, Paulsen, J. pro tem., held that upper riparian owner who constructed a dam which prevented the flow of all but a negligible amount of water each year during irrigation period, and maintained the dam for a period of over five years with the full knowledge on part of lower riparian owners of construction and use of the dam, acquired a prescriptive right to the waters of the stream as against the lower riparian owners.

Judgment affirmed.

1. Limitation of Actions 🔑195(3)
Waters and Water Courses 🔑152(6)

Upper riparian owners resisting suit of lower riparian owner to quiet title to one half of water flowing in small stream for a period during each year, and to enjoin diversion thereof, were entitled to prevail upon proof of bar of statute precluding the maintenance of an action involving title unless plaintiff or his predecessors have been seized or possessed of the property within five years before commencement of action, and they were not required to prove either prescription or adverse possession. Code Civ.Proc. § 318.

2. Waters and Water Courses 🔑127

An upper riparian owner may acquire a prescriptive right to the waters of a stream as against a lower riparian owner by an adverse use of the waters for the prescriptive period.

3. Waters and Water Courses 🔑152(8)

In suit by lower riparian owners against upper riparian owners to quiet title to one half the water flowing in a small stream from the first of May to the 31st of October each year, and to enjoin diversion thereof, evidence warranted conclusion that lower riparian owners and their predecessors had notice of construction and use by upper riparian owners of a dam which stopped all but a negligible amount of water each year for the period in question. and that such dam had existed for more than five years. Code Civ.Proc. § 318.

4. Waters and Water Courses 🔑137

Upper riparian owner who constructed a dam which prevented the flow of all but a negligible amount of water each year during irrigation period, and maintained the dam for a period of over five years with the full knowledge on part of lower riparian owners of construction and use of the dam, acquired a prescriptive right to the waters of the stream as against the lower riparian owners.

Spurr & Brunner, Ukiah, for appellants.

Edward H. Sibbett, in pro. per.

Kasch & Cook, Ukiah, for Babcock.

McCowen & McCowen, Ukiah, for respondent Johnson.

PAULSEN, Justice pro tem.

Appellants brought this action to quiet their title to one-half the water flowing in a small tributary of the Russian River from the 1st of May to the 31st of October each year; to enjoin the diversion thereof by respondents, and for declaratory relief. The trial was limited to a determination of the issues raised by the respondents' plea that the causes of action were barred by the statute of limitations Section 318, Code Civ.Proc. The trial court found that they were so barred and decreed that appellants take nothing by their action. This appeal is from the judgment rendered.

Each of the parties owns property which is riparian to the stream, the Babcock property being located above that of appellants and the Johnson property being located still farther upstream.

It is not disputed that respondents could and did put the water taken by them to a beneficial use for the months in question, but there is a conflict in the evidence as to whether or not respondents had done so during the summer months for a continuous five-year period between the years 1941 and 1949. Appellants contend that respondents failed to show that appellants or their predecessors in interest "had a cause of action at any time prior to the filing of this complaint" and argue that if they "became seized or possessed of any part of the water up to at least one-half the flow * * * for any one year then the 5-year period is broken."

The problem presented here is simplified by appellants' own statement:

> "The crux of this whole matter seems to hinge on whether the defendants have fulfilled the burden of proof and shown that Sibbetts' rights to a reasonable amount of water have been infringed for a period of 5 years beginning in May of 1941. Certainly the defendants were vague as to the amount of water flowing through their properties, how much they used, and how much was allowed to flow across and off their premises. Their testimony as to use and amounts of flow in certain years was worthless and they failed to tie in any year or years in particular that they used water and how much."

The trial court found that respondents Babcock had secured a permit to take water from the stream in the year 1940 and had immediately commenced to construct a dam across the stream and beginning with the year 1941 "said defendants have continuously taken this water in the summer months, claiming to own it as against all persons." It found further that "To all intents and purposes they have during the years taken all of the water of the stream in the summer months, there being only occasional times when water went past their dam and down the stream in any significant quantity." The evidence shows without dispute that in 1940 the Babcocks applied for a permit to take water out of the stream and after it was granted that year they constructed a dam about five feet high. About the 1st of May, 1941 they attempted to stop the total flow of water at the dam. The dam was of a new type in that locality, consisting of concrete piers with metal slots in which boards were inserted when it was desired to stop the flow of water in the stream. Its construction aroused a great deal of public interest, it was discussed in the local papers and many people came to view it. The whole operation was open and notorious. Mrs. Babcock testified that in May at the beginning of each irrigation season they would put the boards in the dam; that this would stop the entire flow of water with the exception of a small amount that seeped through the dam, and that this was done each year beginning in 1941 and continued to the time of the filing of the complaint in this action. Mr. Babcock testified that he pumped water from the dam for about four hours each morning, and that it was then allowed to fill until the next morning. He further testified that occasionally, if there was a little more water than usual flowing in the stream, or if he was late at starting his pump, some water would flow over the dam.

Edson Withrow, who lived downstream from the Babcock property, but not close enough to see the dam, testified that the boards were put in each May and kept there until late in the fall, but that there was always some water flowing down to his property and that he used it to irrigate his garden. He estimated that there was enough water to "half fill a 12 inch pipe". He did not state, however, that this came from the dam. In explaining the situation below the dam, Mrs. Babcock testified that some of the water there came from springs in the bank and some of it from water returned after irrigation.

It is at once apparent that the only question to be determined is whether or not the evidence supports the court's finding that during the months in question and for a continuous five-year period the entire flow of water, with the exception of negligible amounts, was prevented from passing the dam to be used by appellants. Appellants point to a number of conflicts in the evidence and it may be conceded that these portions, if found to be true, would support their contentions. The question, however, is whether there is other evidence that would support the findings if considered in the light most favorable to respondents and if they are given the benefit of all inferences that might reasonably be drawn from it.

[1, 2] The respondents were only called upon to establish the bar of the statute of limitations without the necessity of proving prescription or adverse possession. Akley v. Bassett, 189 Cal. 625, 209 P. 576; Cocking v. Fulwider, 95 Cal.App. 745, 273 P. 142. The proof was sufficient, however, to establish all the elements of prescription.

> "The law is so well-established in this state as to require no extended citation of authorities that an upper riparian owner may acquire a prescriptive right to the waters of a stream as against a lower riparian owner by an adverse use of said waters for the prescriptive period." Moore v. California Oregon Power Co., 22 Cal.2d 725, 735, 140 P.2d 798, 804.

The case of Morgan v. Walker, 217 Cal. 607, 20 P.2d 660, presented facts strikingly similar to those at bar. The court there found that the plaintiffs by means of a dam had, during the irrigating seasons for over five years, taken practically all of the water flowing down a certain creek, merely permitting such water as leaked through the dirt and rock dam to go down the creek to the lands of defendants. There was conflicting evidence as to whether or not practically all of the water was diverted, but the contradiction was weighed by the trial court in favor of the plaintiffs and the court had no hesitation in finding that plaintiffs had thus acquired a prescriptive right to the water so used during the irrigating season. The Supreme Court said, 217 Cal. at page 615, 20 P.2d at page 664, that such proof of continuous occupancy and use of water by plaintiffs as though they were the owners established a prima facie case and that it then devolved upon the defendant to show that the use of the water was permissive only or without his knowledge. The court further stated:

> "'In appropriating the water which flows across his land, the lower appropriator invades no right of the upper riparian proprietor. The latter has no right of action to prevent such use, for he is in nowise injured, and the former should not be permitted to acquire a right in this manner which the latter is powerless to prevent. The case is quite different where the upper owner appropriates the water. The lower owner is injured at once, and the law gives him a remedy; and, if he fails to avail himself of it, the appropriation may, by lapse of time, ripen into an absolute right.' Bathgate v. Irvine, 126 Cal. 135, 141, 58 P. 442, 444, 77 Am.St. Rep. 158; Pyramid Land, etc., Co. v. Scott, 51 Cal.App. 634, 638, 197 P. 398. An upper riparian owner may gain a right by prescription as against the rights of the lower riparian owner by proof that the latter had actual notice of the adverse claim of the upper owner, or that the circumstances were such, as for instance the use of all the water of the creek, that the lower own-

er must be presumed to have known of the adverse claim."

The court further stated with respect to how much water must be used to create a presumption of knowledge of adverse claim: "The amount of the stream which was not so diverted was negligible and consisted only of the seepage through the Childs dam."

[3, 4] In the present case the record shows clearly that appellants and their predecessors had notice of the construction and use of the dam in such a way as to stop all but a negligible amount of water each year from the 1st of May to the last of October. And that the seepage was, in fact, negligible is shown by the photographic evidence of the dam, and the testimony of Mrs. Babcock.

Complaint is made that the judgment is too broad as to time, but we think there is no merit in this contention. Appellants sought to quiet title to the use of water flowing from May 1st to October 31st each year and to enjoin its diversion during that period. The judgment simply states that they shall take nothing by said action.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

124 Cal.App.2d 594

Application of ORLANDO.

Ex parte SMITH.

Civ. 5174.

District Court of Appeal, Second District, Division 2, California.

April 16, 1954.

Proceedings on writ of habeas corpus regarding custody of minor child pending appeal from modification of custodial order. The District Court of Appeal, Fox, J., held that where mother of minor child, prior to appeal from modification of custody order, changing custody from mother to father, had adopted and followed the visiting schedule provided by the order of modification, and had written letter recognizing the respective rights given to her and father by the modifying order, the modifying order was executed prior to appeal, and the father's custody could not be interfered with during pendency of the appeal, with result that mother's petition for writ of habeas corpus would not lie.

Writ discharged.

1. Infants 🔑19

A perfected appeal in a proceeding for the custody of a child automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal, but the appeal does not operate to undo action taken before the appeal, but merely preserves the status quo as of the time of the appeal. Code Civ.Proc. § 946.

2. Habeas Corpus 🔑25(2)
Parent and Child 🔑2(4)

Where mother of minor child, prior to appeal from modification of custody order, changing custody from mother to father, had adopted and followed the visiting schedule provided by the order of modification, and had written letter recognizing the respective rights given to her and father by the modifying order, the modifying order was executed prior to appeal, and the father's custody could not be interfered with during pendency of the appeal, with result that mother's petition for writ of habeas corpus would not lie. Code Civ. Proc. § 946.

John K. Ford, Los Angeles, for petitioner.

James L. Potts, Inglewood, for respondent.

FOX, Justice.

By an interlocutory decree of divorce in August, 1947, the custody of the minor, Craig T. Smith, was awarded to his mother, the petitioner herein, with the provision that the father should have custody of the child during the summer vacation period of each year. As a result of a hearing on an order to show cause, the court, on August 26, 1953, modified the previous custody order and awarded Craig's custody to his father, Thomas H. Smith, with the provision, so far as here material that petitioner have the child during July and August of each year, Easter vacation, alternate Christmas vacations, and at other times from Friday at 8:00 p. m. until Sunday at 6:00 p. m. At the time this latter order was made the father had the boy with him pursuant to the previous order, which gave him custody during the summer vacation. On the next day, August 27th, petitioner's then attorney wrote respondent's attorney the following letter: "My clients have requested that you advise Mr. Smith, when he brings the boy over this weekend to bring his clothes that were sent with him for the vacation period, as the mother desires to keep all of said clothes she purchased for the boy at her house so that he can use it during the period he is visiting there."

Commencing with September and continuing through the middle of January, 1954, the parties complied with the order of August 26th. Since January, 1954, however, respondent has refused to permit petitioner to enjoy the visitation privileges of the later order because of a dispute as to who is entitled to custody pending the determination of petitioner's appeal, notice of which was filed on October 6th. This proceeding is for that purpose and respondent has indicated his willingness to abide by such determination.

It should be noted that no claim is here made that either party is unfit to have the custody of this child, or that his welfare or best interests will be imperiled by remaining in the custody of either parent pending the determination of the appeal.

Petitioner takes the position that upon perfecting her appeal the order of August 26, 1953, was stayed and the earlier order remained in effect, under which she was entitled to custody after the summer vacation. Respondent, however, contends that petitioner submitted to the modifying order and it was executed prior to the time petitioner perfected her appeal and that such appeal, therefore, did not have the effect of undoing what the parties had done pursuant to such order. Respondent's position must be sustained.

[1] It is true, as petitioner argues, that "a perfected appeal" in a proceeding for the custody of a child "automatically constitutes a stay of proceedings and precludes a trial court from interfering with custody as it existed at the time of appeal." Foster v. Foster, 5 Cal.2d 669, 672, 55 P.2d 1175, 1176. However, such an appeal does "not operate to undo action taken before the appeal." In re Barr, 39 Cal.2d 25, 28, 243 P.2d 787, 788. Its effect is to stay "all *further* proceedings in the court below upon * * * [the] order appealed from". Italics added. Code Civ.Proc., sec. 946; In re McKean, 82 Cal.App. 580, 584, 256 P. 226. It simply preserves "the status quo at the time of appeal." In re Barr, supra. If, as respondent contends, the order of August 26th was executed prior to the time petitioner perfected her appeal (which we will assume was on October 6th, the day on which she filed her notice), then habeas corpus does not lie. De Lemos v. Siddall, 143 Cal. 313, 76 P. 1115.

[2] It therefore becomes necessary to examine the conduct of the parties following the modification order of August 26, 1953. At that time the boy was in his father's care by reason of the previous order which gave him custody during the summer vacation. On the day following, petitioner, through her then counsel, wrote Mr. Smith that when he brought the boy over that weekend, to bring his clothes; that she desired to keep all of the clothes that she had purchased for him at her home so he could use them during the period he was "visiting" there. The clear inference from this letter is that petitioner recognized that under the modified order the boy's father was awarded his custody, giving her, however, the right to have the child on weekends, and that she was acquiescing in and accepting such order and proposing to carry out its terms. The

modified custody order and visiting schedule was thereupon adopted and followed by the parties. Thus by consent and conduct the modified order was put into operation and therefore executed before petitioner's appeal was perfected. In this respect the instant case is strikingly similar to the De Lemos case, supra. There the mother delivered the child to the father in open court immediately upon the pronouncement by the court of the modifying order giving its custody to the father. Shortly thereafter the mother perfected an appeal from the order. On appeal it was her contention that the effect of her appeal was to hold in abeyance the order appealed from pending the appeal. The court, however, held that "the modifying order was complied with by petitioner, and it was thus executed before any appeal," 143 Cal. at page 316, 76 P. at page 1116, and that the effect of the appeal was not to undo what had already been done. See interpretation of this case in In re Barr, supra, 39 Cal.2d at page 28, 243 P.2d 787. In the McKean case, supra, the transfer of the custody of the children under the modifying order was also accomplished before the appeal was taken. Relying on the De Lemos case it was held that the mother's petition for a writ of habeas corpus would not lie.

Petitioner relies on In re Robelet, 121 Cal.App.2d 598, 263 P.2d 649. That case is not here applicable because there had been no physical change of possession of the children after the new order and prior to the filing of the notice of appeal which was filed only two days after the order was made. Consequently, the appeal stayed the new order and left the former order in effect pending the determination of the appeal. Since, under the former order, petitioner was entitled to the custody of the children and they were being wrongfully withheld from him, they were properly returned to him through the habeas corpus proceeding.

The writ is discharged.

MOORE, P. J., and McCOMB, J., concur.

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124 Cal.App.2d 555

EMDEN et al.

v.

VERDI et al.

Civ. 19900.

District Court of Appeal, Second District, Division 2, California.

April 14, 1954.

Action by executors of decedent's estate for judgment declaring that defendant held title to certain real property in trust for decedent who had paid the purchase price. The Superior Court of Los Angeles County, Henry M. Willis, J., entered judgment from which defendant appealed. The District Court of Appeal, Fox, J., held that evidence did not warrant finding adverse to presumption of resulting trust which arose when purchase price for the property was paid by decedent and title was taken in the name of defendant.

Judgment affirmed.

1. Trusts ⟹72

Where decedent had paid entire purchase price for property, and title was taken in name of person who thereafter claimed ownership adverse to claim of decedent's executors, a trust was presumed to have resulted in favor of decedent, since natural presumption was that it was intention of parties that the ostensible purchaser should acquire and hold title to the property for benefit of decedent who furnished the purchase price.

2. Trusts ⟹86

The presumption of trust arising where the purchase price for property is paid by one person and title is taken in name of second is evidence to be weighed by trial court along with all the other facts in the case in determining the existence of a trust.

3. Trusts ⟹89(3)

In controversy between executors of a decedent's estate and a defendant who claimed ownership of realty standing in her name, for which the purchase price had been paid by decedent, evidence was insufficient to warrant finding adverse to presumption of trust arising from fact that decedent had paid purchase price, but warranted conclusion that intent of decedent when he caused title to be conveyed to defendant was not to make a gift.

4. Trusts ⚷89(3)

In controversy between executors of decedent's estate and defendant who claimed ownership of property purchased with funds of decedent, but conveyed to defendant, wherein it was contended that presumption of resulting trust was overcome by fact that decedent had paid the purchase price for purpose of providing home for defendant and her family, evidence did not warrant finding that purchase by decedent had been for purpose and with intent of making a gift for purpose alleged by defendant.

5. Appeal and Error ⚷994(3), 996, 1012(1)

A reviewing court will not revaluate the credibility of the witnesses, reweigh the evidence and inferences therefrom, and again determine factual issues, since such would be an invasion of the fact finding prerogative of the trial judge.

6. Gifts ⚷15

Trusts ⚷89(3)

A close relationship may be of such character as to indicate the parties actually intended a gift and thus sufficient to overcome presumption of a resulting trust where property is purchased with funds of one person and title is taken in name of another.

7. Gifts ⚷49(4)

In controversy between executors of decedent's estate and defendant who claimed ownership of property purchased with funds of decedent, with title being taken in name of defendant, evidence as to closeness of relationship between decedent and defendant and her family was not such as to require a finding, as a matter of law, that a gift was intended.

8. Evidence ⚷271(17)

In controversy between executors and defendant who claimed ownership of property standing in her name but purchased with funds of decedent, admission of testimony as to statements made by decedent shortly before his death, including reference to deed from defendant to decedent, conveying to decedent the property in controversy, and his direction to named person to tell defendant, if necessary, in order to secure certain cashier's checks, that he would cause destruction of such deed, was not error, when for purpose of establishing the intent with which original conveyance was caused to be made to defendant, since testimony, even though self-serving, was admissible as an exception to hearsay rule.

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Edward Mosk, Hollywood, for appellant.

George A. Elstein, Los Angeles, for respondents.

FOX, Justice.

Edith Verdi appeals from that portion of the judgment decreeing that she held title to certain real property in trust for the decedent, Victor C. Emden, his heirs and devisees.

The property here in controversy is located on Hollister Avenue, in Santa Monica, and consists of a two-story residence on the front of the lot, with separate living accommodations on each floor, and two other residences in the rear. Decedent purchased this property in August, 1943. Title was placed in the name of appellant Verdi, who was not related to him. Decedent, however, paid all the taxes and repairs on the property. He took out insurance on the property in May, 1945, in his own name. Appellant Verdi occupied the downstairs living quarters in the two-story house. The other rental units were listed under the Office of Price Administration by Mr. Emden. He passed away in August, 1945, approximately two years after he purchased the property.

In 1933, when Emden was in his late fifties, he married Edith's sister, Sally, who was in her early twenties. In 1940 Sally informed Emden that she was in love with another man. Emden thereupon established residence in Nevada and secured a divorce early in 1941. Sally married a month later in Hawaii. They remained, however, on cordial terms. During Emden's marriage a close relationship had developed between him and her family. This relationship continued after Emden's and Sally's separation and divorce; in fact, Edith and a friend of hers accompanied him to Nevada when he was in search of marital freedom. He paid their expenses. Thereafter, when Edith and her husband were divorced, Emden paid the rent on the premises occupied by Edith and her mother at two locations. Edith and her husband remarried in 1946 after Emden's death. In the meantime Emden spent considerable time with Edith and her family. She acted as his chauffeur, for which he paid her $20 per week and expenses. He also paid her transportation to New York in 1944 to visit a sister who was ill.

In the summer of 1943, according to appellant, she and her son, her mother and Sally's adopted son, were living together. The landlady objected to the children. The boys were sent to a camp. It was then, said appellant, that Emden told her to look around and see if she could find a house that would be large enough for the four of them; that he would buy it for her so they could all be together. The result was the purchase by Emden of the Hollister Avenue property. Testimony was given by friends of appellant of conversations with Emden wherein he stated he was going to buy a house for Edith, or indicating he had bought a house for her. She was introduced to tenants by Emden as their "new landlady." The rent was thereupon paid to her.

Shortly before the death of Emden, Mr. Jones, an attorney, went to Emden's home to prepare his will. At that time Emden told him that he had purchased the Hollister Avenue property and placed it in Edith's name and that he had a deed back from Edith which was in his brief case at the head of his bed. Mr. Jones never saw such deed and no such instrument has ever been produced. He also informed Mr. Jones, among other things, that Edith had $50,000 in cashier's checks belonging to him, and asked Mr. Jones to secure them from her. He told Mr. Jones to tell her anything to get these checks—that Emden was going to use them to open up a joint account with her, and that he would give to Attorney Jones her deed to him of the Hollister Avenue property to be destroyed. The next day Mr. Jones received a letter from Emden which he had dictated to his nurse, in which he reiterated the same things he had already related to Mr. Jones in their previous conference. The latter secured the return of the cashier's checks without telling Edith that Emden had said he would have her deed to him of the Hollister Avenue property destroyed if she would return the checks.

Although stated under different captions, the burden of appellant's argument is that the evidence does not support the findings and judgment. With her contention we cannot agree.

[1–3] The evidence is undisputed that Emden paid the entire purchase price for the property, and that title was taken in the name of appellant. In such circumstances a trust is presumed to result in favor of the one who furnishes the consideration. Rowland v. Clark, 91 Cal.App.2d 880, 882–883, 206 P.2d 59; Goes v. Perry, 18 Cal.2d 373, 379, 115 P.2d 441; Bradley v. Duty, 73 Cal.App.2d 522, 526, 166 P.2d 914; Norman v. Burks, 93 Cal.App.2d 687, 691, 209 P.2d 815; Civil Code, § 853. This is because it is the natural presumption in such a case that it was the intention of the parties that the ostensible purchaser should acquire and hold the title to the property for the one who furnished the purchase price. Lezinsky v. Mason Malt W. D. Co., 185 Cal. 240, 251, 196 P. 884 Such a presumption is evidence to be weighed by the trial court along with all the other facts in the case. Gammill v. Nunes, 104 Cal.App.2d 185, 188, 231 P.2d 86; In re Kromrey's Estate, 98 Cal.App.2d 639, 646, 220 P.2d 805. In support of the court's decision are the further facts that (1) Emden paid the taxes; (2) took care of the repairs to the property; (3) renewed the insurance in his own name; and (4) registered the rental units with OPA. Appellant challenges the last item. She says she does not know whether the units were registered. This makes it clear that she did not register them. The presumption is that the law was complied with. Furthermore, decedent took care of other business matters relating to this property and told tenants appellant was the new landlady. It is therefore a reasonable inference that decedent did take care of registering the rental units with the OPA. There is also an inference that Emden believed appellant understood that she was holding title for him. This grows out of his request to his attorney that he tell her he would have her deed reconveying the property to him destroyed, if this were necessary in order to get the cashier's checks. Emden was desperate to recover these checks for he told Mr. Jones to tell her anything to get them. It certainly would not have facilitated the attorney's mission for him to convey Emden's message to appellant if Emden had even a suspicion that she considered herself owner of the property. The inference is clear that decedent did not consider appellant the owner and did not believe that appellant so considered herself. The trial court could reasonably have concluded this situation had existed from the inception of the transaction—that a gift had never been intended—for there is nothing to suggest that appellant had given up any interest she had acquired. It should also be noted that the parties were not related, marriage does not appear to have been contemplated, and a meretricious relation is not suggested. These facts and circumstances and the reasonable inferences to be drawn therefrom amply support the findings and judgment.

Appellant argues that "the presumption of a resulting trust is rebutted by presentation of evidence showing a contrary intent." Mr. Emden's intention when he caused title to be conveyed to Edith was a question of fact for the trial court. After hearing all the evidence, observing the witnesses, taking into consideration their relation to the transaction and to the appellant, their interest in the case, and evaluating their testimony and then resolving the conflicts in the evidence and the inferences to be drawn therefrom, the trial judge has found adversely to appellant on the question of the intent with which this conveyance to appellant was made. Such finding has substantial evidentiary support and therefore it is binding on appeal.

[4] Appellant's next point is that "where party paying purchase price does so to provide home for another, presumption of trust will not arise." First of all, this proposition is lacking in factual foundation. While Edith testified that decedent told her he would buy a home for her so all the family could be together, the trial court may not have believed her in view of her interest. The judge may have for like reasons disbelieved Sally and her mother and the friends of appellant who supported her on this point. The court may well have concluded decedent intended only to provide her a home for the time being in view of the housing shortage. This conclusion finds inferential support from the fact that there were three rental units on this property. It does not appear there was ever any suggestion that decedent would provide her with a home and an income.

[5] Appellant relies on Browning v. Evans, 217 Cal. 585, 20 P.2d 681, in support of her last proposition. It does not, however, go to the extent she claims. The court there recognizes the general rule that "a presumption of a resulting trust ordinarily arises where property is purchased with funds of one person and title taken in the name of another", 217 Cal. at page 591, 20 P.2d at page 683. It is then pointed out that this presumption may be overcome where it is established that the party paying the purchase price did so for the express purpose of providing a home for the person in whose name title is taken —that title so taken is "some evidence that a gift of the fee was intended." Appellant insists that the Browning case is in point and therefore controlling here. True, there is a close parallel between the story of the respective plaintiffs in the two cases, but in the Browning case the trial court believed plaintiff's evidence and accordingly found that a gift was intended and no trust resulted. On appeal it was simply held that the evidence was sufficient to support the finding of a gift of the property and to overcome the presumption of a resulting trust. Hence the judgment was affirmed. Here, however, the trial court has not accepted the evidence on behalf of

appellant that a gift was intended and has found there was a resulting trust. She now seeks a reversal of that judgment. Obviously the Browning case cannot be applicable in such circumstances. What appellant is really urging upon us here is that we re-evaluate the credibility of the witnesses, reweigh the evidence and the inferences therefrom, and decide the factual issue in her favor. Then the Browning case would be applicable. However, under firmly established principles, an appellate court may not thus invade the fact-finding prerogative of the trial judge.

[6, 7] Appellant's next point is that "Where a close relationship exists, a gift will be presumed." This proposition overstates the effect of a close relationship. The principle is that a close relationship may be of such character as to indicate the parties actually intended a gift and thus sufficient to overcome the presumption of a resulting trust. Appellant cites two cases which illustrate this principle and in which it was found the closeness of the relationship established an intent to make a gift. In these cases—Porter v. Douglass, 7 Cal.App. 429, 94 P. 591 and Creasman v. Boyle, 31 Wash.2d 345, 196 P.2d 835,—a meretricious relationship was shown. Here, however, the evidence of the closeness of the relationship between decedent and Edith and her family was not such as to require a finding, as a matter of law, that a gift was intended.

[8] Appellant's final argument is that "The court erred in admitting testimony of alleged statements made by the decedent shortly before his death." Reference is here made to the conversation between decedent and his attorney and the letter dictated by decedent to his nurse and sent to Mr. Jones covering essentially the matters discussed by them in their previous conference. Objection is made particularly to decedent's reference to a deed from appellant to him conveying the property here in controversy and his direction to Mr. Jones to tell appellant, if such were necessary to secure the cashier's checks, that he would cause the destruction of the deed upon delivery of the checks. This testimony was not admitted for the purpose of establishing the existence of such a deed, but for the purpose, as the trial judge ably pointed out, of throwing light upon the intention with which the conveyance was caused to be made to Edith by Emden—"whether or not he intended that the title pass to" her or that she was "taking it solely for convenience and in trust for him." For such purpose this testimony was admissible in evidence as an exception to the hearsay rule and it is immaterial that such statements were self-serving. Whitlow v. Durst, 20 Cal.2d 523, 524, 127 P.2d 530; Hansen v. Bear Film Co. Inc., 28 Cal.2d 154, 174, 168 P.2d 946; Dinneen v. Younger, 57 Cal.App.2d 200, 207, 134 P.2d 323; McNulty v. Copp, 91 Cal.App.2d 484, 489, 205 P.2d 438; Kelly v. Bank of America, 112 Cal.App.2d 388, 394, 246 P.2d 92.

Affirmed.

MOORE, P. J., and McCOMB, J., concur.

124 Cal.App.2d 572

MATOZA v. MATOZA et al.

Civ. 15776.

District Court of Appeal, First District, Division 1, California.

April 16, 1954.

Rehearing Denied May 14, 1954.

Action was brought for an accounting of partnership profits. The Superior Court of the County of Alameda, Chris B. Fox, J., entered judgment for plaintiff and entered an award allowing $3,000 to referee, and defendants appealed. The District Court of Appeal, McMurray, J. pro tem., held that where referee devoted 230 hours to accounting of partnership profits, held hearings, prepared accountings, marshalled conglomerate mass of checks and documents, furnished office space for hearings, paid telephone, stationery and postage expenses, and appeared in court hearings, an allowance of $3,000 to the referee was not excessive.

Judgment and order affirmed.

1. Partnership ⚷332

Where alleged inconsistencies of referee in taking accounting of partnership profits were more concerned with method than substance, and end result would have been the same under methods used by referee and those urged as proper by defendants, who complained of referee's method, if same figures were used, defendants could not successfully complain concerning such alleged inconsistencies.

2. Appeal and Error ⚷931(1)

On appeal, District Court of Appeal will resolve conflicts in evidence in favor of respondent.

3. Partnership ⚷332

Where referee devoted 230 hours to accounting of partnership profits, held hearings, prepared accountings, marshalled conglomerate mass of checks and documents, furnished office space for hearings, paid telephone, stationery and postage expenses, and appeared in court hearings, an allowance of $3,000 to the referee was not excessive.

◆

Gene Rhodes, Castro Valley, J. Warren Manuel, Oakland, for appellants.

Myron Harris, R. J. Darter, W. H. Older and Eugene K. Lawlor, Oakland, for respondent.

McMURRAY, Justice pro tem.

Antone Matoza sued his brother, Henry Matoza, and his nephew, Henry Matoza, Jr., for fraud and an accounting of partnership profits. Plaintiff obtained a judgment for $35,653.61 and the court made an order awarding $3,000 to the referee appointed in the matter and provided that this amount be taxable as costs. From this judgment and order defendants appeal.

Antone Matoza does not speak, read or write the English language; Henry speaks English, but does not read it. In 1940 Antone and Henry commenced farming as equal partners. Henry was the business manager, paying all obligations, receiving all payments and doing all the banking; Antone worked in the fields. At this time Henry contributed equipment and money to the partnership of the value of $9,101.70; Antone made no capital contribution.

In 1945 Henry, Jr. became an equal partner with his father and uncle and this partnership continued until the end of 1949. At that time Henry obtained Antone's signature on a dissolution agreement and paid him $10,000 for his partnership interest in the business, Henry to have the right to continue therein. Antone thereafter commenced this action.

After reference the court found that Henry had at all times from 1940 through 1949 done all the banking for the partners; that he kept no books of account; that the only documents and papers available to the court were: (a) copies of income tax work sheets and returns made on behalf of the partnerships, which did not set forth the annual incomes nor the total annual expenses correctly; (b) copies of various bank statements for the years 1943 to 1950; (c) approximately 4,000 cancelled checks through the years 1942–1950, which are not related to any other records; (d) various leases, invoices, statements, correspondence, bills and other documents which were so unclassified as to be unrelated to any withdrawals or deposits shown on the bank statements. The court also found that Henry had converted partnership funds to his own benefit.

Appellants' principal grounds of appeal from the judgment are that the referee in taking the accounting used inconsistent methods which distorted the facts and that an improper method was used to determine the partners' withdrawals.

The first inconsistency complained of is that the referee treated certain expenditures, in the last year of the partnership, as personal withdrawals by Henry rather than as partnership expenditures and that this procedure resulted in a change from a cash to an accrual method of accounting since there was no credit given Henry for like expenditures at the commencement of the first partnership. The contention is without merit. There is no evidence that Henry made like expenditures at the commencement of the partnership. The expenditures in 1949 were in the nature of prepaying costs of continued operation and the referee was, therefore, justified in treating them as personal withdrawals by Henry, since he alone would benefit therefrom.

The next inconsistency alleged is that the use of both the figures on the income tax returns and those on bank statements and cancelled checks distorted the withdrawals since this resulted in charging certain amounts twice. In view of the evidence before the court below this contention fails. There were no regular books of account, the referee was bound to consider all the evidence available in attempting to arrive at some sensible picture of the partners' withdrawals and, by correlating the income tax and bank statements, it appears that the referee did the best he could with the welter of unrelated matter submitted to him.

Appellants next urge that it was inconsistent to shift from a detailed cash accounting to a net worth method for the years 1944 and 1949; the last years of each of the partnerships. The argument is more impressive than is its demonstration. At the trial of the matter the same proposition was urged by appellants and expert testimony on the subject was heard. On cross-examination the expert admitted, after demonstration, that the method used by the referee resulted in an identical figure with that which would be reached under the method urged as proper. In treating a similar contention it was said in Whann v. Doell, 192 Cal. 680, 684, 221 P. 899, 901: "On the other hand, the contention that an account must be stated in accepted bookkeeping fashion cannot be maintained. * * * Any procedure or record from which it can be intelligently ascertained what the issues were as to the controverted items and how these issues were disposed of by the trial court will suffice for the purpose, whether the matter appears from the findings, the decree or a bill of exceptions, showing the controversy, and the disposition thereof."

The last inconsistency cited is that there was a distortion of facts by using records for some purposes but not for others. Namely, that income tax returns were used as the sole basis for determining operating costs and withdrawals in the years 1940 and 1941 and that for subsequent years both income tax and bank statement figures were used for these purposes. In 1940 and 1941 the only documents available to the referee were the copies of income tax returns, thereafter he carefully surveyed and correlated the bank figures with the income tax figures to arrive at the best picture of the partnership activities. The contention is unsound.

[1] All of these urged inconsistencies are more concerned with method than substance. The end result would be the same under the methods used by the referee and those urged as proper by appellants if the same figures were used.

[2] The next contention of appellants is that the method of determining withdrawals is improper. This contention is covered in previous paragraphs, but in effect is an attack upon the determination of the referee and court as to what were personal withdrawals. A detailed recounting of these items would serve no purpose as this contention at best raises a conflict in the evidence. On appeal this court will resolve such conflicts in favor of respondent. Cohn v. Cohn, 1 Cal.2d 313, 314, 34 P.2d 1000. Under the circumstances here it is ill-advised for appellants to complain that items not satisfactorily explained were charged to personal withdrawals. Although Henry was in complete charge of the business, he had a defective recollection of a number of transactions, among them was a $7,200.00 check relative to which he stated, "I don't remember what that's for," and as to a number of lesser transactions his testimony was of like

weight. In such a state of the record the language of Olmo v. Olmo, 56 Cal.App.2d 590, at page 595, 133 P.2d 866, at page 869, becomes reasonably apposite when it is said: "The referee was confronted with an incomplete and imperfect set of books, * * *. Where records were missing, he resorted to a system of computations based upon average receipts and expenditures, which was the best method he could pursue under the circumstances. If the results arrived at have been to appellant's disadvantage he cannot complain of a situation brought about by his own dishonest manipulation."

[3] The appellants urge that the allowance of $3,000 to the referee was excessive for his services since he could have accomplished the same result by using a different method; preferably, one of those now urged by appellants. The referee devoted 230 hours to this matter, held hearings, prepared accountings, marshalled the conglomerate mass of checks and documents, furnished office space for the hearings, paid telephone, stationery and postage expenses and appeared in court hearings. All of this was done after a stipulation of the parties to the effect that "the compensation of * * * [the] sole Referee herein, for his services pursuant to the order of Reference made by the above entitled Court * * * shall be such amount as may be fixed by the above entitled Court." Even without such stipulation it is readily apparent that such amount of compensation is reasonable and just. It would be reckless to disallow compensation to a referee for securing all of the information which might be germane to the reference on a basis that the work could have been avoided by a blind adoption of some rigid accounting method which would not take into consideration all of the evidence, of whatever weight, available.

The judgment and order appealed from are affirmed.

PETERS, P. J., and BRAY, J., concur.

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124 Cal.App.2d 598

MARTIN et ux. v. BAIRD.

Civ. 4679.

District Court of Appeal, Fourth District, California.

April 16, 1954.

Action for specific performance of alleged agreement to sell land. The Superior Court, Kern County, Robert B. Lambert, J., entered judgment ordering specific performance. Vendor appealed. The District Court of Appeal, Griffin, J., held that letter by vendor to her agent setting forth terms upon which she would sell, and acceptance of those terms in writing by purchasers with additional statement that oil and mineral rights would go to purchasers, was a sufficient written agreement to be subject to specific performance.

Judgment affirmed.

1. Vendor and Purchaser ⚷21

An agreement for purchase or sale of real property need not be evidenced by formal contract drawn with technical exactness in order to be binding, and memorandum of agreement, found in one or several documents, is sufficient.

2. Vendor and Purchaser ⚷16(4)

An offer for the sale of real property must be unequivocally accepted in order to be binding.

3. Specific Performance ⚷28(2)

Where owner's letter to her agent set forth terms upon which she would sell land, and those terms were accepted in writing with additional statement that oil and mineral rights would go to purchasers, there was mutual assent to contract which was sufficiently certain to justify decreeing specific performance.

4. Specific Performance ⚷31

Equity does not require that all terms and conditions of agreement be set forth in contract before specific performance will be ordered, but usual and reasonable conditions of such contract are, in contemplation of the parties, a part of their agreement.

5. Mines and Minerals ⟹54(1)

Where acceptance of terms of offer for sale of real property added statement that oil and mineral rights would go to purchasers, but offer had not indicated that such oil and mineral rights were to be excluded from sale, offer was accepted without change in proposed terms, and binding contract was created.

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Kenneth N. Hastin, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

GRIFFIN, Justice.

Plaintiffs brought this action to compel specific performance of an alleged agreement of defendant to sell 10 acres of land in Kern County. The only question presented is the sufficiency of the evidence to show a written agreement subject to specific performance.

In July, 1951, defendant, who resided in Los Angeles, wrote a real estate agent, Barker, in Bakersfield, about the possible sale of her property, and suggested a selling price of $10,000. Barker received an offer of $8,000 from plaintiffs, through another agent. This offer was reduced to writing on a standard real estate association form for a deposit receipt. It was signed by the plaintiffs. It acknowledged the receipt of $200 deposit by the agent on September 4, 1951, with an offer of $8,000, payable $2,000 down, and the balance at $1,000 or more per year at 6 per cent. July 1st was to be the date of each year's payment. This offer was forwarded to defendant by her agent Barker, with a letter signed by him, stating:

> "Here is an offer offered by a client —thru a fellow broker ..... In brief the offer is—$2,000 cash down—and $1,000 every year—due on July 1st starting 1952—until paid for—interest at 6%. Buyer must have the right to pay up in full at any time. Full purchase price $8,000. I am enclosing the original offer—in case you wish to accept it.—Then of course—sign the offer so that I can open escrow—and please enclose all necessary papers—If the offer is not acceptable—please state any counter offer. The buyer understands the ground is leased until—March 1st 1952.
>
> "Sincerely
> "Jack Barker
>
> [Note] "The Buyers must have the privilege of building a home on the property—Prior to possession March—5—In other words—it would take 5 or 6 months to build a home. Of course if they destroyed a few dollars of crop —they would reimburse Lessee.
>
> "J. B."

Soon after the letter was mailed, Barker called defendant on the phone and informed her of the offer, as mailed, and that he thought the offer could be raised $500, and if she was no satisfied with the $8,000 offer and if she stated she would accept $8,500, he thought the purchaser would give that amount. Soon after defendant received the offer and letter of transmittal she wrote a letter addressed to Barker reading:

> "Thank you for your recent letter containing the offer for my Edison land.
>
> "I have turned down several cash offers on the place for more than your client is offering.
>
> "I talked the matter over with my son and come to the decision that we will have to have $8,900 with $2,500 down, the balance to be paid $1,000 or more per year at 6%. The interest is to be above the $1000 payment.
>
> "If this counter offer is accepted you may let me know and I will make preparations for the sale.
>
> "Thanking you, I am
>
> "Yours truly,
> "Evangeline Baird"

On receipt of this written counter-offer, Barker contacted plaintiffs and they individually read defendant's letter and counter-offer and informed Barker they accepted it. Another deposit receipt was accordingly prepared and was admittedly received by defendant. It recited that $1000 had been paid as a deposit on account of the purchase of the described property at

$8,900, $2500 cash and balance at the rate of $1000 or more per year at six per cent interest, July 1st to be the date of payment each year, "all oil and mineral rights to go to buyer". This deposit receipt was likewise signed by plaintiffs as purchasers, agreeing "to purchase the above-described property upon the terms and conditions herein stated."

A check for the $1000 was delivered to the broker. Barker wrote defendant that her counter-offer had been accepted by the purchasers, that he would prepare an escrow instruction in accordance therewith, and that she should sign and return it to him or come in person to Bakersfield and sign it. Sometime later, defendant appeared with Barker at the title company to sign the instruction. She objected because she did not want to give up the oil rights, and refused to sign. This action followed.

It is defendant's argument that the writings do not reveal a sufficient memorandum in writing, signed by the party to be charged, to satisfy the statute of frauds under section 1624, subdivision 4 of the Civil Code in this, that the letter making the counter-offer was but a proposal directed to defendant's agent and accordingly was not intended as a counter-offer upon which her agent was authorized to act without further action on her part in signing escrow instructions setting forth all of the conditions she wished to attach to the sale, and particularly as to the oil rights and the effect of a lease that existed on the property which was subject to expiration on March 1st, 1952.

[1-4] An agreement for the purchase or sale of real property does not have to be evidenced by a formal contract drawn with technical exactness in order to be binding. A memorandum of the agreement is sufficient, and this may be found in one paper or in several documents, including an exchange of letters which are accepted and acted upon by the parties. King v. Stanley, 32 Cal.2d 584, 197 P.2d 321. It is true that the offer must be unequivocally accepted in order to be binding. Measured by any reasonable standard, there is here mutual assent to a contract which is sufficiently certain so that the court was within its power in decreeing specific performance. Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract. The usual and reasonable conditions of such a contract are, in the contemplation of the parties, a part of their agreement. King v. Stanley, supra; Menveg v. Fishbaugh, 123 Cal.App. 460, 11 P.2d 438, and cases cited; Breckinridge v. Crocker, 78 Cal. 529, 21 P. 179; Grafton v. Cummings, 99 U.S. 100, 25 L.Ed. 366.

[5] No mention was made in any offer submitted by defendant that the oil rights were not to be considered as a part of the deal. This idea may have been an afterthought. The purchasers knew of the existing lease and agreed to take the property subject to that lease.

The court made specific findings against defendant's contention in respect to the contentions above discussed, and ordered specific performance of the written agreements above mentioned. The evidence and authorities cited fully sustain this finding. The bulk of defendant's authorities, such as Duffy v. Hobson, 40 Cal. 240; and Church v. Collins, 18 Cal.App. 745, 124 P. 552, involve holdings that the agent may not bind the principal in a contract for the sale of realty without express authority, and are not here applicable because the writings are signed by the parties themselves and the question of the agent's authority is not the determining factor.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

PIERCE INS. CO.
v.
MALONEY.

Civ. 19353.

District Court of Appeal, Second District,
Division 1, California.

April 12, 1954.

Rehearing Denied May 3, 1954.

Hearing Denied June 9, 1954.

Action by insurance company for declaratory relief and injunction restraining insurance commissioner from further interfering with plaintiff company's business. The Superior Court of Los Angeles, Clarence M. Hanson, J., entered judgment from which defendant appealed. The District Court of Appeal, Drapeau, J., held that where mutual life company was transformed into capital stock company by vote of policyholders in accordance with statute, and some policyholders elected to exercise their priority by purchasing shares of capital stock in the new company, and policies issued prior to transformation were no longer subject to assessment, holders of policies issued prior to transformation were not entitled to preferential or separate treatment over holders of policies issued after transformation, and they were not entitled to share in the profits of the transformed company, but such right thereafter belonged to the stockholders.

Judgment affirmed.

1. Insurance 🔑53

Upon the transformation of a mutual life insurance company into a capital stock company, as authorized by statute, the obligations of the company before its transformation, as set forth in its outstanding policies, continue intact, with result that the obligations of the company, as transformed, to the pre-existing policyholders are to be determined by reference to the policy contract. Insurance Code, §§ 10951.2, 10951.5.

2. Insurance 🔑55

The policyholders in a mutual insurance company are both the insurer and the insured, and as insurer they are entitled to share in the losses and profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise.

3. Insurance 🔑53

Where life policies issued by mutual company prior to its transformation into capital stock company contained no provision giving policyholder any right to share in the assets, reserve, profit or surplus of the company, nor any provision requiring company to make assessment against the policyholder, though policyholder was required to pay stipulated premiums and any assessments levied in order to keep policy in force, the assets of the company such as reserve, profits or surplus were owned by the company as an entity, before its transformation, and not by the policyholders, and the transformation resulted in transfer of the assets to the new capital stock company by operation of law. Insurance Code, §§ 10951.2, 10951.5.

4. Insurance 🔑53

On conversion of a mutual life company to a stock company, the assets of the old company are transferred to the new company by operation of law, and the members of the old company have priority in subscribing to the new company's stock. Insurance Code, §§ 10951.2, 10951.5.

5. Insurance 🔑53

Where mutual life company was transformed into capital stock company by vote of policyholders in accordance with statute, and some policyholders elected to exercise their priority by purchasing shares of capital stock in the new company, and policies issued prior to transformation were no longer subject to assessment, holders of policies issued prior to transformation were not entitled to preferential or separate treatment over holders of policies issued after transformation, and they were not entitled to share in the profits of the transformed company, but such right thereafter belonged to the stockholders. Insurance Code, §§ 10951.2, 10951.5.

6. Declaratory Judgment 🔑344

In action for declaratory relief and for an injunction restraining defendant insurance commissioner from further interfering in plaintiff's insurance business, wherein it was decided as question of law that upon transformation of plaintiff from mutual company into capital stock company the plaintiff was under no obligation to segregate and hold in trust the net surplus or excess earnings, accrued and accruing, from premiums paid in by those who held policies issued by mutual company, exclusion of evidence relating to accounting methods by which such segregation could have been accomplished, was not error. Insurance Code, §§ 10951.2, 10951.5.

7. Injunction ⚷75, 128

Injunction restraining and enjoining insurance commissioner from further making, or enforcing, or attempting to make or enforce, or compelling or attempting to compel plaintiff insurance company to comply with orders contained in certain letter of insurance commissioner, was merely an annulment of what trial court believed to be improper orders, and was not unjustified on theory that it was a reflection upon commissioner in performance of his official duties, unjustified by the evidence. Insurance Code, §§ 10951.2, 10951.5.

8. Insurance ⚷53

Provision of Insurance Code prohibiting an officer, director, or trustee of any insurer from obtaining a personal profit or thing of value by reason of purchase by insurer, and prohibiting such officer or director from directly or indirectly purchasing the assets of the insurer, had no application in determining whether, upon transformation of insurer from mutual to capital stock company, the holders of policies issued prior to such transformation retained any equity in the assets of the company beyond the terms of their policy, even though capital stock not sold to mutual policyholders was purchased by company of which vice president of insurance company was an officer. Insurance Code, §§ 1101, 10810–10940, 10950–10953.12.

◆

Edmund G. Brown, Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., for appellant.

Sherman, Thompson & McCarthy, Chas. R. Thompson and Arnold M. Cannan, Los Angeles, for respondent.

DRAPEAU, Justice.

Plaintiff was originally incorporated in 1927 under the name of Imperial Mutual Life Insurance Company, as a mutual life and benefit association, pursuant to Chapter IV, Title 2, Part 4, Division 1, Civil Code. When the Insurance Code was enacted on September 18, 1935, plaintiff automatically continued business thereunder, in accordance with Chapter 8, Division 2, Part 2 of said code, Sections 10640–10781. During this period it issued "straight assessment" life policies.

On October 28, 1936, pursuant to certain provisions of the Insurance Code, plaintiff transformed itself into an insurer operating under Chapter 9 thereof, Sections 10810–10940, as a mutual company. While so operating up to October 28, 1944, it issued policies on the legal reserve, stipulated premium plan and made assessments when the stipulated premiums were insufficient to cover operating and other costs.

In 1939, Chapter 9A of the Insurance Code was enacted, Sections 10950–10953.12, which permitted an insurance company operating on a stipulated premium plan under Chapter 9 to become a legal reserve, capital stock company.

Accordingly, on October 28, 1944, plaintiff consummated a transformation from a Chapter 9 mutual company to a Chapter 9A capital stock company, and issued policies on a legal reserve, nonassessable basis.

Thereafter, on December 11, 1946, plaintiff again transformed from Chapter 9A to a Chapter 6 "old-line, legal reserve, capital stock company", pursuant to sections 10510–10540 of the Insurance Code. And "has at all times since, and now is, an old-line, legal reserve, capital stock company, having the minimum required capital of $200,000.00 and issuing policies on a legal reserve, nonassessable basis." This latter transformation is not material, insofar as the questions here presented are concerned.

In its transformation from Chapter 9 to Chapter 9A in 1943–1944, plaintiff followed and adopted the procedure set forth in Chapter 9A. This called for a vote of two-thirds of the policyholders, and that capital stock be offered to each policyholder pro rata for purchase within thirty days, otherwise to be sold to the public for cash "and for at least 150 per cent of par value." Sections 10951 and 10951.5, supra.

The effect of the transformation was to put all outstanding business on a nonassessable basis, and to eliminate the additional assessment provisions of Chapter 9 policies.

Plaintiff submitted to defendant a certified copy of the transformation proceedings and an application for permit to sell the stock necessary to qualify under Chapter 9A.

Because no arrangement had been made therein for compensating the mutual policyholders (as then existing owners) for loss of their equity in the company, defendant raised an objection to issuing the permit.

In this connection, defendant asserted that by enactment of section 10951.2, the legislative intent was that mutual policyholders should have all the rights after transformation that they had before. That the mutual contracts should be carried out in their entirety; that if profits were made from them, they belonged to and should be used or distributed to the mutual policyholders; and in case of deficiencies, they should be made up by assessment.

Because of defendant's insistence upon equitable treatment of the policyholders, the Attorney General was requested to render an opinion under section 12923, Insurance Code, as it then read in part: "* * * 'The opinion of the Attorney General in response to such submission shall govern and control the commissioner in respect to the matter so submitted. The commissioner shall not be liable, either personally or in his official capacity, for any order, ruling, decision, or act made or done pursuant to such opinion'."

That opinion of the Attorney General dated September 13, 1944, contained the following:

"From a review of the entire problem I have come to the conclusion that the Legislature by enactment of Chapter 9A has provided a complete statutory plan for transformation of insurance companies qualifying thereunder. I believe that the plan was meant to set forth the requirements to be met, but that when they have been accomplished, the transformation is complete without granting to the Commissioner discretionary powers to make further or additional requirements to be complied with. In other words, it is my opinion that the company in question having complied with the provisions of Chapter 9A, is entitled to a permit and the Commissioner shall issue it as his ministerial act." 4 Op.Atty.Gen. 178, 181.

Defendant still objected that the elimination in the transformation proceedings of the assessment provisions of the Chapter 9 policies was contrary to section 10951.2, supra, which provides: "* * * Such transformation, however, shall in no way annul, modify or change any of the existing contracts and liabilities of such corporation, and any and all such contracts and liabilities shall continue in force and effect the same as though such corporation had not transformed * * * nor shall such transformation in any way prejudice * * * any rights previously acquired."

The matter was again submitted to the Attorney General. In his opinion rendered October 16, 1944 (4 Op.Atty.Gen. 285, 286), he points out that the policyholders themselves adopted the provisions of Chapter 9A by authorizing amendment of the articles of incorporation without dissent. That to forbid elimination of such assessment features would be inconsistent with the purposes of Chapter 9A to promote this kind of transformation. And that the construction sought to be given to the provisions of Chapter 9A would have the effect of nullifying the attempt of any Chapter 9 company to shed its status as an assessment company and emerge as a legal reserve company. He concluded that the amended articles of incorporation providing for the elimination of assessment features in existing and future policies were not inconsistent with section 10951.2, but that such elimination was in accord with the basic theory of Chapter 9A.

As required by section 12923, supra, defendant thereupon issued his permit.

Plaintiff proceeded with the transformation. In accordance with section 10951.5, supra, it offered capital stock to the policyholders under the thirty day preferential right to buy. Some took advantage of this. Others did not. The unpurchased stock was sold to Pierce Brothers.

The next year plaintiff decided to increase its capital to $100,000 and filed its application for permit to issue securities. At that time the Insurance Department required that a person organizing a standard legal reserve insurance company under Chapter 6 (which required a minimum capital of $200,000) should have in addition to the capital a surplus of $200,000 in order to secure a permit for the sale of the stock and the consequent right to qualify the company to do business. However, the Commissioner advised plaintiff at that time that a transformation from 9A status to the standard reserve plan would be approved on the basis of $100,000 surplus, because it was an organized and growing company.

Thereafter, plaintiff took the necessary steps to perfect its transformation from Chapter 9A to a Chapter 6 company. Such transformation, together with the sale of stock was completed on December 11, 1946.

In the meanwhile, defendant was conducting a periodic examination of the affairs of plaintiff. At the beginning of 1947, in a report of such examination, defendant raised the question as to whether Chapter 9 policies were entitled to participate in the profits of the company. Plaintiff protested the report and demanded that the question be again submitted to the Attorney General. His opinion of March 12, 1947 (9 Op.Atty. Gen. 226, 228) in accord with his two previous opinions held as follows:

"Consistency compels the conclusion that the transformation upon completion eliminates the rights of such policyholders to receive earnings attributable to such policies."

In other words, the Attorney General therein adhered to his view that the transformation destroyed all the equities of the mutual policyholders in the company, and that they had no rights except those actually set forth by the express terms of their contracts.

In that same year, i. e., 1947, the legislature amended section 12923, supra, by deleting that part thereof which made opinions of the Attorney General binding on the insurance commissioner.

Thereafter, in March of 1948, defendant ordered plaintiff to appear for a hearing at his office, pursuant to section 12924, Insurance Code. The hearing was held in April, 1948, and on March 31, 1949, defendant wrote plaintiff a letter in which his conclusions were stated as follows:

"1. That the company is governed by provisions of section 10951.2 of the Insurance Code * * *."

2. That the records of the company should be so kept as to make readily determinable the amount of profit earned on Chapter 9 business.

3, 4 and 5: That the surplus existing on the date of the transformation of the company to Chapter 9A, and any subsequent profits on the business then on its books, belong to the policyholders and subject to distribution to them, and may not be distributed as dividends to the stockholders of the Pierce Insurance Company.

"6. In view of the fact that the Chapter 9 policyholders constitute a closed group which will eventually diminish to extinguishment, the amounts to which they are entitled should be distributed to the Chapter 9 policyholders from time to time in such amounts that the balance thereof retained by the company shall at no time bear an unreasonable relationship to the amount of Chapter 9 business remaining in force."

In order to settle the controversy, plaintiff brought the instant action on May 25, 1949, for declaratory relief and for an injunction restraining defendant from further interference in its business.

From findings of fact made by the trial court, it concluded, among other things:

"III. That the Chapter 9A law is valid and legal and plaintiff's transformation from Chapter 9 to Chapter 9A, which * * * included the elimination of the assessment feature from Chapter 9 policies, was valid and legal.

"IV. In connection with plaintiff's transformation from Chapter 9 to Chapter 9A, such Chapter 9A laws were complied with by plaintiff; that they are valid, fair and practicable; that their purpose and intent have been complied with; that the transformation to Chapter 9A completely complied with such law and the purpose and intent thereof; that the transformation was a complete transformation of the company and not an organization of a new Stock Company with an appendix attached to it of the walled-off, separate group of Chapter 9 policyholders; that the policyholders made their election to transform to a Stock Company; that some of the policyholders elected to buy their allocated stock and to take a chance on future profits or losses and some elected not to buy their stock and thereby to take no chance on future profits or losses but to continue as insureds without being subjected to the possibility of assessments or payment of losses; that if any profits are derived since such transformation or in the future from the Chapter 9 policies, such would go into the surplus of the company, and if the Board of Directors would declare a dividend therefrom, such dividend would be payable to the then stockholders whoever they might then be; that the Chapter 9 policyholders who did not elect to buy such stock would not be entitled to any such profits or dividends therefrom unless they should then be stockholders; to wall off and separate the Chapter 9 business * * * would not be in keeping with the purpose and intent of the Chapter 9A laws and would do violence to the policy contracts of such Chapter 9 policyholders and section 10951.2 of the Insurance Code. * * *

"VI. That upon and after the transformation of plaintiff from Chapter 9 to Chapter 9A plaintiff company continued to assume and be liable for the contractual obligations set forth in the Chapter 9 policies including the obligation of maintaining and increasing the legal reserves on said policies. * * * On and after such transformation the entire assets of plaintiff company, including all capital coming into plaintiff company, stand as security for said Chapter 9 policies and plaintiff's contractual obligations thereunder, without the right of plaintiff to thereafter levy or call for additional assessment against such Chapter 9 policyholders in addition to the stipulated premiums provided for in such Chapter 9 policies. That the relationship between plaintiff company and the Chapter 9 policyholders is that of debtor and creditor and plaintiff holds no funds or assets in trust for such policyholders."

Defendant appeals from the judgment which followed in favor of plaintiff and restraining and enjoining defendant from enforcing his orders contained in his letter of March 31, 1949 addressed to plaintiff.

Appellant urges that Chapter 9A was never intended to authorize complete destruction without compensation of the equity of the mutual company policyholders.

Said Chapter, the transformation statute, provides that "Any domestic insurer authorized to transact business under the provisions of Chapter 9 * * * may by vote of two-thirds of its policyholders accept the provisions of this chapter [9A] and amend its articles of incorporation and bylaws to conform to the same so as to cover and enjoy any and all of the provisions and privileges of this chapter. (Section 10951.)

"Such action shall be taken by resolution adopted by not less than a two-thirds vote of the policyholders present * * * at a meeting duly called for that purpose. * * * (Section 10951.1.)

"Such corporation shall be a continuance of the original corporation by the same name or by any other name approved by the commissioner. Such transformation, however, shall in no way annul, modify or change any of the existing contracts and liabilities of such corporation, and any and all such contracts and liabilities shall continue in force and effect the same as though such corporation had not transformed or qualified under this article, nor shall such transformation in any way prejudice, impede or impair any pending action or proceeding or any rights previously acquired. (Section 10951.2.)

"The capital stock issued at the time of transformation as herein provided, shall be first offered to each policyholder of the insurer in the ratio that the total number of shares authorized for such issue bears to the total number of policyholders at the date of transformation. Any such stock not subscribed by any policyholder within thirty days from date of offering may be sold to the public. Such stock shall be sold for cash and for at least 150 per cent of par value." (Section 10951.5).

[1] It is plain from the foregoing, that the obligations of the company before its transformation, as set forth in its policies, continue intact.

[2] "The interest of policyholders in a mutual company are twofold, since they are both insurer and insured; in respect to the former they are entitled to share in the losses and profits of the business on the basis of a partnership, except so far as the charter or policy contract provides otherwise. In such dual capacity, their rights are fixed partly by the policy contract, partly by the by-laws of the company, and partly by the relevant statutes." 18 Appleman Insurance Law and Practice, p. 97, sec. 10046.

[3, 4] An examination of the policy issued by the original company discloses that the insurer agreed to pay its face upon contingencies mentioned: for instance, death, if the policy was then in full force and effect. As a condition to its remaining in force, the policy required the policyholder to pay the stipulated premiums and in addition any assessment levied by the company to balance receipts with necessary expenditures. There is no provision in the policy giving the policyholder any right to share in the assets: reserves, profits or surplus. Neither is there any provision requiring the company to make assessments against its policyholders. It follows, that assets of the type just mentioned were then necessarily owned by the company as an entity, before its transformation.

"On conversion of a mutual company into a stock company, the assets of the old company are transferred to the new company by operation of law, and the members of the old company have priority in subscribing to the new company's stock." 44 C.J.S., Insurance, § 106, p. 651.

And in 18 Appleman Insurance Law and Practice at p. 96, sec. 10045 (Note 10), it is said: Where the law "permits mutual fire insurance companies to be converted into stock corporations with the consent of the superintendent of insurance, and on a three-fourths vote of the president and directors, and provides that on the performance of prescribed conditions precedent to the change the superintendent shall certify to that effect and that the corporation is 're-organized' as an insurance stock corporation, whereupon the law applicable to such corporations shall become applicable to it, *Held*, that the statute by implication transfers the assets of the old company to the new. Grobe v. Erie County Mut. Ins. Co., 1898, 24 Misc. 462, 53 N.Y.S. 628, affirmed 39 App.Div. 183, 57 N.Y.S. 290, and 169 N.Y. 613, 62 N.E. 1096."

Plaintiff, when operating under Chapter 9, had no capital, and the assessment features of the policies were substituted for capital found in a capital stock company, i. e., if funds were needed, the policyholders could be made to pay assessments in addition to premiums. Chapter 9A prescribes that capital must be set up and increased as volume of business increases, together with prescribed reserves. These items of capital and reserve after transformation guarantee Chapter 9 policies as well as Chapter 9A policies. The policyholders are no longer subject to assessment, and liability thereupon falls on the stockholders.

[5] In the instant case, the policyholders have exercised their choice. Those who elected not to purchase shares of capital stock are no longer subject to assessment on account of ownership of their policies. But by reason of total transformation, they are not entitled to share in the profits of the company. This right is reserved to the stockholders, who have now assumed the burdens. In other words, upon completion of the transformation, former Chapter 9 policyholders are not entitled to preferential or separate treatment.

It is next argued by appellant that "the pleadings and evidence in the cause show that every finding upon which the judgment might otherwise be supported is vitiated by refusal of the court to admit relevant evidence of a non-cumulative nature."

[6] During the course of the trial it was agreed that the primary issue was a

question of law. This was stated by the trial court in his memorandum ruling as follows:

"The question for decision is whether a so-called 'legal reserve' (capital stock) insurance corporation created by amendments to the charter of a 'level premium' (Mutual nonstock) insurance corporation is under an obligation to segregate and hold in trust the net surplus or excess earnings, accrued and accruing, from the premiums paid in by those who became and are still policyholders of the original corporation."

This question was decided against the contentions of appellant and in favor of respondent.

Thereafter, at the request of the then Attorney General representing the insurance commissioner, the case was reopened for the purpose of allowing him to make an offer of proof. The proffered evidence had to do with questions of figures, accounting and methods of accounting, which the court refused on the ground that it was incompetent, irrelevant and immaterial.

Obviously this ruling was proper inasmuch as the court had decided the primary issue against the contentions of appellant.

The findings of fact and the judgment have as their basis the respondent's theory of the case, to-wit: that a complete transformation from Chapter 9 to Chapter 9A was comsummated, pursuant to statute. And, as a result, the policyholders of the old company are not now entitled to preferential treatment by the new company.

[7] It is further urged that the "injunction was unnecessary, and is not justified by any evidence of the Commissioner's acts set forth in the cause."

By the judgment, appellant "is restrained and enjoined from further making, or enforcing, or attempting to make or enforce, or compelling, or attempting to compel plaintiff to comply with the orders contained in the Insurance Commissioner's letter to plaintiff dated March 31, 1949 * * *."

The effect of this is to annul what the trial court believed to be improper orders, and should not be deemed a reflection upon appellant in the performance of his official duties, as he now claims.

The parties hereto have filed supplemental briefs on the question whether the transformation here might be a violation of section 1101 of the Insurance Code, which provides:

"An admitted insurer's officers, directors, trustees and any persons who have authority in the management of the insurer's funds, shall not, unless otherwise provided in this code:

"(a) Receive any money or valuable thing for negotiating, procuring, recommending or aiding in, any purchase by or sale to such insurer of any property, or any loan from such insurer.

"(b) Be pecuniarily interested as principal, coprincipal, agent, attorney or beneficiary, in any such purchase, sale or loan.

"(c) Directly or indirectly purchase, or be interested in the purchase of, any of the assets of the insurer."

It appears that Mark Pierce, vice president of respondent, was also an officer of Pierce Brothers, the company which bought all of the stock not sold to policyholders upon transformation of respondent from Chapter 9 to Chapter 9A.

In his closing brief, appellant cited the case of Industrial Indemnity Co. v. Golden State Co., 117 Cal.App.2d 519, 256 P.2d 677, which holds that a purchaser of a mutual insurance company by a stock company having common officials was void under said section 1101, supra.

[8] Appellant in his supplemental brief urges that "the sale of stock to finance the transformation to a stock company, which sale would obviously give control of respondent to the purchaser while the vice-president of respondent was an official of the purchaser, certainly indicates the application of section 1101 to the transaction. That is not here important in the sense that appellant is not seeking to void the sale, but simply to see that the sale is not used by respondent as a means of depriving the policy holders of their equity in the company without compensation."

The cited case, i. e., Industrial Indemnity Co. v. Golden State Co., supra, involved the sale and transfer of all the property, business and assets of the reciprocal insurance company to, and a purchase of them by the stock company for a certain price. It involved the transfer of title from a seller to a purchaser, from one entity to another, the purchase price being paid by the latter to the former.

In the instant case, there was no such sale. At the time and after the transformation, respondent owned its assets and continued to do so. It was a continuation of the same corporation by the process of compliance with Chapter 9A and the amendment of its articles of incorporation. This court is of the opinion that section 1101, supra, has no application to the facts presented in the case before it.

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; Carter, J., dissenting.

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124 Cal.App.2d 546

E. M. COTTON APPLIANCE, Inc.,
v.
FELTON ALUMINUM CO., Inc.
Civ. 19756.

District Court of Appeal, Second District, Division 1, California.

April 14, 1954.

Action was brought for declaratory judgment. The Superior Court of Los Angeles County, Stanley Mosk, J., entered judgment for defendant and entered an order changing place of trial and transferring cause to the Superior Court of Santa Clara County, and the plaintiff appealed. The District Court of Appeal, White, C. J., held that where the only controversy alleged by amended complaint in first cause of action was that the only controversy between the plaintiff and the defendant was "some claim" by defendant, "the exact nature of which is unknown to plaintiff," the first cause of action failed to state a cause of action for declaratory relief.

Affirmed.

1. Declaratory Judgment 🔑**313**

Where the only controversy alleged by amended complaint in first cause of action was that the only controversy between the plaintiff and the defendant was "some claim" by defendant, "the exact nature of which is unknown to plaintiff," the first cause of action failed to state a cause of action for declaratory relief.

2. Corporations 🔑**503(3)**

Constitutional provision that corporation or association may be sued in county where contract is made or is to be performed, or where obligation or liability arises, or breach occurs, or in county where principal place of business of such corporation is situated, subject to power of court to change place of trial as in other cases, applies to tort as well as contract actions. Const. art. 12, § 16.

3. Corporations 🔑**503(3)**

Where complaint in action in Superior Court of Los Angeles County alleged that defendant agreed to manufacture, sell, and deliver to plaintiff in Santa Clara County at defendant's principal place of business aluminum castings made from mold, which was owned by plaintiff, and which was to be returned to plaintiff, and that defendant retained mold, but complaint failed to allege that defendant was under obligation to deliver mold to plaintiff in Los Angeles County, superior court properly transferred the cause on defendant's motion to the superior court of Santa Clara County. Const. art. 12, § 16.

4. Pleading 🔑**236(1)**

Where trial court granted plaintiff leave to file an amended first cause of action of the first amended complaint, but plaintiff did not avail itself of such leave, court did not abuse its discretion in denying plaintiff leave to file second amended and supplemental complaint.

Randolph J. Soker, Los Angeles, for appellant.

Leonard J. R. Davis, San Francisco, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals "from the judgments and final orders * * * entered in the said superior court on the 14th day of November, 1952, in favor of the defendants in said action, and against said plaintiff * * *." The orders and judgments referred to appear to be an order changing the place of trial and transferring the cause, on defendant's motion, from the Superior Court of Los Angeles County to the Superior Court of Santa Clara County, the latter county being the principal place of business of the defendant corporation; and a written order signed by the judge of the superior court (subsequent to the entry of a minute order) sustaining a demurrer to the first cause of action of plaintiff's first amended complaint and granting leave to amend. By the minute order referred to the court also denied plaintiff's motion to file a second amended and supplemental complaint.

Plaintiff's first amended complaint contained two causes of action. In the first cause of action designated as one for declaratory relief it was alleged that plaintiff and defendant entered into an oral contract "whereby plaintiff agreed to purchase from defendant, and defendant agreed to manufacture, sell and deliver to plaintiff at Santa Monica, California, 500 aluminum castings to be made from a permanent mold owned by the plaintiff," the castings to be shipped to plaintiff corporation at Santa Monica; that thereafter the parties agreed to reduce the number of castings to be delivered; that on November 7, 1951, at Santa Monica, "plaintiff and defendant entered into an accord and satisfaction whereby it was mutually agreed that plaintiff was to accept and pay for in full, 473 castings" at a specified amount "for which total amount plaintiff then and there made and delivered to defendant a check and demanded immediate return of plaintiff's permanent mold." That the check was accepted and cashed by defendant.

The only basis for declaratory relief is found in the following allegations of the first cause of action:

"That from and after November 7, 1951, plaintiff has made numerous demands orally and in writing on defendant to return or permit the plaintiff to have picked up for return to plaintiff, f.o.b., Santa Monica, California, the said permanent mold owned by the plaintiff, and of which the plaintiff was and is entitled to possession; but the defendant failed and refused to return, or permit the plaintiff to have picked up for return to the plaintiff, the said permanent mold until July 16, 1952; and the plaintiff is informed and believes that defendant, Felton Aluminum Co., is making some claim against the plaintiff in connection therewith, the exact nature of which is unknown to plaintiff."

[1] It is immediately apparent that the court below was correct in holding that plaintiff had failed to state a cause of action for declaratory relief. The allegations of the amended complaint in the first cause of action are that the dispute, if any, under the contract was settled by an accord and satisfaction *and by the return to plaintiff, prior to the filing of the amended complaint*, of the mold which defendant had been holding. The only controversy is "some claim" by the defendant, "the exact nature of which is unknown to plaintiff." The statements that plaintiff desires a declaration of its rights and that "this is a case of actual controversy" are meaningless. There cannot be a "controversy" where the plaintiff states that he does not know the nature of the defendant's claims, and the property in dispute has admittedly been delivered to the plaintiff.

In the second cause of action of the first amended complaint plaintiff sought damages for the alleged unlawful detention by the defendant of the mold, asserting that by reason thereof it lost an opportunity to sell 500 garbage disposal machines per month for seven months because, not having possession of the mold, it was unable to have modifications made thereon so as to produce therefrom modified castings necessary for the manufacture of its garbage disposal machine.

Respondent filed no affidavits in support of its motion for change of venue except an affidavit that its principal place of business was Santa Clara County. It is appellant's position, in effect, that the court below erred in granting the motion in the face of the uncontradicted allegations of the complaint that the obligation was incurred and was to be performed in Los Angeles County. However, the allegations of the complaint show that the contract had been extinguished by an accord and satisfaction. As pointed out by respondent, appellant's second cause of action sounds in tort, for the unlawful detention of the mold. There is no allegation that respondent agreed to redeliver the mold in Los Angeles County. Section 1824 of the Civil Code provides that "A depositary must deliver the thing deposited at his residence or place of business, as may be most convenient for him." The court below, for the reasons heretofore stated, could properly disregard the attempted statement of a cause of action for declaratory relief under the contract in determining the motion for change of venue. Nowhere in the second cause of action is it alleged that defendant was under an obligation to deliver the mold to plaintiff in Los Angeles County or was under any obligation other than that provided in the aforesaid section 1824 of the Civil Code.

[2, 3] The Constitution of California, section 16, Art. XII, provides: "A corporation or association may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated, subject to the power of the court to change the place of trial as in other cases." This section applies to tort as well as contract actions. Ray Wong v. Earle C. Anthony, Inc., 199 Cal. 15, 247 P. 894. In the instant action, however, the court was not confronted with an action upon contract, but, as heretofore pointed out, an action that sounded in tort. Under the second cause of action, upon which the court was to decide the issue of venue, it nowhere appears that the alleged unlawful detention of the property in question took place in any county other than the County of Santa Clara. It therefore follows that the tort having been committed, if at all, in the County of Santa Clara, that was the proper county in which the action should be tried.

Counsel in their briefs bring out an apparent conflict in the language of various decisions as to where the "burden of proof" lies when a motion for change of venue is made under circumstances such as are here presented. It is unnecessary, however, to go into this question. Respondent urges that the court below did not abuse its discretion, while appellant asserts that there was no conflict in the facts before the court and that the question was purely one of law. Respondent's position is well taken. As heretofore pointed out, the court had before it (excluding the attempted statement of a cause of action for declaratory relief) only the charge that the defendant corporation had wrongfully detained an item of personal property at its principal place of business, coupled with the fact that the principal place of business of such corporation was in Santa Clara County. The plaintiff could have met the motion for change of venue by affidavits setting forth that the unlawful detention took place in Los Angeles County or that the defendant was obligated to make delivery of the property in question in Los Angeles County, but this plaintiff failed to do. As a consequence, the court was obliged to arrive at its decision from the pleadings and the motion. In such circumstances, no abuse of discretion appears. And even though consideration be given to the attempted first cause of action, the court was confronted with the fact that the conclusions pleaded therein, that the contract was to be performed in Los Angeles County, were contradicted by the further allegations that with reference to the claimed breach of that contract, an accord and satisfaction had been entered into, which rendered meaningless the conclusion pleaded as to the place of performance.

[4] Appellant's contention that there was an abuse of discretion in denying leave to file a second amended and supplemental complaint cannot be sustained. The trial court did grant leave to file an amended first cause of action of the first amended complaint, but appellant, so far as the record before this court indicates, did not avail itself of such leave. Neither is there anything in the record before us to show what the allegations of the proposed amended and supplemental complaint would be. In these circumstances, appellant has not met the burden resting upon him to show an abuse of discretion.

The judgments and orders of November 14, 1952, and the order of December 1, 1952, transferring the cause to the Superior Court of Santa Clara County, are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

124 Cal.App.2d 417

BUCKNER et al.

v.

VETTERICK.

Civ. 20104.

District Court of Appeal, Second District, Division 2, California.

April 7, 1954.

Action for injuries to minor plaintiffs when automobile in which they were riding, and which was owned by defendant and driven by his wife, collided with truck. The Superior Court of Los Angeles County, J. F. Good, J., entered judgment from which an appeal was taken on behalf of the plaintiffs. The District Court of Appeal, Fox, J., held that the parent who accepts a ride as a guest, and decides to take along his or her minor children, thereby accepts for them, and they occupy the status of guests and cannot recover for injuries sustained through simple negligence of the driver of the automobile.

Judgment affirmed.

1. Statutes ⚷181(1), 184

Statutes must be construed in the light of their intent and purpose and the mischief at which they were aimed.

2. Automobiles ⚷181(2)

Under guest statute, when mother of two infant children was a guest in automobile owned by defendant but driven by his wife with his consent, thereby precluding mother from recovering on basis of simple negligence, the infant children, for whom the mother had the responsibility of care and direction, and whose presence in the automobile was due to decision of the mother, were also "guests", and recovery could not be had for injuries to them on basis of simple negligence of host, since mother's acceptance of ride as a guest was also an acceptance for the children. Vehicle Code, § 403.

3. Automobiles ⚷181(2)

A parent has the capacity to accept for an infant child an offer to permit the child, along with the parent, to ride as a guest, thereby precluding recovery against driver of automobile for injuries due to simple negligence. Vehicle Code, § 403.

4. Parent and Child ⚷1

Ordinarily, a parent may speak and act for his child when the child is legally incapable of acting for itself, and others are entitled to rely on the action of the parent in such circumstances.

◆

Everett F. Beesley, Everett H. Mills, Los Angeles, for appellants.

Lynch & Reilly, Los Angeles, for respondent.

FOX, Justice.

Plaintiffs, who are 15 months and 26 months old, brought this action by their guardian ad litem to recover damages for personal injuries sustained in a collision between a Ford car in which they were riding and a truck. The Ford belonged to the defendant but was being driven with his consent by Mrs. Vetterick, who was killed in the accident. The mother of plaintiffs was also injured. The evidence indicates that Mrs. Vetterick was negligent in that she failed to make a boulevard stop. The complaint is based upon simple negligence, and properly so, for there is no suggestion in the evidence that the driver of the car was guilty of either wilful misconduct or intoxication.

Mrs. Vetterick and Mrs. Buckner, mother of the plaintiffs, were sisters. They had lunch at the Buckner home and then set out to visit an antique dealer in Whittier to inquire about prices of certain antique items they possessed. Mrs. Buckner accepted the invitation of her sister to accompany her and took along her two small children, the plaintiffs herein. The accident occurred on the way home after they had visited the antique dealer. Mrs. Buckner paid nothing for the ride.

The court granted a motion for a nonsuit. Plaintiffs appeal from the ensuing judgment.

The nonsuit was granted uopn the theory that since the mother was a guest her decision to bring her small children along gave them the same status, viz., that of guests; hence there was no liability since only simple negligence was either alleged or proved.

Plaintiffs challenge the correctness of this ruling on the theory that the children were incompetent to "accept" a ride in an automobile and therefore section 403[1] of the Vehicle Code is inapplicable. The section provides, in effect, that a guest who accepts a ride without giving compensation for such ride has no right of action for damages for injuries resulting from the simple negligence of the driver. The trial court's position is correct.

[1-3] Statutes "must be construed with their intent and purpose in view and the mischief at which they were aimed", Evans v. Selma Union High School Dist., 193 Cal. 54, 57, 222 P. 801, 802, 31 A.L.R. 1121, for these often throw light upon the sense in which the language is used. The situation which section 403 was designed to correct is well known and admirably stated in Crawford v. Foster, 110 Cal.App. 81, at page 87, 293 P. 841, at page 843, where it is said that, "As the use of automobiles become almost universal, the proverbial ingratitude of the dog that bites the hand that feeds him, found a counterpart in the many cases that arose, where generous drivers, having offered rides to guests, later found themselves defendants in cases that often turned upon close questions of negligence. Undoubtedly, the Legislature, in adopting this act, reflected a certain natural feeling as to the injustice of such a situation. * * * Doubtless, the Legislature intended to change the rule heretofore adopted in this state, that a mere invited guest could recover for simple negligence * * *." Thus, under the legislatively declared public policy of this state, the mother of plaintiffs, who was injured in the accident, cannot recover from the defendant. As their mother she had the responsibility of their care and direction. It was her decision that determined whether they should go on this trip. In accepting the ride for herself and deciding to take the children along she also accepted for them. Otherwise, we would have the anomalous situation of the mother who made the decision being a guest and her infant children not being guests and their status with respect to the operator of the car being different from that of their mother, with the result that during the trip the driver would owe a different degree of car to the children from

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[1] Section 403, Vehicle Code, reads: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

that which was owed to their mother. Such a differentiation is both illogical and out of harmony with the purpose of section 403 of the Vehicle Code. It would leave a segment of "the mischief" at which the statute was aimed uncorrected. It would therefore seem both reasonable and logical to say that when a parent accepts a ride as a guest of the operator of a motor vehicle and takes along her small children she also accepts the ride for them and they have the same status with relation to the driver on such ride that the parent has. Therefore, since the mother was a guest, the children were guests and none of them could recover as only simple negligence was involved.

[4] Many decisions of more importance and involving greater hazard are made by parents for their small children daily. An example is the right of a parent to consent to an operation on his child and the right of the surgeon to rely on that consent. See 70 C.J.S., Physicians and Surgeons, § 48, p. 968. The same principle prevails where an adult child is an incompetent and has no legally appointed guardian. Farber v. Olkon, 40 Cal.2d 503, 509, 254 P.2d 520. Thus a parent may speak and act for his child when the child is legally incapable of acting for itself and others may properly rely on the action of the parent in such circumstances.

Both parties rely on Rocha v. Hulen, 6 Cal.App.2d 245, 44 P.2d 478, 483. While this case is not decisive, its rationale is significant. There a five-year-old girl had been injured at a picnic. *Without the knowledge or consent of her parents* (the father was momentarily taking care of the mother who had fainted), she was being driven to a hospital by the defendant, when a collision, due to defendant's negligence, occurred resulting in further injuries to the child. The court held that the child was not a guest but "simply an involuntary occupant of the vehicle" driven by the defendant. The court pointed out that the child had no legal capacity to give consent; that the legislature never intended by the guest statute to exempt one from liability for negligent injury to a child of five years of age where the child had been taken on the ride by the party "without the knowledge or consent of her father or mother". The rationale of the decision is that if defendant had obtained the consent of a parent of the child he would have had the benefit of the guest statute.

The significance of parental consent is further emphasized in Kastel v. Stieber, 215 Cal. 37, 8 P.2d 474, where the plaintiff, an eight-year-old girl, had been living with her aunt in the state of Washington for four years. Her father was dead; her mother paid $20 a month for her care. The aunt desired to take the child to California on account of her health. She was injured in an accident enroute. Since liability was established on the theory that the operator of the automobile was guilty of gross negligence it was unnecessary to consider whether plaintiff was a guest within the meaning of the statute. The court, however, did point out that the mother retained the "say-so" as to the child; that prior to taking the child on the proposed trip to California for her health the mother had told the aunt that the child would be all right in Washington; and that the defendant "did not obtain the consent of the mother * * * to bring her to the state of California, and did not tell the mother of said minor that they were going to California [215 Cal. at pages 42–43, 8 P.2d at page 476]".

Plaintiffs rely on Kudrna v. Adamski, 188 Or. 396, 216 P.2d 262, 265, 16 A.L.R. 2d 1297. In that case the parents of the four-year-old plaintiff had made an appointment for the child with a doctor in Eugene, Oregon, and the trip was made for the purpose of keeping that appointment. The parents had arranged for the defendant, who was the brother of the child's mother, to drive the car which belonged to the child's father. As a result of an accident caused by defendant's negligence, the mother was killed and the child injured. The court held that the defendant-driver was the agent of the child's mother. In such capacity he had no right to say who should ride in the car; hence, he could not have invited the child to ride. Therefore, he was not the child's host and she was not his guest. Furthermore, the mother was one of the driver's employees and not his guest. "The result would be the same", said the court, "if it were held that the child had the same status as its mother, since she was in her mother's immediate custody."

Reference is made by plaintiffs to Hart v. Hogan, 173 Wash. 598, 24 P.2d 99, 102. In that case the child and her mother were riding in a car operated by the owner's wife. The mother was employed by the owner as a nurse or companion for his wife. The court held that the mother and child were not "guest" passengers, since the mother was "being carried for the benefit of the wife and of her principal, the husband." The child's status followed that of the mother. See analysis of this case in Morgan v. Anderson, 149 Kan. 814, 89 P.2d 866, 868.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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124 Cal.App.2d 589

PEOPLE v. MEEHAN.

Cr. 2952.

District Court of Appeal, First District,
Division 1, California.
April 16, 1954.

Hearing Denied May 6, 1954.

Defendant was convicted of second degree burglary. The Superior Court, County of Santa Clara, William F. James, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. Defendant also filed document purporting to be request for writ of mandate aimed at correcting claimed omissions in record. The District Court of Appeal, Peters, P. J., held, inter alia, that evidence sustained conviction.

Petition for writ of mandate denied; judgment and order affirmed.

1. Constitutional Law 🔑268

Record failed to sustain defendant's contention that he was denied due process by failure of his attorneys to fight for his rights and by their claimed conspiracy with the prosecution.

2. Mandamus 🔑61

Defendant's petition for writ of mandate to correct claimed omissions in record would be denied, where claimed omissions in preliminary examination related to a charge that was dismissed and were properly excluded with full knowledge of defendant's counsel, and where there were no omissions in transcript of trial, and where not only did the transcript contain usual affidavit of reporter that it was full, true and complete, but, at request of District Court of Appeal, reporter had checked his notes and filed a supplementary affidavit to affect that transcript was complete.

3. Burglary 🔑41(1)

Evidence sustained conviction for second-degree burglary.

4. Criminal Law 🔑1159(3)

District Court of Appeal was without power to disturb finding of guilt based on conflicting testimony.

5. Criminal Law 🔑1109(1), 1121(1)

Record failed to sustain defendant's charge that testimony of two witnesses for prosecution was perjured, and that a portion of testimony of such witnesses was removed from record.

6. Jury 🔑110(1)

Failure to challenge juror amounted to waiver of right to do so.

7. Jury 🔑99(1)

Even if juror were present at defendant's preliminary hearing, such fact would not necessarily disqualify such juror at trial, in view of fact that prior knowledge does not, of itself, disqualify.

8. Witnesses 🔑337(5)

In prosecution for burglary, in which defendant was also charged with a prior conviction, defendant, who took the stand, could properly be asked if he had been convicted of a felony. Code Civ.Proc. § 2051.

Clarence Meehan, in pro. per.

Edmund G. Brown, Atty. Gen., David K. Lener, Deputy Atty. Gen., for respondent.

PETERS, Presiding Justice.

Defendant, Clarence Meehan, was originally charged with two counts of burglary. The first charge related to an alleged theft at the O. K. Morton Used Car Company lot on October 6, 1952, and the second to an alleged theft at Joe's Service Station in San Jose on October 11, 1952. The defendant changed his plea from not guilty to guilty on the second charge, whereupon, on motion of the district attorney, the first charge was dismissed. Thereafter, the defendant moved to change his plea on the second count to not guilty, which request was granted. An amended information was filed charging a burglary at Joe's Service Station and also charging a prior conviction under section 288a of the Penal Code. Defendant admitted the prior and pleaded not guilty to the burglary charge. After a jury trial he was found guilty of second degree burglary. He appeals from the judgment of conviction and from the order denying his motion for a new trial.

[1] One of appellant's contentions is that he was denied due process by failure of his attorneys to fight for his rights, and by their claimed conspiracy with the prosecution. The record shows quite the contrary. Appellant was first represented by attorney Thorne, who secured the dismissal of one of the charges and recommended a guilty plea on the present charge. Appellant followed this advice, and then told the court that, if the judge would agree in advance to a suspended prison sentence with service of a county jail sentence, he would allow the guilty plea to stand, otherwise, that he desired to change his plea to not guilty. Attorney Thorne, in open court, stated that he had informed appellant that any such deal would be highly irregular, and that all that he could do as an attorney was to make a recommendation to the court. The court informed appellant that no promises would or could be made to him in advance. Attorney Thorne thereupon was permitted to withdraw from the case. After several continuances, at appellant's request, the court appointed counsel, this time attorney Polverino. Against the advice of this attorney, appellant was permitted to withdraw his guilty plea, and to plead not guilty. The amended information was then filed charging the prior conviction which had not theretofore been charged. Attorney Polverino was then discharged by appellant who then secured the services of attorney Watson. Appellant pleaded not guilty to the burglary and guilty to the prior conviction. Attorney Watson represented appellant at the trial. Appellant now charges his attorneys with conspiring with the trial judge to get him into San Quentin by removing certain testimony from the record, and by certain other acts. These charges are entirely baseless. There is nothing in the record to indicate any laxity or adverse interest on the part of any of his attorneys, or any oppression by the court. In fact, the record shows that the court was quite lenient to appellant and entirely fair with him. It also shows able representation by all of his counsel, and, in particular, by attorney Watson, who represented him at the trial vigorously and ably.

[2] After conviction, at the request of appellant, this court appointed competent counsel to represent him on the appeal. Appellant was unable to get along with this attorney, fired him, and since then has appeared *in propria persona*. His "briefs" are long rambling documents in which many unsubstantiated charges are made. In September of 1953 he filed a writ of habeas corpus in this court. This petition was denied, but the brief filed in connection therewith was accepted as an opening brief. In addition to his briefs, appellant has filed a document purporting to be a request for a writ of mandate aimed at correcting claimed omissions in the record. The claimed omissions in the preliminary examination all relate to the charge that was dismissed, and were properly excluded with the full knowledge of appellant's then counsel. There are no omissions in the transcript of the trial. Not only does the reporter's transcript contain the usual affidavit of the reporter that it is full, true and complete, but, at the request of this court, the reporter has checked his notes and has filed a supplementary affidavit to the effect that the transcript is complete. For these reasons, the petition for the writ of mandate will be denied.

[3] Contrary to the contention of appellant, the evidence amply supports the judgment. The amended information charged the breaking into Joe's Service Station in San Jose with intent to commit theft. The evidence shows that the theft was of certain used batteries. The appellant was definitely identified by an eyewitness of the theft. Joe Valente, who lived next door to the service station, testified that he was awakened in the middle of the night by the sound of someone walking on the gravel of the driveway adjoining his house. He looked out of his window and for a half an hour watched the defendant carry batteries from the "lube" room of the service station to his automobile, which was parked in front of the witness' house. While continuing to watch the appellant, the witness had his wife telephone to Joe Faraone, the owner of the service station, and to the police. When the police arrived the witness told them the appellant was still in his automobile, and pointed the car out to them. Appellant was found in the car, together with a number of used automobile batteries. Thirteen batteries had been stolen from the service station. Not only did Valente positively identify appellant as the thief, but Faraone positively identified one of the batteries found in appellant's car as having been taken from his station. One of the arresting officers testified that when he arrived on the scene he noticed that the gate of the service station "lube" track was ajar, and that the lock was missing. Valente called the officer's attention to appellant's automobile. Appellant was in the car. Upon the officer's demand, appellant got out of the car, and, when asked what he had done with the missing lock, stated that he had thrown it away, and the officers found it where appellant told them he had thrown it. Appellant also informed the police officers that he had broken the lock with a crowbar which he had hidden under the back seat of his car. The crowbar was there found. Appellant, at the trial, denied making these admissions.

[4] This evidence obviously supports the judgment. Defendant's testimony merely created a conflict. It was his testimony that the batteries found in his car were his property, he having purchased fifteen batteries the day before his arrest from one Clarence Marshall. A receipt showing such a purchase was introduced into evidence, and Marshall, who also operated a service station, testified that he had sold fifteen used batteries to appellant on that date. He was unable to identify any of the batteries found in the car of appellant as having been sold by him, testifying that such identification was impossible. Faraone, however, testified that he could and did identify at least one of the batteries from the markings he had placed upon it. Appellant then testified that the day after he purchased the batteries from Marshall he had driven to Emeryville in Alameda County intending to sell the used batteries to a smelter located there, but arrived after that establishment had closed. He then drove to San Francisco where he transacted some business, and then drove back to San Jose, arriving there about 11 p. m. He stated that he then felt very tired and decided to draw up to the curb and sleep. The record shows that at that time appellant lived in San Jose. He testified that he drew up in front of Valente's house and was sound asleep in his car when the officers arrived. He denied most of Valente's, Faraone's and the arresting officer's testimony. The testimony of appellant and of his witnesses did no more than create a conflict. We are without power to disturb the finding of guilt, based as it is on conflicting testimony.

[5] Appellant contends that the testimony of Valente and Faraone was perjured. This is no more than a charge that his testimony, and that of his witnesses, should be believed rather than the testimony produced by the prosecution. Nothing in the record sustains this charge. The corollary charge that a portion of the testimony of these two witnesses was removed from the record is totally unsupported.

[6, 7] Appellant also charges one of the jurors with "perjury" in that he claims that this juror was present at his preliminary hearing. No challenge of this juror was made at the trial, although appellant claims that he requested his counsel Watson to remove the juror, but that Watson failed to do so. Appellant kept silent.

Failure to challenge the juror, of course, amounted to a waiver of that right. See cases 15 Cal.Jur. p. 419, § 91. Moreover, even if the juror were present at the preliminary, such fact would not necessarily disqualify him at the trial, because prior knowledge does not, of itself, disqualify. See cases collected 15 Cal.Jur. p. 421, § 92.

[8] Some objection is made to the testimony that he had suffered a prior conviction. Appellant took the stand and on cross-examination he volunteered the statement that he previously had been in San Quentin. He was then asked what was the charge, to which he answered section 288a of the Penal Code. He complains of this question. Since the appellant took the stand, he could properly be asked if he had been convicted of a felony, § 2051, Code of Civ.Proc. That, substantially, was all that was done here.

None of the other arguments of appellant warrants discussion.

The petition for a writ of mandate is denied, and the order denying the new trial and the judgment are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

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124 Cal.App.2d 615

In re COLE'S ESTATE.

BROWN et al. v. COLE.

Civ. 8429.

District Court of Appeal. Third District.
California.

April 19, 1954.

Hearing Denied June 16, 1954.

Proceedings involving confirmation of sale of parcel of real property belonging to decedent's estate. The Superior Court, Sonoma County, Finley, J., entered order of confirmation from which unsuccessful bidder appealed. The District Court of Appeal, Schottky, J., held that under provisions of Probate Code relating to sale of real or personal property of a decedent's estate, and authorizing the payment of a commission to an agent who procures an increased bid at time of hearing the return of sale containing the original bid, when executor had no agreement with any agent to secure a purchaser or to pay commission, and bid of agent was conditioned on payment to him of a five per cent commission which would have reduced net amount received by estate to less than next lowest gross bid, next lowest bid in gross amount, not calling for payment of commission, was actually the highest bid as to the estate, and confirmation of sales to latter bidder was proper.

Order confirming sale affirmed.

1. Executors and Administrators 🔑366

The executor or administrator of an estate is in effect a trustee for the creditors and the heirs of the deceased, and the probate court is in effect the guardian of the estates of deceased persons, with result that on sale of property belonging to an estate, it is duty of both executor and court to endeavor to obtain highest price possible for the property sold. Probate Code, §§ 761, 761.5.

2. Executors and Administrators 🔑366

Provision of Probate Code declaring in part that where original bid is made by purchaser direct to estate and thereafter at time of hearing the return of sale containing original bid, and increase bid is made by a bona fide agent which results in confirmation and sale of property at such increase bid, court shall allow a commission to the agent who procures the increase bid, in reasonable amount fixed by court in its discretion, does not require the court to accept any bid or confirm any sale unless the amount that the estate will derive from such bid is actually the highest amount offered, and no intent is manifested to benefit an agent or broker who might appear at the hearing, at the expense of and to the detriment of the estate. Probate Code, §§ 761, 761.5.

3. Executors and Administrators 🔑366

Under provisions of Probate Code relating to sale of real or personal property of a decedent's estate, and authorizing the payment of a commission to an agent who procures an increased bid at time of hearing the return of sale containing the original bid, when executor had no agreement with any agent to secure a purchaser or to pay commission, and bid of agent was conditioned on payment to him of a five per cent commission which would have reduced net amount received by estate to less than next lowest gross bid, next lowest bid in gross amount, not calling for payment of commission, was actually the highest bid as to the estate, and confirmation of sale to latter bidder was proper. Probate Code, §§ 760, 761, 761.5, 785.

◆

Edward T. Koford, Santa Rosa, for appellants.

Murphy, Brownscombe & Gleason, by Thomas A. Brownscombe, Santa Rosa, for respondent.

SCHOTTKY, Justice.

This is an appeal by an unsuccessful bidder from an order confirming the sale of a parcel of real property belonging to the above entitled estate.

The facts, which are not in dispute, are substantially as follows: The parcel in question was sold at private sale to Lloyd Demrick for the sum of $6,200, and thereupon respondent reported the sale to the superior court for confirmation and the same was noticed for hearing on December 5, 1952. Upon the hearing of said report and petition for confirmation of sale, appellant Poulsen, a real estate broker, acting as appellant Brown's agent, increased by 10 per cent the bid theretofore made by Demrick, and thereafter by competitive bidding in open court Demrick finally bid the sum of $7,575 for said real property, and Brown (through Poulsen) bid the sum of $7,600, which latter bid was made subject to the payment of a 5 per cent commission to Poulsen. Both bids were reduced to writing and the usual 10 per cent deposits were paid into court, Brown depositing 10 per cent of the whole $7,600. There is no contention that the sale or return was irregular in any respect. On December 12, 1952, the court made an order confirming the sale to Demrick for the bid price of $7,575. The order contains the following recitals, among others:

> "* * * that in open Court Lloyd M. Demrick offered in writing the sum of $7,575.00 for said real property upon the terms prescribed in the notice of sale, and in open Court Dana C. Poulsen, on behalf of Muriel Brown, offered in writing the sum of $7600.00 for said real property, upon the condition that there be paid Dana C. Poulsen as agent a commission of five per cent of the amount so bid; that said Lloyd M. Demrick is a responsible person, his bid complies with all provisions of the law, is not subject to the payment of a commission, and is the highest and best bid; that the Court accepted said bid of Lloyd M. Demrick."

The written bid of Brown was in the form of a "Deposit Receipt" agreement between Poulsen and Brown, acknowledging receipt of the $760 deposit paid by Brown and stating the terms and conditions upon which Brown would purchase the property. Appended to the form, after Poulsen's and Brown's signatures, is the following paragraph, apparently for execution by respondent:

> "I agree to sell the above described property upon the terms and conditions herein stated. I agree to pay said broker, employed by me to sell said property, as commission the sum of *5%, subject to court confirmation* Dollars, or one-half of the amounts paid hereon should same be forfeited by purchaser. One-half of said amount, however, shall not exceed said commission.
>
> "____________
> "____________
> "____________
> Seller"

There is no evidence that respondent or any other representative of the estate ever employed Poulsen or any other real estate agent to secure a buyer for the property.

The principal contention of appellant, which, appellant states, "presents the real crux of the appeal," is that appellant Brown bid $7,600 for the property, that this was the highest bid, and that pursuant to section 785 of the Probate Code the court could do only one of two things, i. e., either accept this bid of $7,600, without thinking in terms of a "net bid," or order a new sale.

When the Probate Code was adopted in 1931, the provisions of the Code of Civil Procedure relating to probate proceedings were in substance incorporated in the Probate Code. The provisions of the former section 1559 of the Code of Civil Procedure were in substance incorporated in sections 760 and 761 of the Probate Code, and the provisions of the former sections 1552 and 1554 of the Code of Civil Procedure were in substance incorporated in section 785 of the Probate Code.

Section 760 authorizes the executor or administrator to enter into a written contract with any bona fide agent to secure a purchaser for any real or personal property of the estate and provide for the payment of a commission, the amount of which must be fixed and allowed by the court upon confirmation of sale. Section 761 provides:

> "In case of sale on an increased bid made at the time of confirmation to a purchaser not procured by the agent holding the contract, the court shall allow a commission on the full amount for which the sale is confirmed, one-half of said commission on the original bid to be paid to the agent whose bid was returned to the court for confirmation and the balance of the commission on the purchase price to the agent, if any, who procured the purchaser to whom the sale was confirmed."

Section 785 sets forth the proceedings in court upon the hearing of a petition for the confirmation of sale, and provides that the court must first determine if the sale is necessary or for the benefit of the estate and further provides that "if a written offer of 10 percent more on the first ten thousand dollars ($10,000) bid and 5 percent more on the amount of the bid in excess of ten thousand dollars ($10,000) is made to the court by a responsible person, and the offer complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale."

Section 761.5 was enacted in 1945, undoubtedly for the purpose of clarifying the provisions of section 761 after the decision in 1944 in Re Estate of Rule, 25 Cal.2d 1, 152 P.2d 1003, 155 A.L.R. 1319, and reads as follows:

> "Where an original bid is made by a purchaser direct to the estate and thereafter at the time of hearing the return of sale containing the original bid, an increased bid is made by a bona fide agent which results in the confirmation and sale of the property at such increased bid, the court shall allow a commission to the agent who procured the increased bid, which commission shall be fixed by the court at such amount as the court, in its discretion, finds will be a reasonable compensation for the services of the agent to the estate."

[1, 2] Appellant argues that said section 761.5 was enacted to provide for the payment of a commission to the "raise broker" who procures a successful bidder on an increased bid in open court. However, it must be borne in mind that the executor or administrator of an estate is in effect a trustee for the creditors and the heirs of the deceased, and that the Probate Court is in effect the guardian of the estates of deceased persons. In the sale of property belonging to an estate it is the duty both of the executor and the court to endeavor to obtain the highest price possible for the property sold. Bearing these principles in mind, there is nothing in the provisions of section 761.5 which requires the court to accept any bid or confirm any sale unless the amount that the estate will derive from said bid is actually the highest amount offered. We do not believe that the intent of the legislature in enacting section 761.5 was to benefit an agent or broker who might appear at the hearing at the expense of and to the detriment of the estate.

In the instant proceeding, as hereinbefore set forth, the executor had not entered into any agreement with any agent to secure a purchaser or to pay a commission. He reported the highest bid he had received in his return of sale and petition for confirmation. Appellant Poulsen as agent for Brown appeared at the hearing and competitive bidding was engaged in. Lloyd Demrick made a bid of $7,575 and thereupon appellant Poulsen, on behalf of appellant Brown, made a bid of $7,600, subject to the payment of a commission of 5 per cent, as hereinbefore set forth. The following colloquy then occurred:

> "The Court: Well, now, counsel, what is the point upon which you contend that Mr. Poulsen's bid should be accepted by the Court over and above the bid of the next lowest bidder?
>
> "Mr. Koford: It is our contention, if the Court please, that the Court on a bid in open court above the ten percent has one of two things to do under Section 785, and that is to accept the high bid or to order a new sale without reference to expenses of a new sale or any commission deducted therefrom.
>
> "The Court: Accept the first bid made?
>
> "Mr. Koford: The highest bid.
>
> "The Court: Well, if that is true, the highest bid would be the next lowest bidder which would net the greatest amount to the estate.
>
> "Mr. Koford: Well, that is where we differ, if the Court please. The Court should not consider the net amount, but should take the high bid, to-wit, $7600.
>
> "The Court: That would be true if there was a binding agreement made with the administrator by Mr. Poulsen as a real estate broker or acting on behalf of the administrator under a written agreement, and then, of course, the estate should pay the commission without any question but here, if Mr. Poulsen's position is correct, anyone who is a real estate broker could come into court and buy property of an estate five percent cheaper than anyone else because they could bid on behalf of a relative and it would be subject to five percent commission, and could always be bought five percent cheaper. That is not what the law contemplates I am sure.
>
> "Mr. Koford: Well, the result would be this: Any broker in Court, as against a buyer not represented by a broker, would have to sit down and figure five percent above the bid—
>
> "The Court: That is something we can't consider here because in these probate matters we are concerned about the greatest benefit to the estate and that is the only thing. Now, as I say, if Mr. Poulsen had had an agreement with the administrator and the administrator had offered this for sale through him and he had found a buyer, then his position would be sound, but in view of the fact there was no such agreement, and nothing before the Court, I can't see how the Court can accept that bid because it would net less to the estate than the next lowest bid, and the Court is concerned primarily with the best interests of the estate."

The court then confirmed the sale to Lloyd M. Demrick for the sum of $7,575.

[3] We believe that the trial court correctly construed the foregoing provisions of the Probate Code and did not err in its confirming said sale. If the court had confirmed the sale to appellant Brown, as appellants contend that the court was bound to do, the effect would have been to confirm an offer that by its terms would net $7,220 to the estate as against the sum of $7,575 offered by Demrick. To have done so would certainly not have been for the benefit of the estate, and we do not believe that either reason, statute or authority would support such a ruling.

Appellants rely on certain language in Re Estate of Naftzger, 24 Cal.2d 595, 599, 150 P.2d 873, as supporting their contention that the court could not take the commission into consideration in determining the amount of appellant Brown's bid. As in the instant case, the Naftzger case involved a bid made by a new bidder at the hearing of a petition to confirm a sale of real property. The bidder, there, bid exactly 10 per cent more than the original bid returned for confirmation. The bid was in writing and stated that "The name of real estate agent procuring within bid, and to whom commission is to be paid, according to law, if confirmed by court to within bidder is as follows: Geo. S. Preninger." The court accepted the increased bid, confirmed the sale, and ordered the payment of a commission of $345 to the real estate agent named in the bid. The unsuccessful bidder appealed and sought to have the order of confirmation set aside, contending that the accepted bid was not an increase of 10 per cent because it did not net the estate that amount. The sale was made under the alternative procedure set out in the last sentence of section 785. The Supreme Court refused to read into the provision any requirement that additional commission payable by reason of the increased bid must be added to the amount of the bid, stating, 24 Cal.2d at page 600, 150 P.2d at page 875:

> "We are of the view that the probate court should be permitted 'the exercise of a wise discretion' [citing cases] in determining whether to confirm a sale on a bid made in open court of barely 10 per cent more in amount than that named in the return, or to order a new sale. We perceive no sufficient reason for reading into the second sentence of section 785 the requirement that to 'ten per cent more in amount than that named in the return'—which amount 'named in the return' in the contemplation of the statute may be subject to the payment of commissions and other expenses—there be added some assumed amount equal to the expenses of 'a new sale' which is not to take place or an amount equal to an expense which may be incident on confirmation of the sale in the original proceedings to the new bidder. [Citing In re Estate of Bradley, 168 Cal. 655, 660, 144 P. 136.] The statute itself does not specify such requirement; we shall not add it."

It should be noted that the bid in the Naftzger case was a bid of $12,650 and was not conditioned upon the payment of a specified commission as was the bid in the instant case. It should also be noted that the commission of $345 allowed by the court was less than 3 per cent of the amount bid, and that, after deducting the commission, the net amount derived by the estate was $12,305, which was $805 more than the original $11,500 bid. We do not believe that the cited case can be considered as an authority sustaining appellants' contention that the arbitrary fixing by a bidder of a 5 per cent commission in his bid can be disregarded by the Probate Court in determining if the bid is a higher bid than a bid not subject to a commission which would net a greater amount to the estate. Admittedly in the Naftzger case the increased bid was 10 per cent higher than the bid returned to the court, and the Supreme Court, in construing the last sentence of said section 785, said, 24 Cal.2d at page 599, 150 P.2d at page 875:

> "So construing the use of the word here, it appears that the authority granted the probate court either to accept an increased bid of 10 per cent made in open court and forthwith confirm the sale to the bidder or, if the court's discretion so dictates, 'to order a new sale,' does not contemplate that such bid in open court must include in addition to the specified 10 per cent increase, 'the expenses of a new sale.'"

Our conclusion is that the court correctly concluded that the bid of Demrick was the highest bid and that there was no error in the order confirming the sale to him. In view of this conclusion it is unnecessary to discuss the other contentions made by appellants.

The order confirming sale is affirmed.

PAULSEN, J. pro tem., and PEEK, J., concur.

124 Cal.App.2d 487

PETE v. HENDERSON.

Civ. 15761.

District Court of Appeal, First District,
Division 1, California.
April 12, 1954.

Action by administrator to recover damages for negligence in permitting a judgment to become final without taking an appeal. From adverse judgment of Superior Court, Alameda County, Chris B. Fox, J., administrator, appealed. The District Court of Appeal, Peters, P. J., held that offer of proof that judgment was erroneous and would have been reversed on appeal was admissible.

Judgment reversed.

1. Attorney and Client 🔑107

A lawyer is required to exercise due care in handling affairs of his client and must perform his professional duties to the best of his ability.

2. Attorney and Client 🔑129(4)

A lawyer, who is negligent in handling the affairs of his client, is liable for all damages directly and proximately caused by his negligence.

3. Attorney and Client 🔑129(4)

The extent that judgment would have been reversed on appeal under circumstances that would not require judgment debtor to pay it, constitutes damages for negligent failure to perfect appeal.

4. Judgment 🔑518

In action by administrator to recover damages for negligence in permitting a judgment rendered against administrator to become final without taking an appeal, offer of proof that judgment entered against administrator was erroneous and would have been reversed on appeal was admissible and would not constitute a collateral attack on that judgment.

5. Attorney and Client 🔑129(2)

In action by administrator to recover damages for negligence in permitting a judgment rendered against administrator to become final without taking an appeal, administrator must plead and prove that the appeal, had it been taken, would have resulted in reversal.

6. Trial 🔑18

The fact that a layman litigant elects to represent himself does not relieve him of the duty of observing legal rules, but that fact should be considered in determining whether, in a situation where trial court has discretion to act to relieve the lay litigant from his default, that discretion should be exercised.

7. Pleading 🔑237(1)
Trial 🔑69, 159

One of the chief objects subserved by a motion for nonsuit is to point out the oversights and defects in plaintiff's proofs, so he can supply if possible the specified deficiencies, and to that end, in a proper case, the trial court may permit the plaintiff to amend his complaint and to reopen the case and make the required proof.

8. Attorney and Client 🔑129(2)

In action by administrator to recover damages for negligence in permitting a judgment rendered against administrator to become final without taking an appeal, trial court had power to pass upon the question as to whether the judgment would have been reversed had the appeal been perfected.

Louis Pete, Jr., in pro. per.

Vaughns & Yonemura, Oakland, for respondent.

PETERS, Presiding Justice.

The plaintiff, Louis Pete, Jr., appearing *in propria persona,* is the administrator of the estate of his father. The defendant is the administratrix of the estate of John Henderson, a deceased attorney. This action was brought by plaintiff, in his representative capacity, against Henderson, prior to his death, for damages alleged to have been caused by the negligence of the attorney in failing to file a notice of appeal in an action in which a judgment for $1,660 had been rendered against plaintiff, and which judgment plaintiff was forced to pay without having it reviewed on appeal. The prayer requests as damages the $1,660 so paid, and $150 paid by plaintiff in advance to Henderson as a fee to take the appeal. Punitive damages are also prayed for, but this demand was abandoned during the trial.

At the close of plaintiff's case defendant moved for a nonsuit on the ground that the plaintiff had failed to prove a cause of action. Defendant conceded liability for the $150 paid to the attorney to prosecute the appeal, but contended no other item of damage had been proved. The trial court ruled not only that there was a failure of proof, but that, as a matter of law, no other damages than the attorney's fees could be recovered in this type of action. Accordingly, the trial court found that, although defendant was negligent, plaintiff's damages were limited to the $150 paid as a fee for taking of the appeal. Judgment was entered in favor of the plaintiff in that amount. Plaintiff appeals.

The facts are simple. Plaintiff, as administrator, retained Henderson to represent him in an action in which he was a defendant. Judgment in that action was entered against appellant for $1,660. Appellant then employed Henderson to prosecute an appeal from that judgment, and, pursuant to agreement, paid him $150 for that purpose. Henderson filed the notice of appeal one day late. The finding that Henderson was negligent in this respect is supported by the evidence, and is not challenged by respondent. Appellant thereupon was forced to and did pay the judgment creditor $1,660, the amount of the judgment. Thereupon, this action was instituted against Henderson, who was then living. Henderson died during the pendency of the action and respondent, as administratrix of his estate, was substituted in his place.

At the close of appellant's case respondent moved for a nonsuit on the ground of failure of proof. During the discussion of this motion, the trial judge, on numerous occasions, emphatically stated that he would not permit any discussion or evidence relating to the merits of the appeal in the first action. It was his position that the judgment in the first action was final, that such judgment could only be upset by an appeal, and that he, as a Superior Court judge, was without power to consider what might have happened to that appeal, had one been properly perfected.

[1, 2] These rulings of the trial court were incorrect. A lawyer is required to exercise due care in the handling of the affairs of his client and must perform his professional duties to the best of his ability. Clark v. State Bar of Calif., 39 Cal.2d 161, 246 P.2d 1. If he does not do so, he is liable to his client for such failure if damage results. His liability, as in other negligence cases, is for all damages directly and proximately caused by his negligence. (See cases collected 6 Cal.Jur.2d p. 324, § 146.)

[3] In the present case the attorney was negligent in failing to file the notice of appeal. That is admitted. The question is, what damages were proximately caused by that negligence? Obviously, the $150 fee paid to the attorney to take the appeal was a proper item of damage. This was allowed and is not in question on this appeal. But that is not the only item of damage that appellant may have suffered. If the judgment against him for $1,660 was erroneous, to the extent that it would have been reversed on appeal under circumstances that would not require him to pay it, he has suffered serious damage indeed. That damage was directly and proximately caused by the negligence of the attorney. If proof of the required facts can be made, appellant should be able to recover the damage so suffered.

[4] The trial judge was of the opinion, and so ruled, that he had no power to rule on the propriety of another trial judge's judgment which had become final. It was his theory that such proof would constitute a collateral attack on a final judgment and that this is not permitted by the law. Such proof would not constitute a collateral attack on the judgment. The judgment in the first action, as between the parties to that action, is final. The purpose of the present action is not to reverse that judgment. It has been finally determined that the judgment creditor in the first action is entitled to that money. The appellant is not trying to gain recoupment from that

judgment creditor. He is seeking to recover damages from his attorney, who was not a party to the first action, for his negligence in permitting the judgment to become final without taking an appeal. If he can prove that the judgment in that case was erroneous and would have been reversed, he should be permitted to do so. In that event he has proved damage proximately caused by the negligence. If this were not the rule, attorneys would be placed in a special class, in that they, unlike other persons, would be freed from liability for certain damages directly and proximately caused by their negligence. There is no reason for placing them in such a special class.

It is true that this result involves certain difficulties, not the least of which is to try and convince one trial judge that another judge of equal jurisdiction rendered such an erroneous judgment that it would have been reversed on appeal, had one been taken. But the fact that it may be difficult to make such proof is no ground to deny the right to present such proof if it can be made. The Supreme Court, on at least one occasion, has held that a trial judge may be called upon to determine whether an appeal, had it been perfected, would have been successful. In Estate of Hanley, 23 Cal.2d 120, 142 P.2d 423, 149 A.L.R. 1250, the precise point decided was that the time for taking an appeal was jurisdictional, and that between the parties there can be no excuse for the late filing of an appeal. But the author of the majority opinion in that case was careful to point out that if a party is prevented from taking his appeal by the fraud or duress of the other party, he may maintain an equitable action against the other party. 123 Cal. at page 124, 142 P. 423. In such equitable action the trial court would be compelled to determine the merits of the dismissed appeal. See dissenting opinion 123 Cal. at page 128, 142 P. 423. That is precisely the type of issue involved in the instant case.

Although no California case seems to have been decided directly involving the admissibility of such proof in an action between attorney and client, there is language and reasoning in Gambert v. Hart, 44 Cal. 542, and Drais v. Hogan, 50 Cal. 121, that support the conclusions above set forth.

[5] The rulings of the trial court on these issues were clearly erroneous. Does this require a reversal? We think that it does. It is true that a plaintiff in such a case must plead and prove that the appeal, had it been taken, would have resulted in a reversal. Appellant neither pleaded nor proved this fact. This would ordinarily be fatal and would require an affirmance. Feldesman v. McGovern, 44 Cal.App.2d 566, 112 P.2d 645; Hays v. Ewing, 70 Cal. 127, 11 P. 602. But there are several factors here existing that make that rule inapplicable to the instant case.

[6] In the first place, the appellant, a layman, has appeared in this action *in propria persona,* stating to the trial court that he found it impossible to secure a lawyer who would handle the case against attorney Henderson. While the fact that a layman litigant elects to represent himself does not relieve him of the duty of observing legal rules, and certainly does not excuse him from a failure of proof, that fact should be considered in determining whether, in a situation where the trial court has discretion to act to relieve the lay litigant from his default, that discretion should be exercised.

[7, 8] Here the trial court, on a motion for a nonsuit, ruled not only that there was a failure of proof, but that, as a matter of law, no proof could be offered on the issue. It is well settled that "one of the chief objects subserved by a motion for nonsuit is to point out the oversights and defects in plaintiff's proofs, so he can supply if possible the specified deficiencies." (See cases cited 9 Cal.Jur. p. 563, § 39.) To that end, in a proper case, the trial court may permit the plaintiff to amend his complaint and to reopen the case and make the required proof. Manford v. Coats, 6 Cal.App.2d 743, 45 P.2d 395. Indeed, in a proper case, it becomes an abuse of discretion to refuse to do so. Low v. Warden, 70 Cal. 19, 11 P. 350. This is such a case. Here the plaintiff, *in propria persona,* presented his case. Counsel for defendant moved for a nonsuit, admitting Henderson's

negligence and liability of his estate for the fee, but urged a failure of proof as to the $1,660 claimed damage. The trial judge ruled that there was no way known to the law that plaintiff could prove any damage, other than the amount of the fee, proximately resulting from Henderson's negligence. He fully stated, several times, that he must conclusively presume the validity and propriety of the judgment in the first action, and lacked legal power to pass upon the question as to whether it would have been reversed had the appeal been perfected The trial court unequivocally told appellant that any offer of proof of the transcript of the first proceeding would be denied, not in the exercise of discretion, but because such proof was inadmissible. Under such circumstances the ends of justice require that the judgment, predicated on these erroneous rulings, be reversed, and appellant be given the opportunity to amend his complaint, and to prove, if he can, that, had the judgment in the first action properly been appealed, it would have been reversed.

The judgment appealed from is reversed.

BRAY and FRED B. WOOD, JJ., concur.

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124 Cal.App.2d 577

MORTON et al.

v.

SUPERIOR COURT OF STATE, IN AND FOR SAN MATEO COUNTY et al.

PEOPLE et al. v. MORTON et al.

Civ. 15983, 16125.

District Court of Appeal, First District, Division 1, California.

April 16, 1954.

Rehearing Denied May 14, 1954.

Hearing Denied June 9, 1954.

Proceeding by state and county for injunction restraining defendant from operating its quarry. The Superior Court, San Mateo County, Aylett R. Cotton, J., granted injunction and defendant appealed. Proceeding on appeal was consolidated with defendant's petition for prohibition aimed at arresting enforcement of injunction. The District Court of Appeal, Peters, P. J., held that where it appeared that those conditions and practices which created a public nuisance and which violated ordinance regulating quarries could be corrected by measures short of requiring cessation of all quarrying operations, and where administrative decision denying license to quarry was under attack in courts, injunction absolutely prohibiting operation of quarry was too broad.

Prohibition proceeding dismissed; order granting injunction reversed.

1. Nuisance 🔑3(5)

The operation of a quarry is a lawful business and not a nuisance per se.

2. Nuisance 🔑85

If a quarry in fact is being so operated as to constitute a nuisance, the acts constituting the nuisance may be enjoined, and, where it appears that quarry cannot be operated at all without creating a nuisance, operation thereof may be completely prohibited.

3. Nuisance 🔑60

A valid ordinance may restrict such acts in operation of a quarry as constitute a nuisance, and, if it appears that quarry cannot be operated at all without creating a nuisance, may prohibit operation completely.

4. Nuisance 🔑85

An absolute prohibition against operation of a quarry, while possible under police power, practically amounts to a taking of the property, since it denies owner right to engage in only business for which land is fitted, and can be justified only where irreparable injury to others necessarily results from operation and condition cannot be rectified except by complete prohibition.

5. Nuisance 🔑77

An injunction against operating property for the only lawful purpose for which it is fitted is an unusual and heroic remedy, and should be employed only where no other means of protecting the complaining public exists.

6. Nuisance ⚷35

When a business is not a nuisance per se, an injunction directed at nuisance created by the business should be limited in scope so as not to enjoin the defendant's entire business, if a less measure of restraint will afford a relief to which the plaintiff is entitled.

7. Nuisance ⚷85

Where it appeared that those conditions which were consequent to operation of quarry, and which created a public nuisance, could be corrected by measures short of requiring cessation of all operations, injunction would lie only against the objectionable practices and absolute injunction against all operations was too broad.

8. Mines and Minerals ⚷92.8

San Mateo County ordinance requiring that there be fences about quarries and that certain excavation practices and excessive dust and noise be avoided constituted a valid exercise of the police power.

9. Nuisance ⚷85

Where it appeared that quarry could be operated without violating ordinance regulating quarrying, injunction would lie only against the violating practices and absolute injunction against all operation was too broad.

10. Mines and Minerals ⚷92.8

San Mateo County ordinance, requiring operators of existing as well as of new quarries to apply for and secure permits to operate, was a valid exercise of the police power.

11. Constitutional Law ⚷312

If a quarry operator fails to apply for a permit to operate quarry, or applies and is denied, and, by failing to challenge the denial, allows it to became final, continued operation of quarry will constitute a nuisance which can be absolutely enjoined without involving a violation of due process.

12. Counties ⚷81

The San Mateo County Planning Commission is as much bound by the rules, restricting the right to prohibit lawful businesses in cases where regulation thereof is possible, as is a court.

13. Constitutional Law ⚷312

Where quarry operator, who had applied for and been denied a permit to continue to operate its quarry, had pending an action for mandamus to compel issuance of permit, absolute injunction against operation of quarry, on ground that it was unlicensed, would constitute deprivation of a vested right without due process of law.

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Alfred J. Harwood, San Francisco, for petitioners and appellants.

Keith C. Sorenson, Dist. Atty. of San Mateo County, Redwood City, for respondents.

PETERS, Presiding Justice.

There are presently two proceedings pending before this court growing out of the same controversy. 1 Civ. No. 15,983 is a petition for a writ of prohibition aimed at arresting the enforcement of an order granting an injunction *pendente lite*. 1 Civ. No. 16,125 is an appeal from the order granting the injunction. Prior to the perfecting of the appeal an alternative writ of prohibition and an order temporarily staying the enforcement of the injunction were issued. When the appeal was perfected the two proceedings, by stipulation, were consolidated. The issues presented in the prohibition proceeding involving the validity of the injunction can all be decided on the appeal, so that the prohibition proceeding is now moot.

The amended complaint upon which the request for the preliminary injunction was predicted sets forth three causes of action. The first two are by the county against the Whipple Road Quarry Company and its president, Hamilton Morton. The first prays for an injunction on the theory that the defendants are operating the quarry without a permit as required by ordinance 961 of the county, that such operation without a permit constitutes a nuisance, and therefore should be enjoined. The second cause of action, also by the county, alleges that the quarry is being operated in a manner that violates certain regulatory provisions of the ordinance, that such operation constitutes a nuisance, and should be enenjoined. The third cause of action is by the state. It sets forth that the quarry is being operated under certain described conditions that makes it a public nuisance, which should be enjoined. After the trial, the court issued its order absolutely enjoining the operation of the quarry. This order is predicated on findings contained in the order that the quarry is being operated without a permit in violation of ordinance 961, that the method of operation violates that ordinance in certain described particulars, and that the method of operation creates a public nuisance.[1]

The record shows the following: The quarry is located in unincorporated territory about one mile from the city limits of Redwood City, and is operated by the Whipple Road Quarry Company, a corporation. It operates on a royalty basis under a lease on lands owned by others. It has been operating at its present site since 1929. The quarry itself, and the area surrounding it are hilly and wooded, being very precipitous in certain parts. A hard-surfaced road known as Edgewood Road (Old Whipple Road) leads past the quarry property. About 900 cars daily, including defendants' trucks, travel on it. A large part of the area surrounding the quarry, particularly towards the west, is entirely uninhabited. Some homes, however, are located in the general area, particularly along or near Edgewood Road, which is easterly from the quarry property. The evidence shows that there are about fifty-five homes within a half mile of the boundaries of the quarry property, twenty being located on Edgewood Road. No owner of any property immediately adjacent to the quarry property has complained about its operations. Most of the witnesses who testified in this proceeding and complained about the quarry's operations live on or near Edgewood Road. Practically all of the homes in the area have been built since 1929.

There is a rather sharp curve in Edgewood Road as it approaches the quarry property. On this curve a private road, built for the quarry's use, enters Edgewood Road. This quarry road originally had a macadam surface, but in the summer of 1952 Morton put a penetrating oil on it. Then in February of 1953 the road was hard surfaced. It was regraded, rolled with rock, then a road oil was added, and the road rolled again. This was done in an attempt to keep the road free from dust. This quarry road runs uphill from the Edgewood Road intersection, and is quite steep. A surveyor testified that for the first forty feet the incline is eight per cent, for the next forty feet it is eight and eight-tenths per cent, the third forty feet is eighteen per cent, the fourth is eighteen and six-tenths per cent, while the fifth forty-foot stretch is eighteen per cent, and the sixth forty feet is sixteen and five-tenths per cent. The road then is practically level from the top of the hill to the quarry operation, a distance of about ninety feet.

The major objections of the householders who testified for the plaintiffs were that the operation of the quarry caused an excessive amount of dust, which carried over to the homes along Edgewood Road, and that the rock crusher, the trucks and the tractors used in the quarry's operation created a great amount of noise that was audible and annoying to some of the householders. There was also substantial evidence that the trucks from and to the quarry created a traffic hazard, particularly where the quarry road enters Edgewood Road. The traffic conditions on Edgewood Road are not due solely to defendants' trucks. Their trucks constitute a small percentage of the total number of vehicles on the road. Several other quarries also use Edgewood Road for their trucks, as do many private vehicles.

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[1] The record shows that after the preliminary injunction was granted, the trial court sustained a demurrer to the complaint upon which the injunction was predicated. Counsel have informed the court that an amended complaint has since been filed. That pleading is not before this court. So far as the record shows, the trial to determine whether a final injunction should be granted has not been held.

The quarry applied for a permit, as required by ordinance 961, but such application was denied by the Planning Commission and the Board of Supervisors. A mandamus proceeding is pending in the Superior Court to test the validity of those denials. An inspector of the County Planning Commission testified that in several respects the quarry was being operated in a manner that violated certain of the regulations contained in that ordinance. Thus, in at least one place, an excavation had been completed with less than a one-to-one slope, certain precautions against erosion had not been taken, and some portions of the quarry property had not been enclosed by a fence.

There was evidence that the tempo of the operations of the quarry had been increased shortly before the trial, that the quarry sometimes operated on Sunday, and that on some days it started operations early in the morning. There was also testimony by one witness to the effect that on one occasion a truck tire had rolled down the hill from the quarry property, crashed through a fence and into the home of the witness, barely missing a small child playing in the yard.

In most respects this evidence was contradicted by the witnesses for the quarry company, some of whom were householders on Edgewood Road. However, there is substantial evidence in the record to support the allegations of the complaint that this quarry was being operated in violation of the ordinance and in a manner so as to constitute a public and private nuisance as alleged in the complaint. This evidence need not be further reviewed. But it is important to note that there was no evidence of any kind that any one of the conditions of which complaint is made, except the very fact of the operation of the quarry, could not be regulated so as to prevent such conditions from constituting a nuisance. To the contrary, there was much testimony to the effect that the conditions complained about were subject to correction. There was testimony of engineers and experts that a housing could be devised for the crusher, where most of the dust was created, that would successfully prevent the escape of substantially all of the dust from that cause. Frequent sprinkling of the shoulders of the quarry road would obviously curtail dust from that source. The traffic hazard could be controlled by the use of a flagman at the intersection of the quarry and Edgewood roads. Moreover, Morton testified that he was in the course of constructing a different access road to the quarry operations that would be hard-surfaced and not as steep as the present road. Noise regulations of various sorts could have been imposed. Obviously, Sunday or early morning or late evening operations could be regulated. These facts are of considerable importance because the record does not show that, at either the hearing on the permit application, or on the present trial, defendants were given the opportunity to correct their methods of operation so as to minimize or prevent the conditions about which complaint was made. As already pointed out, the preliminary injunction from which this appeal is taken constitutes an absolute prohibition against the operation of the quarry in any fashion. Thus, had the restraining order not issued in the prohibition proceeding, the defendants would have been prevented entirely from operating the quarry, regardless of what corrective measures they might have been required to use to obviate existing conditions.

[1–3] There can be no doubt but that the injunction, insofar as it is based on the second and third causes of action, is much too broad in that it prohibits the operation of quarry, and does not give the defendants the alternative of correcting the manner of their operations. The operation of a quarry is, of course, a lawful business. It is not a nuisance *per se*. Of course, if in fact it is being operated so as to constitute a nuisance, the acts constituting the nuisance may and should be enjoined. It is even possible, where the facts justify it, that is, where the evidence shows that the business cannot be operated at all without creating a nuisance, to prohibit the operation completely. This same result may be reached by a proper and reasonable zoning ordinance. In re Angelus, 65 Cal.App.2d 441, 150 P.2d 908. But that is not this case. Here the trial court made no finding that the conditions creating the nuisance could not be rectified. The evidence, had such a finding been made, would not support such a finding. As already pointed out, the evidence is all to the contrary.

[4] There is a vast difference between regulating the methods of operation of a lawful business by injunction or ordinance, and in completely prohibiting the carrying on of such business. In re Lawrence, 55 Cal.App.2d 491, 497, 131 P.2d 27. Quarry property is generally a one-use property. The rock must be quarried at the site where it exists, or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted. While, under the police power, such complete prohibition against operating the property can be decreed, it can only be justified where irreparable injury to others necessarily results and the condition cannot be rectified except by complete prohibition.

[5] An injunction against operating property for the only lawful purpose for which it is fitted is an unusual and heroic remedy. It should only be employed where no other means of protecting the complaining public exists. Whether the attempt to regulate be by ordinance or by injunction the approach must be reasonable.

[6] The law is well settled to the effect that, when the defendant's business is not a nuisance *per se*, the injunction should be limited in scope so as to not enjoin the defendant's entire business if a less measure of restraint will afford the relief to which the plaintiff is entitled. The rule is stated as follows by Pomeroy in his work on Equitable Remedies, Vol. 2, (2d ed.), section 534:

> " 'Injunctions against carrying on a legitimate and lawful business should go no further than is absolutely necessary to protect the lawful rights of the parties seeking such injunction. When a person is engaged in carrying on such business, he should not be absolutely prohibited from doing so, unless it appears that the carrying on of such business will necessarily produce the injury complained of. If it can be conducted in such a way as not to constitute a nuisance, then it should be permitted to be continued in that manner.' Chamberlain v. Douglas, 1898, 24 App.Div. 582, 48 N.Y.S. 710, 711 * * *. In accordance with the same principle injunctions will not be issued, it is said, against a business which is a nuisance, when the nuisance can be remedied by the use of scientific appliances; instead the court will direct the introduction of such appliances, and whenever necessary to prevent hardship a reasonable amount of time, in which the defendant may conform to the injunction, will be allowed."

This has long been the rule in California. In the early case of McMenomy v. Baud, 87 Cal. 134, 26 P. 795, it was claimed that a brass foundry was allegedly endangering the safety and health of plaintiff and offending him by noise, jarring, smoke, smell, and obstructions. The court said 87 Cal. at Page 139, 26 P. at page 796: "Therefore, where the injurious effects complained of may be prevented without abating or enjoining the works or the operations thereof entirely, only the causes of the specific injurious effects proved should be enjoined. If, for example, the cause be the production and escape of smoke and soot in such a way as that they penetrate plaintiff's premises to his injury, the remedy by injunction should be restricted to this specific injury, and leave the defendant at liberty to operate his works, if he can, and elects to do so, in such a manner as to remove the cause and prevent the injury. [Citing cases.]"

In the recent case of Anderson v. Souza, 38 Cal.2d 825 at page 840, 243 P.2d 497, at page 507, the court stated: "Injunctive process ought never to go beyond the necessities of the case and where a legitimate business is being conducted and in the conduct thereof a nuisance has been created and is being maintained, the relief granted should be directed and confined to the elimination of the nuisance, unless under the peculiar circumstances of the case the business, lawful in itself, cannot be conducted without creating a nuisance and violating the rights of contiguous property owners."

In Thompson v. Kraft Cheese Co., 210 Cal. 171 at page 180, 291 P. 204 at page 208, in reversing an injunction on the ground that it was too broad the court stated:

"Where the decree absolutely prohibits any acts, there should be abundant evidence that the continuance of the acts will inevitably result in irreparable injury. In the absence of such strong evidence, the decree should merely enjoin the doing of the particular acts in a manner calculated to injure the plaintiff. [Citing cases.]" See, also, Fresno v. Fresno C. & I. Co., 98 Cal. 179, 184, 32 P. 943; Byers v. Colonial Irrigation Co., 134 Cal. 553, 555, 66 P. 732; People v. Selby Smelting & Lead Co., 163 Cal. 84, 124 P. 692, 124 P. 1135; Vowinckel v. N. Clark & Sons, 216 Cal. 156, 162, 13 P.2d 733; McPheeters v. McMahon, 131 Cal. App. 418, 425, 21 P.2d 606; see, also, cases collected 14 Cal.Jur. p. 275, § 76, in footnote 14 on p. 276.

This rule of law has been applied in this state to attempts to prohibit absolutely the operation of quarries, and this is so whether such absolute prohibition is attempted by ordinance or by injunction. One of the most recent cases is Wheeler v. Gregg, 90 Cal.App.2d 348, 203 P.2d 37. In this case a certain area was zoned as residential, but the ordinance permitted, under certain circumstances, a variance permit. Such a variance permit was granted to Gregg permitting him to operate a quarry subject to certain defined restrictions. In the action by the adjoining property owners to enjoin the quarry as a nuisance, the court, in its decree, included these restrictions and added several of its own. The property owners appealed. In upholding the action of the trial court the appellate court stated 90 Cal.App.2d at page 368, 203 P.2d at page 50: "Where, as here, the operations in question could not be characterized as a nuisance *per se,* the court was justified in following a well established rule of law which provides that under such circumstances the decree should not enjoin more than the specific thing which might constitute a nuisance, as appears from the requirements of the particular case. * * * It is now established law in this state that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and the regulation thereof should go no further than to control those particular features of the operations which might result in substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the land upon which the operations are being conducted. [Citing cases.]"

After reviewing some of the evidence the court stated 90 Cal.App.2d at page 369, 203 P.2d at page 51: "The court was therefore justified in giving heed to the aforesaid rule, that in proper cases it will not enjoin the conduct of a defendant's entire business where such business is not a nuisance *per se* if less measure of restriction will afford plaintiffs the relief to which they may be entitled."

In People v. Hawley, 207 Cal. 395, 279 P. 136, it appeared that smoke, dust and noise emanated from defendant's quarry, and that stagnant water there accumulated, to the annoyance and damage of some of the surrounding property owners. Excavations made by defendant whose quarry lands were in and near the bed of a stream, endangered the surrounding properties by increasing the danger of floods. The trial court, as to a portion of the quarry property, enjoined these practices, ordering defendant to drain off the stagnant waters and to fill the depressions, to substitute an electric for the existing steam shovel to eliminate noise and smoke, and to take certain described steps to protect the area from floods. As to the balance of the quarry property, however, the court found that such regulations would not protect the adjoining property owners, and enjoined all quarry operations in this area. The Supreme Court reversed this portion of the decree on the grounds that absolute prohibition was not justified and that conditions similar to those imposed on the other portion of the quarry lands would protect the adjoining owners. Thus, an absolute prohibition was not permitted.

In In re Kelso, 147 Cal. 609, 82 P. 241, 2 L.R.A.,N.S., 796, it was held that a zoning ordinance absolutely prohibiting quarrying operations in certain portions of the city was void. The court held that the use of property may be regulated under the police power in order to protect others, but that such regulation must be reasonable and can go no further than is necessary to protect the rights of others. "We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done, and, this being so, we are satisfied that an absolute prohibition of such removal, under all circumstances, cannot be upheld." 147 Cal. at page 613, 82 P. at page 242. The court then pointed out that proper regulations might cost so much as to make the quarry operation unprofitable, "but, if this be the effect of proper regulations, the property owner cannot complain, for he holds his property subject to the proper exercise of the police power of the state." 147 Cal. at p. 613, 82 P. at page 242. At page 612 of 147 Cal. at page 242 of 82 P. the court stated: "Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others; but it cannot be doubted that rock and stone may, under some circumstances, be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others, it is a lawful use, which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power." See, also, In re Throop, 169 Cal. 93, 99, 145 P. 1029.

[7] Now how do these rules apply to the present case? As to the third cause of action the trial court found that the quarry operation created a public nuisance in that such operation created a traffic hazard, creating excessive noise and dust "resulting in irreparable injury to the community in the vicinity of said quarry and to the public at large" and therefore should be enjoined. Obviously, under the rules above stated, so far as this cause of action is concerned, the injunction is too broad and must be reversed. There is no evidence that these conditions cannot be corrected, and there is uncontradicted and substantial evidence that they can. The trial court should have enjoined the objectionable practices and imposed conditions to correct them.

[8, 9] This is equally true of the second cause of action. As to it, the trial court found that the quarry was being operated in violation of ordinance 961 in that unlawful excavation practices were being used, certain areas were not fenced, and excessive dust and noise were created (all being in violation of the ordinance). There can be no doubt that these regulatory provisions constitute a valid exercise of the police power, and that the evidence supports these findings. Thus, defendants are operating in a manner prohibited by law. But the injunction has no relation to the manner of operation. It prohibits absolutely the use of the premises as a quarry. All of these acts which create a nuisance because of the manner of the operations can be corrected or stopped without preventing the quarry from operating. For these reasons the injunction as to the second cause of action should have been limited to prohibiting the acts creating the nuisance and to ordering any reasonable regulations of the manner of use that may be necessary. Thus, neither the second nor the third causes of action, nor the evidence and findings based thereon, supports the absolute injunction.

The first cause of action presents a somewhat different problem. It is the theory of this cause of action that, because defendants have no permit to operate a quarry as required by county ordinance 961,[2] such permit having been applied for and denied by the Planning Commission, the continued operation of the quarry without a permit, regardless of how operated, constitutes a nuisance. The trial court so found.

[10, 11] We have no doubt that, insofar as the ordinance requires of existing as well as of new quarries that they apply for and secure a permit to operate, it is a valid exercise of the police power. We also have no doubt that, if defendants had not applied for a permit, or if they had so applied and

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[2] This ordinance was passed in October of 1951 and became effective in November of that year.

the permit had been denied and defendants had allowed the determination to become final by not challenging the denial, the continued operation of the quarry would, as declared in the ordinance, constitute a nuisance which could be enjoined. Such would not be a denial of due process. City of San Mateo v. Hardy, 64 Cal.App.2d 794, 797, 149 P.2d 307; People v. Ryan, 17 Cal.App.2d 1, 3, 61 P.2d 360; Donovan v. City of Santa Monica, 88 Cal.App.2d 386, 397, 199 P.2d 51; City of Stockton v. Frisbie & Latta, 93 Cal.App. 277, 285, 270 P. 270. But that is not the present case. Here the defendants have utilized all of their administrative remedies, and are challenging, by mandamus, the validity of the rulings denying them a permit. From the evidence, briefs and pleadings it appears that defendants applied to the Planning Commission for a permit; that such a permit was denied; that defendants then "appealed" to the Board of Supervisors as provided in the ordinance; that again the permit was denied; that defendants then petitioned for a writ of mandamus in the Superior Court to review the validity of these denials, and that such mandamus proceeding is still pending in the Superior Court. Of course, the Commission was empowered to deny the application for the permit because defendants were operating in a manner contrary to several of the regulatory provisions of the ordinance, but, under the facts here involved, such denial cannot be given the effect of an absolute prohibition against conducting the business by the device of using such denial as a basis for an absolute injunction. Certainly it is not and should not be the law that the Superior Court, under such circumstances, on application by the county, can enjoin this lawful business simply and solely because defendants do not have a permit, while the validity of such failure is being tested, in a case where, as already held, the same Superior Court was without power to restrain the operation of the quarry because of the very acts which caused the Planning Commission to deny the permit. If the Superior Court was without power to enjoin because of those acts, as we have already held, it was without power to enjoin because of the lack of a permit based on a denial which was predicated on the same acts.

[12] The records, if any, compiled by the Planning Commission or the Board of Supervisors, are not in the present record. But certainly it cannot be presumed that the hearing and investigations by the Commission, or the "appeal" to the Board of Supervisors were more complete or exhaustive than the court hearing in the present injunction proceeding. It can reasonably be assumed that the facts that caused the Commission and the Board to deny the application for a permit, are the same facts that induced the Superior Court in the present proceeding to issue its injunction.[3] But as already held, these facts did not warrant the issuance of an injunction absolutely prohibiting defendants from operating. The Planning Commission is as much bound by the rule restricting the right to prohibit lawful businesses, where regulation is possible, as is a court. If, as already held, the trial court on the facts before it was without power to enjoin absolutely, it would be anomalous, indeed, to hold that an administrative determination which is under direct attack in the courts, should have greater legal effect. To so hold would be to give greater legal efficacy to administrative rulings than is afforded to judicial determinations. That is not the law. The vested right of defendants to engage in a lawful business, subject only to a lawful exercise of the police power, cannot be taken away in such a cavalier manner. To do so would be to deprive defendants of a vested right without due process.

[13] It necessarily follows that as long as the Planning Commission's determination is under direct legal attack, such inchoate

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[3] If the county desired to use the denial of the permit as the basis for the injunction the burden was on it to show, if such were the fact, that such denial was on grounds different from those urged in the injunction proceedings. This the county did not do.

determination denying to defendants the right to engage in a lawful business that they have engaged in since 1929 cannot be used as the sole basis upon which a court may enjoin the operation of that business. So far as the first cause of action is concerned, predicated as it is solely upon the denial of the permit by the Planning Commission, it is premature. The injunction based thereon must be reversed.

For reasons already mentioned, the prohibition proceeding (1 Civ. No. 15,983) is now moot, and for that reason is dismissed. In action 1 Civ. No. 16,125, the appeal from the order granting the preliminary injunction, the order granting such injunction is reversed, with instructions to proceed as here indicated.

BRAY and FRED B. WOOD, JJ., concur.

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124 Cal.App.2d 406

PAULEY v. FAUCETT et al.

Civ. 19741.

District Court of Appeal, Second District, Division 1, California.

April 5, 1954.

As Modified on Denial of Rehearing April 26, 1954.

Hearing Denied May 27, 1954.

Action in interpleader and for declaratory relief respecting disposition of royalties, deposited with the court clerk by plaintiff as assignee of an oil and gas lease executed by defendant executor's testator. From a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., defining the parties' rights to participate in royalties derived from production of oil by a slant-drilled well surfaced on testator's property and bottomed under an adjoining railway right of way, two other defendants appealed. The District Court of Appeal, Doran, J., held that neither appellant had any interest in such royalities under testator's deed, conveying to one of appellants a three per cent royalty in all oil within or underlying the described land, or testator's agreement to sell land to the other appellant with an undivided 48½ per cent interest in oil, etc., thereunder, where no oil was produced by such well from testator's property.

Judgment affirmed.

1. Mines and Minerals 🔑55(2)

An unambiguous deed, conveying royalty in all oil and gas underlying described land, speaks for itself and requires no construction or interpretation.

2. Mines and Minerals 🔑55(5)

A deed conveying three per cent royalty in all oil within or underlying described land gave grantee no rights in royalties derived from production of oil from land beneath adjoining railway right of way by slant-well, drilled thereto from surface of grantor's land by assignee of oil and gas lease thereon pursuant to supplemental agreement, not signed by grantee, between grantor and assignee.

3. Mines and Minerals 🔑55(2)

Where deed of oil royalty is clear, definite, certain and unambiguous, no act of either party thereto may be considered in determining its meaning.

4. Contracts 🔑143

No court, whether trial or appellate, has power to make for parties to written instrument a contractual arrangement which they did not see fit to make.

5. Mines and Minerals 🔑54(2)

Under agreement to sell land, with specified interest in oil and gas thereunder, to one to whom vendors executed a grant deed, deposited in escrow which was never closed, purchaser acquired no interest in royalties on oil produced from outside such land by slant-well drilled from surface thereof to land beneath adjoining railway right of way by assignee of oil and gas lease on vender's land pursuant to supplemental agreement, not signed by purchaser, between vendor and assignee.

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Harold F. Clary, Los Angeles, for appellant, Allen R. Mitchell.

Sprague & Sparks, Bailie, Turner, Lake & Sprague, R. Leslie Sparks, Los Angeles, for appellant, Wm. A. Hyson.

L. S. B. Ritchie, Los Angeles, for defendant, Robert L. Faucett, Executor.

Martin S. Ryan, Los Angeles, for respondent, Margaret F. Shoemaker.

Donald O. Bircher, in pro. per.

DORAN, Justice.

The plaintiff, Edwin W. Pauley, as lessee of an oil and gas lease executed by the decedent Edward P. Shoemaker to one C. C. Potter and assigned by Potter to Pauley, filed this action in interpleader and for declaratory relief in reference to the disposition of royalties accruing under said lease and held by plaintiff. By order of court, accrued and accruing royalties were deposited with the clerk of the court.

The events leading up to the present litigation, chronologically arranged, are as follows:

March 14, 1947, Edward P. and Margaret F. Shoemaker, husband and wife, and owners of the real estate here involved, executed a property settlement agreement which recognizes that the realty is community property.

August 19, 1948, Shoemaker conveyed to appellant Mitchell a 3% oil royalty in all oil, gas, etc. "within or underlying" or which may be produced or saved from the described acreage. This deed, made pursuant to permission granted by the Corporation Commissioner, was made subject to an outstanding oil lease in favor of Shell Oil Company which was thereafter surrendered. Shoemaker reserved the right to execute a new oil lease.

May 31, 1949, a second property settlement was made between the Shoemakers, granting to Mrs. Shoemaker 50% of all moneys received from oil royalties, etc. or other moneys received by Mr. Shoemaker in any manner involving oil, gas or mineral rights. Upon sale of the real property, Mrs. Shoemaker was to receive a stipulated portion of the purchase price.

On August 26, 1949, Edward P. Shoemaker and appellant Mitchell executed an oil lease covering this property in favor of one C. C. Potter, which lease, a month later, was assigned by Potter to Edwin W. Pauley, plaintiff and respondent herein.

June 27, 1950, Shoemaker agreed to sell appellant Hyson one or more acres of land, together with an undivided 48½% interest in oil, etc., thereunder, for which Hyson paid $2,000. An escrow was opened and a grant deed signed by Mr. and Mrs. Shoemaker was deposited therein, but the escrow was never closed.

October 2, 1950, a supplemental agreement adding a new paragraph to the oil lease was signed by Shoemaker and plaintiff Pauley, but not by appellant Mitchell who held the 3% royalty deed hereinbefore mentioned. Margaret F. Shoemaker approved the supplemental agreement and joined in its execution.

In November, 1950, the oil well drilled by Pauley came into production. Under the supplemental agreement just referred to, total royalties of 9% were to be paid on production of oil from a contemplated whipstock or slant-drilled well surfaced on the Shoemaker property. The oil well here involved, is such a slant-drilled well which is bottomed under an adjoining Pacific Electric right-of-way, and produces no oil underlying the property leased from Shoemaker. Of the 9% royalty provided under the supplemental lease agreement, 7% thereof is for oil and gas produced from an interval wholly outside the leased property, plus 2% as consideration for use of the surface of the leased premises.

On December 11, 1950, there was a sale and escrow agreement by Shoemaker and one Mars Norton covering a certain portion of the leased property.

January 17, 1951, Shoemaker sold to the defendant Donald O. Bircher 2% of the oil royalties accruing under the terms of the lease as amended, and in February, 1951, supplemental agreements and a grant deed from Shoemaker to Bircher were signed.

On February 16, 1951, Edward P. Shoemaker died, and defendant Robert L. Faucett was appointed executor of the decedent's will.

To Pauley's complaint seeking a determination of rights as to royalties the above mentioned parties answered, claiming certain rights therein by reason of the transactions and documents hereinbefore set forth.

The trial court, after finding that the royalties involved herein came entirely from the slant-drilled well bottomed "wholly without the external boundaries of the leased property", determined that the testator's wife, Margaret F. Shoemaker, by reason of the property settlement agreements, "is entitled to 4½% gross royalty production which is one-half of the gross royalty production interest", under the lease, which provided for a 9% royalty to be paid by Pauley.

The other half of the 9% royalty, was divided by the trial court between defendant Donald O. Bircher who "is entitled to an undivided 2% of the gross royalty production" from the well, by reason of Shoemaker's sale to Bircher of such interest on January 17, 1951; and Robert L. Faucett, Executor of the estate of Edward P. Shoemaker, who "is entitled to an undivided 2½% of the gross royalty production".

In respect to the appellant Allen R. Mitchell, it was determined that by the terms of the conveyance from Shoemaker to Mitchell on August 19, 1948, Mitchell had no interest in the royalty derived from the slant-drilled well since the oil was not produced from the described acreage, and Mitchell had refused to sign the supplemental lease agreement relating to slant-drilling. As to any oil produced from under the Shoemaker tract, Mitchell would, of course, be entitled to royalties as per the conveyance from Shoemaker.

Likewise, the appellant Wm. A. Hyson, who claimed under an uncompleted escrow with Shoemaker, was held not entitled to any interest in royalties produced from outside the Shoemaker tract, and therefore could claim no part of the income from the slant-drilled well in question. There was a similar holding in respect to the claim of Mars Norton who was held to have no interest in income from the well in question.

An examination of the record herein and of the documents on which the respective claims are predicated, leads to the conclusion that the judgment has correctly defined the rights of the various parties to participate in royalties derived from this well. No reversible error has been pointed out, and the record discloses substantial evidence in support of the findings.

The Mitchell Appeal

[1,2] It is claimed that "Appellant Mitchell by the instrument dated August 19, 1948, acquired a permanent 3% of all oil or gas within or underlying or which might be produced and saved from the lands described therein and his proportionate part of all royalties payable under the oil and gas lease then covering the lands and any lease which might thereafter be placed thereon". This, it is contended, covers the oil produced from the slant-drilled well in question.

In the brief filed by defendant Faucett, executor of the estate of Edward P. Shoemaker, and in the trial court's memorandum opinion, it is correctly pointed out that under the express terms of Shoemaker's deed to Mitchell, the 3% oil royalty therein conveyed, and approved by the Corporation Commissioner, relates only to "an undivided 3% interest in all oil, gas and other hydrocarbon substances which may be produced and saved from" the property owned by Shoemaker. Mitchell acquired no rights other than those therein specified.

As stated in the Faucett brief, "No claim is made that defendant Mitchell is without right or interest in the oil and gas underlying the Shoemaker acreage. * * Neither the brief of defendant Mitchell nor the record shows wherein that the Deed gives him any interest in the surface of the Shoemaker land or in the oil and gas being produced from the Pacific Electric lands". As hereinbefore mentioned, Mitchell, who did not see fit to sign the supplemental lease agreement of October 2, 1950, relating to slant-drilling, acquired no rights thereunder, and it is under this supplemental agreement, not under the original lease from Shoemaker and Mitchell to Potter, that the royalties here involved came into being.

Appellant Mitchell makes no claim that the deed from Shoemaker contains any ambiguity whatever. The conveyance therefor speaks for itself and requires no construction or interpretation. The precise grant of a 3% interest in the proceeds from oil and gas underlying the specifically described Shoemaker property is necessarily limited to that particular land, and cannot be extended by construction or otherwise, to include, as in the present case, oil produced from under other lands. Nor do any succeeding clauses in the instrument modify the original grant.

[3, 4] Mitchell has cited no case having factual similarity, tending to support the contention here made. And, as said in Paddock v. Vasquez, 1953, 122 Cal.App.2d 396, 265 P.2d 121, 128, "Since the deed is clear, definite, certain, and unambiguous, no act of either party may be considered in determining its meaning". No court, whether trial or appellate, is empowered to make for the parties to an instrument, a contractual arrangement which those parties did not see fit to make.

The Hyson Appeal

[5] As hereinbefore indicated, the claim of appellant William A. Hyson, is predicated upon an agreement dated June 27, 1950, whereby Shoemaker agreed to sell to Hyson one or more acres of land together with an undivided 48½% interest in and to the oil, gas and mineral rights thereunder. In this connection it may be noted that neither appellant Mitchell, nor respondent Pauley, were parties to this transaction, and the slant-drilled oil well here involved, had not then come into being.

Appellant Hyson appears to claim a present interest in all oil royalties "under the doctrine of equitable conversion", and contends that "Hyson's rights are determined as of the date of his contract of sale". In this connection it is argued that by reason of the agreement with Shoemaker, Hyson is entitled to participate "as a co-lessor or co-owner" with Shoemaker. The arguments offered to sustain these contentions are based upon premises which find no support either in law or in fact, and are in no wise persuasive.

The record herein discloses that after the Shoemaker-Hyson agreement was executed, the matter was placed in escrow. The transaction remained uncompleted at the time of Shoemaker's death, February 15, 1951. While it is true that Hyson's agreement with Shoemaker was made after execution of the oil lease which was duly recorded, this agreement relates only to the Shoemaker property therein described, and, as said in the Faucett brief, "certainly, he cannot claim more than he is entitled to under his contract of purchase". In this respect the Hyson claim is refuted by the same reasoning which applied in the Mitchell appeal already discussed herein. Moreover, as was the situation in the Mitchell claim, Hyson was not a party to and had nothing to do with the supplemental lease agreement under which the slant-drilled well was put down, and no oil has been produced from beneath the Shoemaker property covered by the Hyson agreement.

None of the cases cited in the Hyson brief stand as authority for permitting Hyson to share in the royalties here involved. In part, these cases deal with general principles about which there can be no controversey, but involve factual situations quite divergent from those here presented. For example, Union Pacific Railroad Co. v. City of Los Angeles, 53 Cal.App.2d 825, 128 P.2d 408, relates to Union Pacific's liability to pay a city license fee for "producing oil from any well located in the city", where the mouth of the well was within the city limits but the oil as taken from property within the City of Long Beach. No such situation exists in the present case.

So likewise, the expression in Lever v. Smith, 30 Cal.App.2d 667, 672, 87 P.2d 66, 69, that "upon the execution of the contract the vendees therein became the equitable owners of the property", relied upon in Hyson's brief, while doubtless good law in that case, which involved a purchaser of a lot subject to a community oil and gas lease, furnishes no support for Hyson's position in the present controversy.

The contention that the findings and conclusions of the trial court are erroneous, and that consequently the judgment must fall, is not borne out by the record. A fair trial seems to have been accorded to all parties concerned, the findings and conclusions of the trial court are supported by both law and evidence, and no reversible error has been pointed out.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur

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124 Cal.App.2d 527

HUDSON LUMBER CO.
v.
UNITED STATES PLYWOOD CORP.

UNITED STATES PLYWOOD CORP.
v.
HUDSON LUMBER CO.
Civ. 15855.

District Court of Appeal, First District,
Division 1, California.
April 13, 1954.
Rehearing Denied May 13, 1954.
Hearing Denied June 9, 1954.

Proceeding by seller of logs against buyer for confirmation of arbitrators' award and entry of judgment in conformity therewith. Buyer petitioned for denial of seller's petition and for order vacating such award. The Superior Court, City & County of San Francisco, William T. Sweigert, J., confirmed award, and buyer appealed. The District Court of Appeal, Bray, J., held that, where arbitration awards concerning theory and basis of cost accounting to be used in determining cost plus price for logs sold under contract and amount of credit buyer was entitled to for logs not properly scaled as merchantable under contract were definite, mutual, and final on their faces, facts that credit allowed equalled exact amount which buyer claimed on basis of accounting system not approved by arbitrators and that, if true, arbitrators had not properly applied accounting method approved by them in determining buyer's credit would not make the awards less definite, mutual, or final.

Judgment affirmed.

1. Arbitration and Award 🔑72, 73

The superior court upon motion to confirm, and the district court on appeal, do not have power to review sufficiency of evidence to sustain arbitration award. Code Civ.Proc. § 1288.

2. Arbitration and Award 🔑66

Both before superior and reviewing courts, every intendment of validity must be given to arbitration award, and burden is upon one claiming error to support his contention. Code Civ.Proc. § 1288.

3. Arbitration and Award 🔑31

Arbitrator need not make findings or give reasons for his conclusions. Code Civ.Proc. § 1288.

4. Arbitration and Award 🔑63

Where an issue is submitted to arbitration, arbitrators' decision is not reviewable even if they had decided it incorrectly. Code Civ.Proc. § 1288.

5. Arbitration and Award 🔑82(1)

There is strong public policy in favor of arbitration, of settling arbitrations speedily and with minimum of court interference, and of making arbitrators' awards final and conclusive. Code Civ. Proc. § 1288.

6. Arbitration and Award 🔑73

In absence of some limiting clause in arbitration agreement, merits of award, either upon questions of fact or of law, may not be reviewed except as provided in arbitration statute. Code Civ.Proc. § 1288.

7. Arbitration and Award 🔑73

Where inconsistency did not appear on face of arbitration award, and money credit was possible under theory of first award, court could not examine evidence to ascertain if such credit was in a correct amount, or if arbitrators, in arriving at such amount, had used some method other than one found by them to be correct. Code Civ.Proc. § 1288.

8. Arbitration and Award ⚷73

Once it is determined that money credit can be given under method found by arbitrators, the court may not determine how they arrived at amount of such credit. Code Civ.Proc. § 1288.

9. Arbitration and Award ⚷73

If arbitration is a "general" one, arbitrators' findings upon questions of law and fact are final and conclusive and may not be reviewed by the courts except for fraud or similar misconduct or unless error appears on face of award. Code Civ.Proc. § 1288.

10. Arbitration and Award ⚷58, 59, 60

Where arbitration awards concerning theory and basis of cost accounting to be used in determining cost plus price for logs sold under contract and amount of credit buyer was entitled to for logs not properly scaled as merchantable under contract were definite, mutual, and final on their faces, facts that credit allowed equalled exact amount, which buyer claimed on basis of accounting system not approved by arbitrators, and, if true, that arbitrators had not properly applied accounting method approved by them in determining buyer's credit would not make the awards any less definite, mutual, or final. Code Civ.Proc. § 1288(d).

◆

Bruner & Minder, A. W. Bruner, San Leandro, Heller, Ehrman, White & McAuliffe, Lloyd W. Dinkelspiel, Lawrence C. Baker, San Francisco, for appellant.

Eugene M. Prince, Eugene D. Bennett, L. F. Kuechler, San Francisco, Pillsbury, Madison & Sutro, San Francisco, of counsel, for respondent.

BRAY, Justice.

United States Plywood Corporation, a corporation, respondent here, petitioned the superior court for confirmation of award of arbitrators and entry of judgment in conformity therewith. Hudson Lumber Company, a corporation, the respondent below and appellant here, petitioned for the denial of that petition and for an order vacating said award. Appellant appeals from the judgment confirming and refusing to vacate said award.

Question Presented.

In a proceeding to confirm arbitrators' awards which are not inconsistent on their faces, is evidence received by the arbitrators admissible to prove that the awards are inconsistent?

Record.

This proceeding grows out of a contract dated December 9, 1947, wherein appellant agreed to buy and respondent to sell, over a long period of years commencing in 1948, merchantable cedar logs on a cost plus basis. The contract provides that as logs are delivered appellant is to pay at a tentative rate which is to be adjusted at such time as the cost of production is finally determined. Deliveries were made from August, 1948, to October 1, 1950, and a tentative price of $35 per 1,000 feet net scale of logs paid. A controversy arose as to the proper method of determining the costs under the following paragraph of the contract: "With the exception of the stumpage charge payable pursuant to subdivision (i) hereof logging costs, as hereinabove defined, shall be computed on a common cost per M ft. for all species derived from the LaTour timber and this common cost will be the cost per M ft. of cedar logs delivered to Hudson hereunder." There was a provision to the effect that the cost of logs should be determined by a designated firm of certified public accountants or such other certified public accountants as respondent should select. Respondent selected the firm of Arthur Andersen & Co. for this purpose. The contract provided for arbitration pursuant to the Rules of the American Arbitration Association. The parties submitted to arbitration two questions: (1) The claim made by appellant that improper cost accounting methods had been applied under the contract in determining the cost plus price for the years 1948 and 1949; (2) The claim made by appellant that in scaling logs under the contract there had been insufficient allowances for the fact "that said logs contained rot" which resulted in the respondent making deliveries of unmerchantable logs.

The arbitrators met, took evidence and made an award in favor of respondent on the accounting issue and in favor of appellant on the scaling issue. The awards were as follows:

> "1. That the theory and basis of cost accounting as followed in the audits and reports of Arthur Andersen & Co. for the years 1948 and 1949 are pursuant to the proper construction of the contract of December 9, 1847.
>
> "2. That Hudson is entitled to a credit for payment to Plywood under the contract for incense cedar logs delivered to October 31, 1950, which logs were not properly scales [scaled] as 'merchantable' under the contract, said credit being the sum of Thirty-Four Thousand, Seven Hundred and Fifty-Seven Dollars and Seventy Cents ($34,757.70)."

Applicable Law.

Appellant contends that the second award is inconsistent with the first and therefore the arbitrators "so imperfectly executed * * * [their powers], that a mutual, final and definite award, upon the subject matter submitted, was not made." Code Civ.Proc. § 1288, sub. (d). That subdivision requires the setting aside of the award in such event.

[1-6] Before discussing the situation here it is well to consider the legal effect of an award in arbitration. "* * * the superior court upon motion to confirm, and this court on appeal, has no power to review the sufficiency of the evidence to sustain the award * * *. [I]t is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention. [Citation.] It has been held that the arbitrator need not make findings or give reasons for his conclusions. [Citation.] Certainly it is settled that the courts have no power to review the sufficiency of the evidence. [Citations.]" Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 185, 260 P.2d 156, 171. As said in the Crofoot case, where an issue is submitted to arbitration, even if the arbitrators decided it incorrectly, their decision is not reviewable. Right or wrong it is conclusive. "Questions of fact and the sufficiency of the evidence cannot be reviewed by the courts." 119 Cal.App.2d at page 190, 260 P.2d at page 174. "* * an error of mixed law and fact, or of law" is not reviewable by the court. 119 Cal.App.2d at page 190, 260 P.2d at page 174. There is a strong public policy in favor of arbitration, of settling arbitrations speedily and with a minimum of court interference and of making the awards of arbitrators final and conclusive. "* * in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." Crofoot case, 119 Cal.App.2d at page 186, 260 P.2d at page 172. The statute referred to is section 1288, Code of Civil Procedure, prohibiting the vacation of such awards except under certain conditions, the only condition claimed to be applicable here being where the arbitrators "'so imperfectly executed'" their powers "'that a mutual, final and definite award, upon the subject matter submitted, was not made.'"

With these principles in mind we come to the determination of whether the awards here are mutual, final and definite. It is conceded that either award, if standing alone, could not be reviewed for the reasons given. But appellant claims that the second is completely inconsistent with the first award; that the Andersen method of computation which the arbitration board found to be the correct one does not permit of a dollar credit for unmerchantable deliveries and yet in the second award the board gave such dollar credit. At first appellant contended that under the Andersen theory there could be no dollar credit whatever for unmerchantable logs. Now it concedes respondent's contention that under that theory there could be a dollar credit for erroneous scaling in certain particulars but not to include a monetary credit for falling, bucking and limbing. Appellant then contends that such credit could not possibly under the evidence come to the amount awarded it, hence proving that the arbitrators in arriving at that amount did not use the Andersen method. This fact, contends appellant, would be demonstrated if the trial court had admitted certain evidence which was before the board. Appellant contends, in effect, that exhibit H–26 before the board (H–2 for identification before the court) should have been admitted not only as evidence of the facts upon which the board acted in arriving at award 2, but as evidence of the issues before the board under that award. However, the exhibit did not have that effect and was merely evidentiary. Again, it is contended that the amount of the second award is identical to the penny with the credit which appellant claims by its method of computation. Thus, says appellant, the board in the first award found in favor of the Andersen theory and basis of cost accounting, but arrived at the second award on appellant's theory and basis of cost accounting. On the face of the awards and the record before the trial court no such inconsistency appears.

[7, 8] The trial court took the position that it could only admit evidence of *the issues* submitted to the arbitrators, but could not review evidence with respect to how they reached their conclusion, and therefore rejected appellant's offer of evidence received by the board which appellant claims showed the inconsistency and irreconcilability of the two awards. This brings us to the crucial question as to whether, where no inconsistency appears on the face of the award, and where, as here, a money credit in some amount was possible under the theory of the first award the court may examine the evidence to ascertain if the credit was in a correct amount, or if the arbitrators in arriving at that amount used some method other than the one found by them to be the correct one. The answer is the court may not. To do so would violate the principle of the Crofoot case, supra, 119 Cal.App.2d at page 189, 260 P.2d at page 174: "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong the parties have contracted that such a decision should be conclusive. At most, it is an error of law, not reviewable by the courts." Once it is determined that a money credit can be given under the method found by the arbitrators, the court may not determine how they arrived at the figure they did; particularly is this so "since it is the law that the arbitrator is under no compulsion to explain his award or give reasons for his conclusions [citation], we must conclusively assume those conclusions are supported." Crofoot case, 119 Cal.App.2d at page 190, 260 P.2d at page 174. If it be that the arbitrators used the wrong figures or method in the second award, the situation is identical with one of those in the Crofoot case where it was contended that the arbitrator used the wrong date in calculating the deduction of damages allowed as to certain items. The court said, 119 Cal.App.2d at page 190, 260 P.2d at page 174: "If this were an error, a point we do not decide, it was an error of mixed law and fact, or of law, and, as such, not reviewable on this appeal."

The following extract from Sapp v. Barenfeld, 34 Cal.2d 515, 212 P.2d 233, shows how far the courts go in upholding arbitration. There the court after holding in effect that the only evidence before the board which is admissible in a court review of the award is that which shows what issues were before the arbitrators rather than on what evidence they decided those issues, said concerning a claim which it was contended the arbitrators failed to consider, 34 Cal.2d at page 523, 212 P.2d at page 239: "The claim must be expressly raised at some time before the award. If it can only be implied from the facts alleged, the failure to consider it is only an error of judgment that in the absence of fraud or gross misconduct is not subject to judicial review. 'Even if the omission to find as to those items was due to a mistake on the part of the arbitrators, nevertheless the omission was in effect a disallowance of those items, which became final and conclusive when the award was made and proper notice thereof given to the interested parties.'"

[9] In In re Frick's Estate, 130 Cal. App. 290, 19 P.2d 836, the transcript of the evidence before the arbitrators was offered in evidence and rejected by the trial court. In holding that the rejection was proper the reviewing court pointed out "that there was a decided controversy between the parties as to certain material facts; that the evidence of these facts was in wide conflict; that two of the arbitrators believed the evidence of respondent and found accordingly" 130 Cal. App. at page 293, 19 P.2d at page 837, and stated the applicable rule 130 Cal.App. at page 292, 19 P.2d at page 836: "* * * if the arbitration was a 'general' one, the findings of the arbitrators on questions of law as well as on questions of fact are final and conclusive and may not be reviewed by the courts (except for fraud or similar misconduct or *unless the error appears on the face of the award).* 2 R.C.L. p. 392; 5 C.J., p. 161; 3 Cal.Jur. p. 77; Peachy v. Ritchie, 4 Cal. 205, 207; Carsley v. Lindsay, 14 Cal. 390, 395; Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 160 [162 P. 631]." (Emphasis added.)

"Every reasonable intendment will be indulged to give effect to arbitration proceedings. An award made upon an unqualified submission will not be set aside on the ground that it is contrary to law unless the error appears on the face of the award * * *. The arbitrators were not required to find facts nor to give reasons for their award [citations] nor to describe how they arrived at their decision." Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 451, 452, 207 P.2d 647, 649, 650.

The cases cited by appellant as supporting their contention that the evidence upon which the arbitrators arrived at their decision is admissible in court to show the inconsistency of the awards do not so hold, as they are all cases where the inconsistency was evident on the face of the award. Moreover, the California cases were decided before the adoption of our present arbitration statutes, which very definitely increased the power of arbitrators. Pierson v. Norman, 2 Cal. 599, expressly stated: "It is evident, from merely reading the award, that it is uncertain and incomplete * * *." In Boyd v. Bargagliotti, 12 Cal.App. 228, 107 P. 150, 154, "the proceeding, called an arbitration, was not, as is obvious, an arbitration under our Code." The decision of the arbitrators on its face was not final as it left to be determined later the main question submitted, namely whether the work in question was performed as required by the award. In Application of Albert J. Pfeiffer, Inc., 222 App.Div. 62, 225 N.Y.S. 294, and Mercury Oil Refining Co. v. Oil Workers Int. Union, CIO, 10 Cir., 187 F.2d 980, it was held that the awards on their faces were too vague and indefinite to be enforceable. Arcola Fabrics Corp. v. Brenda Modes, Inc., Sup., 72 N.Y.S.2d 700, at first glance lends comfort to appellant's contention. However, on analysis it is not in point. There it was held that the arbitrators so imperfectly exercised their powers that a mutual, final and definite award based on the question submitted of what amount of merchandise remained undelivered was not made. The arbitrators found that all merchandise had been delivered. It was conceded that this was not true, even the successful party admitting that some of the merchandise was undelivered. Thus, it was a situation where there was no evidence to support the award, rather than as in our case, a question of sufficiency of the evidence, a matter which the authorities hold a court may not inquire into. In Modernage Furniture Corp. v. Weitz, Sup., 64 N.Y.S.2d 467, the arbitrator found the sales manager guilty of a willful refusal to enforce the employer's policy, sufficient cause for discharge, and yet sought to dispose of the issue by giving the manager a "warning" merely. The court held the arbitrator had no authority to make such disposition of the matter for having found the manager "guilty of the charge he should have reached the only legal conclusion possible, that is, that the employer had the right to discharge" him. 64 N.Y.S.2d at page 469. Obviously, all this appeared on the face of the award. In Application of Perlowin, 278 App.Div. 348, 105 N.Y.S. 2d 262, the award was set aside because it disregarded a stipulation of the parties submitting the controversy to arbitration, which stipulation directed the arbitrators "how they should decide one aspect of the controversy." 105 N.Y.S.2d at page 264. Clearly, arbitrators are limited to the issues presented to them.

[10] On their faces the awards are definite, mutual and final. The arbitrators determined the method of cost accounting proper under the contract. If the arbitrators under the evidence before them did not properly apply that method to the credits due appellant, such error did not make the awards any the less definite, mutual or final. Actually, the error, if any, in the second award was in appellant's favor, as it contends that the second award was far greater than the application of the Andersen theory would justify and equals the exact amount appellant claims it should receive. In view of the record admissible in court, the fact that the second award equals the exact amount which appellant claimed, does not of itself make the awards on their faces any the less definite, mutual or final.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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124 Cal.App.2d 539

SILLS v. SOTO et al.

District Court of Appeal, Third District, California.

April 13, 1954.

Personal injury action arising out of automobile accident. The Superior Court, Sacramento County, Henry, J., denied motion which plaintiff made for new trial on ground that damages awarded were inadequate as a matter of law and entered judgment upon verdict for plaintiff, and plaintiff appealed. The District Court of Appeals, Paulsen, J. pro tem., held that award of damages was not inadequate as a matter of law.

Judgment affirmed.

1. Appeal and Error 🔑699(2)

Where supplemental reporter's transcript, which trial judge had certified as containing all instructions actually given by him at trial, established that complained of instructions were not given, assignment of error based upon purported giving of such instructions would be disregarded by the District Court of Appeal.

2. Evidence 🔑571(2)

In personal injury action arising out of automobile accident, jury was not bound by medical testimony that plaintiff had not been feigning his symptoms and that accident had caused plaintiff's severe physical pain and much mental suffering, but was free to exercise independent judgment in determining nature, extent, and duration of plaintiff's injuries and amount of disability resulting therefrom.

3. Damages 🔑130(4)

Award of $2,500 damages to man, who, 15½ months after accident, had not resumed employment, except for less than one day, who allegedly became nauseated and suffered severe pains and headaches at the least exertion, who was not believed by doctors to be feigning his symptoms but was believed by them to have suffered severe physical pain and mental suffering because of accident, and who claimed $1,050 in lost wages and $1,000 to $1,100 in medical expenses, although he had alleged in his complaint only $658.20 for medical expenses, was not inadequate as a matter of law.

4. Appeal and Error 🔑1004(1)
Damages 🔑208(1)

It is in first instance, for jury to fix amount of damages, and, secondly, for trial judge, upon motion for new trial, to pass upon question of adequacy of such damages.

5. Appeal and Error 🔑1004(1)

Normally, the reviewing court does not have power to interfere with award of damages made except when facts before it suggest passion, prejudice, or corruption on part of jury or when uncontradicted evidence demonstrates that award is insufficient as matter of law.

6. Damages ⚿96, 104, 119

Where there cannot be fixed standard for determining amount of damages, triers of fact must of necessity be given broad discretion in deciding what award is fair and just.

7. New Trial ⚿75(4)

Where damages awarded in personal injury action were not inadequate as a matter of law, it could not be said that trial judge had abused his discretion in refusing to grant new trial on ground that damages were inadequate.

8. Damages ⚿210(2)

Where, in personal injury action, plaintiff did not seek to amend his complaint, in which he had prayed for special damages for medical expenses in amount of $658.20, plaintiff was limited to such amount, and jury was properly so charged.

◆

Busick & Busick, Sacramento, for appellant.

Desmond, McLaughlin & Russell, Sacramento, for respondents.

PAULSEN, Justice pro tem.

A jury awarded appellant damages in the amount of $2,500 for personal injuries sustained in an automobile accident. The trial court denied appellant's motion for a new trial and he has appealed from the judgment entered upon the jury's verdict.

[1] The major portion of appellant's opening brief is devoted to a discussion of the alleged error of the trial court in instructing the jury in respect to negligence and contributory negligence since the respondents admitted liability and the case was tried on the sole issue as to the amount of damages sustained by appellant. However, as pointed out by respondents, this assignment of error must be disregarded as the record on appeal, as augmented by a supplemental reporter's transcript which the trial judge has certified contains all the instructions actually given by him at the trial, establishes that the said complained of instructions were not given and that the case was submitted to the jury on the sole issue as to damages. Suprisingly, appellant in his reply brief offers no explanation of his misleading opening brief. However, in fairness to counsel, it should be observed that they did not participate in the trial, but were later substituted as attorneys of record, and from the clerk's transcript it would appear that the judge endorsed as "Given" certain instructions in regard to liability, but which in fact were not given according to his aforementioned certification to this Court.

Since the main point raised by appellant has become moot, we have but to consider his contentions that the evidence establishes that the damages are inadequate as a matter of law and that the trial court committed prejudicial error by instructing the jury that appellant could not recover in excess of $658.20 for medical expenses incurred or paid.

The accident out of which this cause of action arose occurred at the intersection of Broadway and Fifth Avenue in the City of Sacramento at 5 p. m. on a weekday when the traffic was heavy. At that time and place respondent Fleming drove a truck owned by the respondent Soto into the rear of an automobile being operated by appellant. For three or four minutes immediately prior thereto appellant's vehicle had been stopped behind three others, the first of which was awaiting an opportunity to make a left turn.

The appellant testified that he heard a thundering crash and then was thrown forward with such force and violence that he jackknifed under the steering wheel and lost consciousness for several minutes and that when he came to he was in a violent chill and had terrific pains in his head, neck, back, stomach and over his left ribs. Nevertheless, appellant was able to move his automobile from the middle of the intersection where it had stopped after the impact, and to engage in a short conversation with respondent Fleming. He now maintains that he was in a daze and a stupor when he did so, and that thereafter he again lapsed into unconsciousness. However, within a short time appellant recovered sufficiently to drive to a friend's house and telephone his sister to come and drive him home. This she did after first taking him to the Emergency Hospital as recommended by the police officer whom she called. After examination at the Emergency Hospital, the appellant was discharged without treatment and he was unable to contact his physician until the following day.

The next morning appellant went to work at his regular job which entailed heavy labor, but became ill and returned home and up to the time of trial, approximately 15½ months later, he had not been employed. He testified that his condition still was such that the least exertion or strain made him dizzy and nauseated and caused severe pains and headaches. His sister corroborated his testimony that he was unable to so much as cut the lawn or use a shovel to dig in the yard. Although ambulatory, he does nothing but read or water flowers and does not go fishing or engage in other activities as he formerly did. There was no evidence that prior to the accident appellant had been lazy, physically defective, or a malingerer. His employer for the 20½ months immediately preceding the accident testified that appellant seemed nervous, but that he was of a happy nature, well liked by all, a better than average worker, and that he would rehire him if he were ready to go back to work.

The day after the accident appellant's family doctor examined appellant but gave him no treatment, and he was not called as a witness at the trial. Being dissatisfied with the attitude of said physician and his failure to prescribe, appellant consulted Doctor Mearns three days after the accident and went to him three or four times during the following two months. Doctor Mearns, who is an orthopedic surgeon, testified at the trial pursuant to a subpoena issued on behalf of respondents and was the only witness produced by them. Doctor Mearns testified that a thorough examination, including X-rays, disclosed no bone injuries, but some osteoarthritis in appellant's neck and lower spine, which he claimed could not have been caused by the accident, but which he admitted quite possibly could have been aggravated by it. He also found that appellant had a mild strain of the muscles which extend over the shoulder blades from the neck to the shoulders, sprains of the muscles of the middle and lower back, and a probable contusion under the left arm. Doctor Mearns recommended heat and rest and was of the opinion at that time that appellant's muscular pains would probably disappear within the course of two months. However, when Doctor Mearns saw appellant about eight weeks later he was impressed with his nervousness and noted that appellant then complained of shortness of breath at night and inability to sleep. Although Doctor Mearns felt that some of appellant's complaints might be attributable to nervousness, he was thoroughly convinced that appellant was sincere and honest and was actually suffering from the pains he described. Doctor Mearns admitted he could speak only as an orthopedist and not as a psychiatrist and that although he determined appellant was not physically disabled, he was in no position to state whether or not he was psychotically disabled.

Appellant testified that about a month after the accident he developed shortness of breath and such severe chest pains that he consulted Doctor Johnson, a heart specialist, who diagnosed his ailment as a myocardiac condition caused by the accident. However, Doctor Johnson was not called as a witness, and Doctor Schroeder who subsequently took two electric cardiographs testified that they revealed no abnormality or disease of appellant's heart. However, he found that the left side of his chest was larger than his right and felt that nerve injuries incurred in the accident had caused an increased sensitivity of appellant's anterior chest wall which could produce painful sensations. Doctor Van Den Berg, a neurologist, discounted appellant's contention that an accident could produce myocarditis, but he admitted that he had not examined appellant's heart and did not know what its condition might be. Doctor Van Den Berg, on the basis of a neurological examination he made of appellant about eight months after the accident, testified that from the history of the case he concluded that appellant had suffered a concussion of the brain, a twisting of his spine, sprain of both shoulders, and some injury to the left arm. He could not determine whether or not the small hernia in the right groin, which appellant then had, antedated the accident, but he testified that the accident could have precipitated the hernia but that there would have to have been a congenital weakness or susceptibility to hernia in order for it to do so. Doctor Van Den Berg agreed with Doctor Mearns that appellant's arthritis of the neck and spine was not caused by the accident. In fact, ten years before he had treated appellant for mild arthritis. Doctor Van Den Berg found no evidence of a spinal cord injury, but he was of the opinion that the accident had caused nerve injury which was manifested by appellant's various pains, diminished sensation, altered reflexes, and feeling of numbness. He found no organic cause for appellant's frequent headaches, vomiting, and stomach distress and felt these disturbances were due to nerves. However, Doctor Van Den Berg was confident that appellant suffered from these subjective symptoms and did not imagine his pains. He stated that appellant had a definite neurosis and that any accident or strain, such as anxiety over pending litigation would tend to increase appellant's neurotic condition. He emphasized that people of the neurotic type, like appellant, were just as sick and suffered as much from pains and disturbances caused by nerves as if they had an organic disease. The doctor stated he could not estimate when appellant might be relieved or cured, but he did not think appellant would ever again be able to do hard work.

Doctor Schroeder, a specialist in internal medicine, to whom appellant went for examination and treatment about six months after the accident, in substance concurred in Doctor Van Den Berg's findings and prognosis. In addition, he stated that appellant's spine had a list or curve to the right. On this doctor's advice appellant had a brace fitted in an effort to improve his posture and ease muscular strain in his back. Doctor Schroeder agreed with Doctor Van Den Berg that appellant had suffered nerve injuries in the accident, but he went further and stated that he had no doubt that most of appellant's complaints were due to such injury. He added that appellant's left superficial abdominal reflexes were absent. Doctor Schroeder felt the accident caused appellant to undergo a personality change and that he was totally disabled except for capacity to live an almost "vegetative" existence. Doctor Schroeder concluded appellant was a "disabled man and very severely disabled. He has not impressed me as a malingerer at all."

[2–5] It is unnecessary to further detail the medical testimony as the foregoing résumé thereof demonstrates the unanimity of opinion of the experts that appellant was not feigning his symptoms and that the accident had caused appellant severe physical pain and much mental suffering. However, the jury was not bound by this testimony and was free to exercise its independent judgment in determining the nature, extent, and duration of appellant's injuries and the amount of disability resulting therefrom. Ortzman v. Van Der Waal, 114 Cal.App.2d 167, 170, 249 P.2d 846, 252 P.2d 7. Nevertheless, it is obvious that the jury did not reject the medical testimony in toto but gave it due consideration. By awarding the appellant $2,500, the jury recognized that he had suffered more than nominal damage. Although a judgment for a larger amount might not have been reversed as excessive, it does not follow that $2,500 is inadequate as a matter of law. No one but the victim knows the severity of the physical discomfort or the extent of the mental distress he experiences. The jury and the trial judge were just as capable of assigning a monetary value to the suffering undergone by appellant as this Court which has not had the opportunity to observe him and to judge of his credibility. There is no mathematical yardstick by which damages for pain and suffering can be measured. One individual might not be willing to endure appellant's pain and suffering for one day or for one hour for even a million dollars whereas a more stoic and mercenary person might consider $500 adequate compensation for such physical and mental discomfort and distress. For this cogent reason it has become well established that:

> "In the first instance, it is for the jury to fix the amount of damages, and secondly, for the trial judge, on a motion for a new trial, to pass on the question of adequacy. * * * Normally, the appellate court has no power to interfere except when the facts before it suggest passion, prejudice or corruption upon the part of the jury, or where the uncontradicted evidence demonstrates that the award is insufficient as a matter of law." Gersick v. Shilling, 97 Cal.App.2d 641, 645, 218 P.2d 583, 586.

[6, 7] The facts of this case do not bring it within the exceptions to the general rule. The jury was entitled to discredit appellant's claim that he had lost wages of $70 a week for 15 months and would continue to do so by reason of the injuries he sustained in the accident. The jury could find that the appellant was not wholly incapacitated and then he was and had been able to pursue some gainful occupation, and that he could and should mitigate such damages by securing employment suitable to any physical limitations he might have. The jury could determine that appellant's suffering was not of the intensity and duration that he described. If we assume, as contended by appellant, that the jury did not award the appellant more than $658.20 for his medical expenses, the jury must have assessed $1,841.80 as general damages to compensate appellant for his past and any future pain and suffering. This amount cannot be held inadequate as a matter of law. In a case such as this where there can be no fixed standard for determining the amount of damages, the triers of fact must of necessity be given broad discretion in deciding what sum is fair and just. The gravity of alleged injuries presents a question of fact which is within the province of the jury to determine. In evaluating the nature and effect of appellant's injuries, the jury could consider that they had not necessitated hospitalization nor the keeping of appellant under opiates. In fact, he was never bedridden. The appellant was able to attend the trial and the jury could from his physical appearance, facial expressions, and general demeanor draw its own conclusions as to how much pain he was then experiencing. Another factor which the jury could take into account was that only three doctors testified, although appellant was examined or treated by four or five others after the accident. The jury could also consider that the medical opinions expressed were based largely on complaints made by appellant and not on objective symptoms. The jury may have concluded that appellant exaggerated his ailments. Harris v. Los Angeles Transit Lines, 111 Cal.App.2d 593, 599, 245 P.2d 35. Since it cannot be said that from all the facts and the inferences which could be drawn therefrom that there could not be a reasonable difference of opinion as to whether or not appellant's general damages exceeded $1,841.80, it cannot be held as a matter of law that the $2,500 awarded him by the jury was inadequate. For the same reason, it cannot be said that the trial judge abused his discretion in refusing to grant a new trial on the ground that the damages were inadequate.

[8] The last ground which appellant urges as a basis for reversal of the judgment is alleged error in the trial court's instructing the jury that appellant could recover no more than $658.20 for medical expenses although he testified that he had spent between $1,000 and $1,100 for medical care since the accident. There was no proof that this was a reasonable amount nor that it did not include the cost of penicillin injections for an infection which may or may not have been caused by the accident. Moreover, the appellant did not seek to amend his complaint in which he prayed for special damages for incurred medical expenses in the amount of $658.20. Therefore, he was limited to that amount and the jury was properly so charged.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

124 Cal.App.2d 534

QUIROZ et al. v. STUZANE et al.

Civ. 19936.

District Court of Appeal, Second District,
Division 1, California.

April 13, 1954.

Action for injuries to a boy struck by a truck driven by one of defendants. From a judgment of the Superior Court of Los Angeles County, Robert H. Scott, J., for defendants, plaintiffs appealed. The District Court of Appeal, Doran, J., held that the trial court erred in excluding testimony of one who was driving a taxicab at the time and place of the accident as to a remark made by him when he saw the truck being driven fast and weaving in and out and another witness' testimony as to what part of the truck he thought hit the boy, as such remark, which probably related to the manner in which the truck was being operated, was relevant and not hearsay, and a witness is not required to testify with such certainty as to exclude all doubt from his mind.

Judgment reversed and cause remanded for a new trial.

1. Negligence ⊂⊃85(1)

The conduct of child of immature judgment should not be measured by standard of care required of an adult.

2. Evidence ⊂⊃317(2)

In action for injuries to boy crossing street when struck by truck driven by defendant, trial court erred in excluding testimony of one driving taxicab at time and place of accident as to a remark, made by him when he saw truck being driven fast and weaving in and out, on ground that he could not testify as to what he said except in defendant's presence, as remark, which was probably related to manner in which defendant was operating truck, was relevant and not hearsay.

3. Witnesses ⊂⊃247

In action for injuries to boy crossing street when struck by truck driven by defendant, trial court erred in excluding testimony as to what part of truck witness thought hit boy on ground that witness could not tell what he thought he saw, as witness is not required to testify with such certainty as to exclude all doubt from his mind.

4. Automobiles ⊂⊃244(7)

In action for injuries to boy crossing street when struck by truck driven by defendant, evidence that truck passed taxicab on its right side at high speed while taxicab and another automobile on taxicab's left side were stopped to let boy pass, supported trial judge's finding that defendant was negligent in operation of truck. Vehicle Code, §§ 529, 562(b).

5. Automobiles ⊂⊃160(4)

Pedestrians crossing streets and operators of motor vehicles thereon have equal rights.

◆

Rayfield Lundy, William B. Jones, Los Angeles, for appellants.

Gladys Towles Root, Joseph M. Rosen, Los Angeles, for respondents.

DORAN, Justice.

The action is for damages suffered by Gilbert Quiroz who, at the time of the accident was nine years nine months old. While crossing the street the boy was struck by a truck driven by defendant Antonio S. Andrade.

The trial judge decided, as the findings recite,

"I

"That the defendant Antonio Soto Andrade was negligent in the operation of the 1935 Dodge pick-up truck.

"II

"That plaintiff Gilbert Quiroz was guilty of contributory negligence in the crossing of the street known as Compton Boulevard, and that the said contributory negligence was the proximate cause of the collision between the truck operated by defendant Antonio Soto Andrade and the plaintiff Gilbert Quiroz."

As recited in appellant's brief, "The sole issue wished to be argued by plaintiff is whether or not the court's ruling that plaintiff was guilty of contributory negligence was proper."

In this connection appellant argues that, "A pedestrian crossing a street between intersections, at a place other than a marked crosswalk, must yield the right of way to vehicles. This is not a prohibition against crossing the street at a place other than a crosswalk, nor is crossing the street between intersections at a point other than a crosswalk negligent as a matter of law. And it is not necessarily the proximate cause of collision with an approaching vehicle, nor does it necessarily acquit the motorist of a charge of negligence. 7 Cal. Jur. (2) p. 112, Sect. 270."

[1] It also should be noted, as recited in Cal.Jur.(2d) p. 121, that, "The conduct of a child of immature judgment should not be measured by the standard of care required from an adult, for the reason that children have an imperfect knowledge of natural facts and laws and of the proper relation between cause and effect; they lack the discretion, thoughtfulness, and judgment presumed to be attributes of an ordinarily prudent adult who acquires these by experience. Thus, conduct which would be sufficient to charge an adult with contributory negligence as a matter of law may have no such effect in the case of a child."

For an excellent and comprehensive review of the law applicable to the issue, see 7 Cal.Jur.(2d) pp. 107–126, inc., and also 9 West's Cal.Dig., Automobiles, 🔑217(3), p. 46 et seq.

[2] The evidence may be best presented by referring to the testimony of Eugene Davis, who was driving a taxicab at the time and place of the accident. Davis testified, referring to the truck driver, "I noticed him on Compton Avenue, at about 97th Street, when I first noticed the truck". "He was traveling north". "I saw the truck driving in such a manner, he was driving so fast and weaving in and out, that I paid attention to him and I remarked that—

"The Court: Do not—

"The Witness: Well, he was driving in a fast manner—

"The Court: Wait a minute, Mr. Davis.

"The Witness: Yes.

"The Court: You are not allowed in testifying to tell what you said—

"The Witness: I see.

"The Court:—or what anybody else said unless Mr. Andrade was there and heard you.

"The Witness: Thank you.

"The Court: You can tell what you saw or the things that you heard but not the things that were said except in the presence of Mr. Andrade."

The above-quoted ruling by the court was error. The remark the witness referred to in all probability related to the manner in which defendant was operating the truck and was relevant. It did not call for hearsay and the rule referred to by the trial judge did not apply.

The witness continued,

"A. Well, the truck would pass me, then we would come to an intersection and it would go by me again, and when we'd come to another intersection it would weave out and in and pass me again. And at the point of the accident I happened to be stopped and the truck was in the rear. I particularly noticed him because of the noise that the motor was making, traveling at such a high speed."

The witness testified that the cab was stopped to let the boy pass and continued:

"Q. And the truck passed you? A. On the right side."

The witness testified that at the time the truck passed it was traveling 35 or 40 miles an hour and that, "In fact, there was two cars there, one on my left, and I was on the right, stopped to let the child by.

* * * * *

"A.—I had stopped, and the boy came right across in the front, and the truck came up on the extreme right and hit the child; but there were a car going south on the west side of the street who had stopped also * * *"

[3] It is important to note at this point another incident in the trial. A witness testified as follows:

> "Q. Did you see what part of the car hit him? A. I am not sure, but I think it was the—
>
> "Mr. Ibanez: I object to anything that the witness says he thinks he saw.
>
> "The Court: You may tell what you saw, not what you think you saw."

The ruling was error. It is elementary that a witness "is not required to testify with that certainty which excludes all doubt from his mind." People v. Soap, 127 Cal. 408, at page 410, 59 P. 771, at page 172. The court held in People v. Schoon, 177 Cal. 678, at page 680, 171 P. 680, at page 682, that, "There is no legal objection to such testimony." In the Schoon case the witness testified, "I thought then I saw somebody lying on the sidewalk * * *."

[4] Section 529 of the Vehicle Code provides that "The driver of a motor vehicle may overtake and pass another vehicle upon the right *only* under conditions permitting such movement in safety." (Italics added.) Section 562(b) provides that, "The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway." Obviously, the fact that the other cars traveling in both directions had stopped was notice to the operator of the truck to proceed cautiously. The finding by the trial judge that the defendant was guilty of negligence is abundantly supported by the evidence and the law.

[5] The finding that the boy was negligent, however, presents a different question. There are many cases where pedestrians crossing streets are held to be negligent but it does not follow and, it is not the law, that such an act is negligence per se. Manifestly each case depends on the facts and circumstances. It is well settled that pedestrians and the operators of motor vehicles have equal rights. The record herein discloses no evidence, direct or circumstantial, that the boy was negligent.

The attempted appeal from the order denying a new trial is dismissed.

The judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU and DORAN, JJ., concur.

In re RESLER'S ESTATE.*

RESLER et al.
v.
ROOS et al.
Civ. 15524, 15690.

District Court of Appeal, First District, Division 1, California.
April 16, 1954.
Rehearing Denied May 14, 1954.
Hearing Granted June 9, 1954.

Proceeding in probate of testate estate. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., made findings of fact, conclusions of law, and order on final account and executors' request for instruction and entered decree of settlement of final account, supplemental account, and final distribution, and testator's widow appealed. The District Court of Appeal, Fred B. Wood, J., held, inter alia, that where testator clearly manifested an intent to dispose of entire community estate, and his widow elected to take under the will, the will would be given effect in accordance with testator's intent, but reversed orders and decree on other grounds.

Orders and decree reversed with directions.

1. Husband Wife 🔑272

Neither member of a community has legal capacity, by his own act alone, whether inter-vivos or by will, to require or to effect a partition of community property, and interests of husband and wife may be segregated only in instances and in manner provided by statute. Civ.Code, §§ 136, 137, 141, 146, 158, 159.

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* Subsequent opinion 278 P.2d 1.

2. Wills ⚷577

Properly interpreted, will evidenced testator's intention to dispose of the entire community estate, rather than merely his own half-interest therein.

3. Wills ⚷439

It is the intent of the testator which governs interpretation of his will.

4. Wills ⚷488

In absence of ambiguity, patent or latent, in a will, there is no basis for consideration of extrinsic evidence bearing upon testator's intent.

5. Wills ⚷800

Where testator clearly manifested an intent to dispose of entire community estate, and his widow elected to take under will, will would be given effect in accordance with testator's intent.

6. Wills ⚷558(1)

The normal intendment is that in his will a person deals with property that is actually or potentially subject to his power of disposition.

7. Wills ⚷6

A testator has no power of testamentary disposition over his joint tenancy interest, which ceases to exist when he dies.

8. Wills ⚷558(1)

Where testator devised to wife, in addition to one-half of community property, such share in additional property, if any, as would give her property equal in value to one-half of property standing in name of testator or testator and widow, property which testator held in joint tenancy with third person could not be considered in determining widow's interest.

9. Wills ⚷767

Where will made specific legacy of testator's interest in a certain business, if he were owner thereof at death, but testator had sold his interest before death and taken a note in return, sale of subject matter abrogated bequest, and legatee was not entitled, under the legacy, to receive the note.

10. Wills ⚷736, 832

Where will made specific legacy and disposed of entire estate, but did not designate estate to be appropriated for payment of debts, expenses and family allowance, residuary estate was solely liable, if sufficient, and specific legatees would be liable only upon consumption of entire residuary estate. Probate Code, § 750.

11. Executors and Administrators ⚷194(5)

In probate proceeding, evidence supported finding that testator's widow had entered oral agreement with her co-executors whereby family allowance to widow would continue for only one year, and that widow was entitled to no further allowance.

12. Wills ⚷800

Where will disposed of entire community estate, giving one-half thereof to testator's widow, and provided that estate and inheritance taxes should be chargeable to and payable out of residuary estate only, widow was entitled to one-half of entire community estate before payment of taxes.

◆

Jefferson E. Peyser, Guernsey Carson, San Francisco, for appellants.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondents.

FRED B. WOOD, Justice.

Jacob Resler died testate July 13, 1949. He left surviving him his widow, Fay Lieberman Resler; his stepmother, Yetta Resler; a brother, Abraham Resler; three sisters, Lenore Roos, Gertrude Resler and Mollie Resler Rogers; a nephew, Stanley Resler; a niece, Phyllis Rose Baruch; and no lineal descendant.

Jacob and Fay were married in 1936 and lived together until his death.

Fay has appealed from (1) the findings of fact, conclusions of law and order as to final account of executors, objections thereto, and requests of executors for instructions filed October 10, 1951, and (2) the decree of settlement of final account, supplemental account and final distribution, filed August 8, 1952.

The issues upon these consolidated appeals relate principally to the interpretation properly to be placed upon certain provisions of the will. Specifically, appellant presents these questions: (1) Did the testator dispose of all the community property or only his undivided half-interest therein, and in ascertaining the testator's intent in that regard should the court have entertained appellant's offer of extrinsic evidence? (2) Should the value of certain property held by the testator and a third party as joint tenants have been included in the computation when ascertaining the widow's distributive share under the will? (3) Did the court make proper disposition of the Camil Roos note? (4) Did the court err in charging the entire estate, including the widow's community interest, with testator's debts, the expenses of administration, and the family allowance? (5) Did the court err in limiting to one year the $2,000 per month family allowance awarded appellant? (6) Did the court err in decreeing that appellant's share is one-half of the property remaining after deduction of estate and inheritance taxes?

(1) Did the testator undertake to dispose of all the community property or only his undivided half interest therein?

"From a reading of the Will," the trial court found "that the decedent did not intend to devise or bequeath all of the community property * * * and that he did intend by said Will to bequeath and devise only his half of said community estate." That is an interpretation of the fourth paragraph of the will, which reads: "There shall first be set aside to my beloved wife, FAY LIEBERMAN RESLER, property (other than that which I have specifically hereinafter devised and bequeathed) equal in value to one-half (½) of the community estate of myself and my said wife. In addition thereto, I hereby devise and bequeath to my said wife if she survives me and lives for one hundred and eighty days after my death, such, if any, additional property as with her said share of our community estate shall give to her property of value equal to one-half (½) of that property which at the date of my death stands in the name of myself or of myself and my said wife (excluding therefrom any property held in the names of my wife and myself as joint tenants with right of survivorship).

"The further provisions of this my Last Will and Testament relate to that portion of my estate remaining after there has been set aside the property to be distributed and devised and bequeathed to my wife in accordance with the foregoing provisions of this paragraph."

The property parenthetically described as "that which I have specifically hereinafter devised and bequeathed" consisted of "all household furniture, personal effects and automobile that I may possess at the time of my death, except as hereinafter specifically devised and bequeathed," bequeathed to the testator's wife (par. Fifth); $5,000 to his stepmother (Sixth); $2,000 to his sister Frances Resler Rosenfeld (Seventh), which lapsed because she predeceased him; $1,000 to his nephew (Eighth); diamond ring to his niece and wrist watch to his brother (Ninth); his interest in a certain business, operated under the name "Swift Ltd.," to his sister Lenore (Eleventh).[1]

He gave the residue of the estate to his brother and to his sisters Mollie, Lenore and Gertrude, one-fourth thereof to each, describing the residue as follows: "All the rest, residue and remainder of my estate, whether the same be real, personal or mixed, of whatever kind or character, and wheresoever the same may be situate, of which I may die seized or possessed, or in which I may have any interest or right of testamentary disposition or power of appointment at my death, and including all failed and lapsed legacies and devises." (Twelfth.)

A literal reading of this will indicates that the testator dealt with the entire community estate, not merely his half-interest in the community. He dealt with the corpus of that estate, not with his undivided half-interest therein.

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[1] Decedent later sold his interest in this business to his brother-in-law Camil Roos, accepting the promissory note of the latter (dated January 4, 1949) in the principal sum of $52,254.58, bearing interest at 6%. By the date of the testator's death, the principal sum had been reduced to $32,254.58. There was interest unpaid which by September 4, 1951, accumulated to $5,053.39.

First, he directed that "property" be "set aside" to his wife, equal in value to one-half the aggregate value of all their community property. (1st sentence of 4th paragraph.) That, in substance, was a direction that the corpus of the community estate be partitioned and, when partitioned, one-half of the corpus (not an undivided half-interest in the whole) be "set aside" to the wife.

Next, he bequeathed to her "such, if any, additional property as with her said share of our community estate shall give to her property of value equal to one-half of that property which at the date of my death stands in the name of myself or of myself and my said wife * * * [excluding their joint tenancy property] * * *." (2nd sentence of 4th paragraph.) This clause applied, at least, to his separate property, whether standing in his sole name or in their names as tenants in common, and augmented the bequest already made from the community estate by giving her "property" (whether community or separate) equal to one-half the value of all his separate property. This clause, consistently with the first one, dealt with the corpus of the property, not with an undivided interest in it, and required a selection or setting aside of specific items of property, measured by their value. It tends to support, certainly does not cast any doubt upon, our interpretation of the first clause.

Finally, he expressly characterized this "setting aside" to the wife as testamentary (a devise or bequest) when he declared that the "further provisions" of his will related to that "portion of my estate remaining after there has been set aside the property to be distributed and devised and bequeathed to my wife in accordance with the foregoing provisions of this paragraph." (3rd sentence of 4th paragraph.) Consistently adhering to the concept of setting "property" (not her undivided interest in property) aside to the wife, he declared the nature and purpose thereof: "to be distributed and devised and bequeathed to my wife."

The statement, also, that such "further provisions" relate to that "portion of my estate remaining" is additionally consistent with the thought that he was dealing with all the community property (her interest therein as well as his) as if it were a part of "my [his] estate."

[1] This "remaining portion" he dealt with in similar fashion: Specific monetary legacies, to several of his collateral relatives; diamond ring, to his niece; wrist watch, to his brother; other personal effects, automobile, and household furniture, to his wife; his interest in Swift Ltd., to a sister. Each of these provisions is a bequest of the entire interest in a specific item of property. Each tends to confirm, certainly does not negative, the interpretation we have placed upon the first sentence of the fourth paragraph of the will. Respondents argue: (1) the monetary legacies are small in proportion to the amount of cash in the estate, (2) the ring and the watch should be treated as de minimus, (3) the testator's interest in Swift Ltd. may have been his separate property, and, inferentially, (4) he could put the household furniture, automobile and personal effects in his wife's name by simply relinquishing his half-interest therein to her. Such an argument misses the point, which is, simply, that in disposing of the "portion of my [his] estate remaining" after partitioning the property and giving half of the corpus to his wife, he followed the same pattern, a pattern he could not have followed in respect to community property, without first effecting such a partition.[2]

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[2] Neither member of the community has the legal capacity by his own act alone whether inter-vivos or by will, to require or to effect a partition of the property of the community. The interests of husband and wife may be segregated only in the instances and in the manner provided by statute; i. e., by agreement of husband and wife, Civ.Code, §§ 158–159, by divorce decree, Civ.Code, § 146, by separate action based upon a divorce decree which made no disposition of community property (Percy v. Percy, 188 Cal. 765, 771), or as the result of an unsuc-

[2] Clearly, the testator intended to and did assert dominion over the entire community estate and undertook to and did dispose of all of it, subject of course to the right of the widow to assert her right to her undivided one-half independently of the will.

[3] It is the "intent" of the testator which governs in any such case as this. It was so held as early as 1865 in this state: "The intention of the testator is to be kept in view as the pole star in the construction or interpretation of his will; and it is not to be presumed in the absence of a manifest intent on his part, that he designed to make disposition of any property not his own. But when it does so appear, and the owner of such property accepts a legacy or devise under the will, which acceptance necessarily operates to give effect to the will as an entire disposition by the testator, such acceptance must, by the conditions on which it is founded, be held to be a confirmation of the dispositions of the will. * * * That the testator attempted to deal with the Blucher Rancho [a part of the community estate] as his own property, is evident from the language of his will in respect to it. He uses the language of a sole proprietor, as it would seem, *ex industria*. He speaks of it as '*my* Blucher Rancho' not less than five times in his will." Morrison v. Bowman, 29 Cal. 337, 350–351.

By 1887, this concept was too well established to require the citation of authority: "No citation of authorities is required to show that a will is to be construed according to the intention of the testator. Such is the rule prescribed by the Code. It is elementary. It has always been a cardinal canon. As said in Morrison v. Bowman, 29 Cal. 337, the intention of the testator is to be kept in view as the pole star in the construction or interpretation of the will. The language of every clause in the will before us bears evidence of the fact that the testator intended to deal with the whole of the community property; and all the provisions of the will, taken together, afford most convincing proof of the fact that he believed he was dealing with the whole of the community property when he used the words 'all my estate.' He speaks of the home place as 'my residence,' and deals with the household and kitchen furniture as his own, regardless of any claim or right in his wife. He disposes of certain shares of stock as if no one but himself had any interest therein. He refers to a certain stock of grain, and the business in connection therewith, as 'my (his) grain business,' when he must have known (if he was dealing with a half interest only) that his wife would take the other half by operation of law, and with his executors would have the right to control and manage the same after his death, and provides that Major Batte shall wind up the business, and fixes his compensation at two thousand dollars therefor." In re Stewart's Estate, 74 Cal. 98, 101–102, 15 P. 445, 446.

This unbroken line of authority continues: In re Smith's Estate, 1895, 108 Cal. 115, 119–120, 40 P. 1037; In re Estate of Vogt, 1908, 154 Cal. 508, 510–512, 98 P. 265; In re Estate of Dargie, 1918, 179 Cal. 418, 419–421, 177 P. 165; In re Estate of Moore, 1923, 62 Cal.App. 265, 270–274, 216 P. 981; In re Estate of Emerson, 1947, 82 Cal.App. 2d 510, 513–514, 186 P.2d 734; In re Estate of Klingenberg, 1949, 94 Cal.App.2d 240, 243–244, 210 P.2d 514.

[4, 5] The testator having clearly manifested an intent[3] to dispose of the community property in its entirety (the wife's interest as well as his own) and she having insistently elected to take under the will, the will must be given effect in accordance with his intent.

(2) Should the value of certain property held by the testator and a third party as joint tenants have been included in the computation when ascertaining the widow's distributive share under the will?

The parties stipulated and the court found that the whole of the estate of the decedent was community property of himself and his wife.

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cessful divorce action or action for separate maintenance. Civ.Code, §§ 136, 137, 141. See McClain v. Tufts, 83 Cal.App.2d 140, 142, 187 P.2d 818.

[3] In the absence of ambiguity, patent or latent, there is no basis for the consideration of extrinsic evidence bearing upon such intent.

That would seem to leave no property which would be subject to division, allocation, or bequest pursuant to the provisions of the second sentence of the fourth paragraph of the will.

Yet appellant directs attention to certain property, known as the "Albany property," which until testator's death stood in his name and that of his sister, Gertrude Resler, as joint tenants with right of survivorship. It was valued at $40,000.

Appellant claims that property to the amount in value of half of the testator's half interest in the Albany property was devised to her by the provisions of the second sentence of the fourth paragraph of the will. We do not so read the will.

In the first sentence of the fourth paragraph, as we have observed, plaintiff in effect directed partition of the community property, giving his wife half of the corpus of the community as thus partitioned. He then said: "In addition thereto, I hereby devise and bequeath to my said wife * * * such, if any, additional property as with her said share of our community estate shall give to her property of value equal to one-half (½) of that property which at the date of my death stands in the name of myself or of myself and my said wife (excluding therefrom any property held in the names of my wife and myself as joint tenants with right of survivorship."

This "additional property" would of course be measured by something other than community property. That measure or standard would include his separate property in his estate and subject to his testamentary disposition, whether standing in his name alone or in the names of himself and wife as tenants in common. Conceivably, it might but would not necessarily include separate property of his standing in the names of himself and a third person as tenants in common. But we do not derive from the language used an intent to include property held in joint tenancy with a third person, such as the Albany property.

[6, 7] The normal intendment is that in his will a person deals with property that is actually or potentially subject to his power of disposition; actually, if it is his separate property, or his half-interest in the community; potentially, as we have seen, if it is his spouse's half-interest in the community estate. A testator, of course, has no power of *testamentary* disposition over his joint tenancy interest, which ceases to exist when he dies. It is no answer to say that here the testator was not undertaking to dispose of his joint tenancy interest in the Albany property, that he was merely using it as a measure of value. Why import into this will an intent to deal with inter-vivos transactions and in effect thwart the result thereof? Where would one stop? Upon what basis could we include a joint tenancy interest and exclude a mere life tenancy? A testator could include either a joint tenancy interest or a life tenancy interest, or both, in his measure of value but the intent to do so must be clearly expressed to overcome the presumption that in his will he deals with and speaks of his disposable interest in property. If we were to go beyond this presumption without a clearly expressed intent which overcomes the presumption in reasonably precise terms, we would enter the realm of fruitless speculation.

This testator has not indicated an intent contrary to the presumption mentioned. Indeed, insofar as he has mentioned a joint tenancy interest, he has indicated an intent to exclude it. When referring to property standing "in the name of myself and my said wife" he said, "excluding therefrom any property held in the names of my wife and myself as joint tenants with right of survivorship."

Yet, appellant would, in effect, read into "stands in the name of myself" his interest in property standing "in my name and the name of a third person (other than my wife)" *including,* not *"excluding,"* property held as joint tenants with right of survivorship.

In support of the urge to read this in, appellant says "It is only natural" that the testator "would want to compensate his wife for the loss to the estate caused by the various inter-vivos and testamentary gifts of community property" and, having "taken community property[4] and put it into joint tenancy so that his wife could not reach it, Mr. Resler wanted to compensate her for the loss she was certain to suffer if he predeceased his sister."

This, we think, proves too much. There was a piece of property which he held in joint tenancy with appellant. She, of course, became sole owner of that property upon his death. We do not know its value. For the purpose of discussion, let us assume it was worth $40,000. His half-interest ($20,000) goes to her automatically. Thus, she receives, according to her formula, more than the one-half which he allotted her by his will. Is she also to receive a further additional $10,000 worth of property out of his estate, predicated upon his already terminated joint interest in the Albany property? If so, she will receive property exceeding by $30,000 the value of the half-interest which, according to her interpretation, he intended she should receive. It is, indeed, a strange "equalizing" factor that thus disproportionately favors the widow.

[8] We conclude that the trial court correctly found that the Albany property did not come within the purview of the fourth paragraph of the will and that its value could not be considered in determining the value of the property to be distributed to appellant pursuant to the will.

(3) Did the court make proper disposition of the Camil Roos note?

[9] The Camil Roos note, appraised at $32,254.58, was awarded to Lenore, and money in the amount of half the value of the note to appellant. Accumulated interest in the amount of $5,053.39 as of September 4, 1951, was found due the estate but no specific mention of it was made in the decree.

This disposition of the note was erroneous and seems to have resulted from treating the note as the equivalent of the testator's interest in Swift Ltd., which interest the testator gave to Lenore but no longer owned at the time of his death. The bequest was abrogated by destruction of the subject matter. The testator's intent in that regard is clear for in his will he said *"if at the time of my death I am the owner* of an interest in that certain business * * * operating under the * * * name of 'Swift Ltd.', *I give* and bequeath all of my *said interest* therein to my sister, Lenore Roos" (Emphasis added). This language negatives an intent to bequeath to Lenore the proceeds of the sale of that "interest." See In re Estate of Babb, 200 Cal. 252, 256–259, 252 P. 1039; In re Estate of McLaughlin, 97 Cal.App. 481, 275 P. 874.

Accordingly, this promissory note was a part of the community estate of the testator and appellant, not specifically bequeathed by him to Lenore or any other person. It was thus a part of the community estate which by the fourth paragraph of his will was subject to division or partition and allocation.

If, when such division is made, this note is allocated to appellant there will, of course, be no basis for distributing it to Lenore. If, when the division is made, the note is not allocated to appellant, it will go into the residuum and be available for award to Lenore pursuant to a written consent that it be distributed to her, a consent filed by the other residuary legatees; that is, if the note is not needed, as a part of the residuary estate, for the payment of debts, expenses of administration, family allowance and taxes. In the present state of the case the award of the note to Lenore must be annulled.

(4) Did the court err in charging the entire estate, including the widow's community interest, with testator's debts, the expenses of administration, and the family allowance?

[10] The testator did not make provision by his will, and did not designate the estate to be appropriated, for the payment of "his debts, the expenses of administration, or family allowance". Nor did he leave any portion of the estate undisposed of by will. Accordingly, "the property given to residuary legatees and devisees" must be first "appropriated for that pur-

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[4] We are aware of no proof that the Albany property was community property at any time.

pose". Probate Code, § 750; In re Estate of De Santi, 53 Cal.App.2d 716, 717–721, 128 P.2d 434. See also In re Estate of Babb, supra, 200 Cal. 252, 258–260, 252 P. 1039; In re Estate of Bacigalupi, 105 Cal. App. 578, 580–582, 288 P. 122.

The trial court erroneously held the entire estate chargeable with testator's debts, the expenses of administration and family allowance. Instead, the property given the residuary legatees is solely liable if sufficient in amount. The property bequeathed to appellant does not become liable for any part thereof unless and until the residuary property is entirely consumed in paying the debts, expenses and family allowance, and then only for her ratable portion of the remaining unpaid part.

(5) Did the court err in limiting to one year the $2,000 per month family allowance which it awarded the appellant? No.

[11] An order was made allowing appellant, for support and maintenance, $2,000 per month, beginning as of July 13, 1949, and continuing until further order of the court. No further order was made until July 27, 1951, when a minute entry was made declaring, "Widow entitled to $24,000 family allowance," followed by this finding in the findings of fact dated September 19th and filed October 10, 1951: "On August 4, 1949, upon the petition of said Fay Lieberman Resler, widow of decedent, this Court ordered that a family allowance of $2,000.00 per month be allowed and paid to said Fay Lieberman Resler for her support and maintenance beginning as of July 13, 1949, and continuing until further order of the Court. At the time of the hearing on said petition, the attorney for the executors advised the executors that the administration of the estate would be concluded within six or eight months after issuance of letters, and the executors, Camil N. Roos and Lenore Roos, and Lenore Roos individually, in reliance upon said statement, made no objection to the making of the said order for family allowance. Some time prior to the expiration of one year, and in April, 1950, said executrix and widow of said decedent, Fay Lieberman Resler, entered into an oral agreement with her coexecutors, Camil N. Roos and Lenore Roos, that the family allowance should continue for one year following the death of decedent and no further. In reliance upon said agreement, neither the executors, Lenore Roos nor Camil N. Roos nor Lenore Roos individually, made any effort to have the order of family allowance, made as hereinabove set out, vacated or set aside. Following the expiration of said one year period from the date of the death of decedent, and on or about October 11, 1950, said Fay Lieberman Resler, demanded the payment to her of an additional $6,000.00, representing $2,000.00 a month for the period following the end of said one year period, and said $6,000.00 was paid to her upon her executing and delivering to her two coexecutors her agreement in writing that, in the event this Court should determine that the maximum family allowance to which she was or would be entitled to was in the sum of $24,000.00, she would repay to the estate the said $6,000.00. The total amount of family allowance to which said Fay Lieberman Resler is or will be entitled is the sum of $24,000.00, and she is, therefore, indebted to the estate in the sum of $6,000.00, and the executors are directed to reimburse the estate by withholding the sum of $6,000.00 from the amount distributed to her on distribution of the estate. The item in the final account of executors heretofore filed, 'Fay Resler, family allowance to 10/13/50, $6,000.00', which is on page 4 of Exhibit A attached to the account, is disallowed."

We have examined the record and are convinced that the evidence though in conflict supports this finding of an oral agreement or understanding between appellant, Lenore and Camil.

Accordingly, we conclude that the court properly found and decreed that appellant is indebted to the estate in the sum of $6,000, the excess over $24,000 paid her as family allowance.

(6) Did the court err in decreeing that the widow's share is one-half of the property remaining after deduction of estate and inheritance taxes?

[12] The testator in his will directed that "all estate and inheritance taxes applicable to or payable on account of all

gifts, devises, and bequests made in and by the terms of this my Last Will and Testament be held chargeable to and payable out of my residuary estate and not chargeable to and payable by or collectible from the persons to whom or for whose benefit such gifts, devises and bequests are made." (Third paragraph of the will.)

The trial court found that this provision had only to do with gifts, devises and bequests made in the will; that the only gift, bequest or devise to appellant is the bequest of household furniture and personal effects, said taxes thereon being payable out of the residuary estate; that the taxes on the other specific bequests (the ring, the wristwatch, the $1,000 to the nephew, and the Camil Roos note to Lenore) are likewise payable out of the residuary estate; and that appellant is entitled to receive "an undivided one-half of the property hereinbefore listed as remaining for distribution with the exception of the household furniture and jewelry specifically bequeathed, and the promissory note of Camil N. Roos"; i. e., a one-half interest in "that part of the estate remaining after payment of * * * [expenses of administration, debts of decedent, family allowance, and] * * * the federal estate taxes, if any, assessed against the said estate."

The error of these findings stems from the erroneous conclusion of law that "there is no gift or devise or bequest made to Fay Lieberman Resler in article 'Fourth' of the said will."

Accordingly, all estate and inheritance taxes payable on account of bequests made by the will (including those payable in respect to bequests to appellant expressed in the fourth and fifth paragraphs) must be paid out of the residuary estate.

This means that in allocating specific pieces of property to appellant under the fourth paragraph of the will, the total value of all of the community property (without deduction of any portion of the amount of federal estate or state inheritance taxes) must be used as the yardstick. That total will then be divided by two. The resultant sum will be the measure of the bequest made in the fourth paragraph. Appellant must receive property (in addition to the furniture, automobile and personal effects bequeathed her in the fifth paragraph of the will) which has a total value equal to that sum.

It is apparent that the orders and the decree appealed from must be reversed but that not all the issues involved need be retried. Accordingly, the orders and the decree appealed from are reversed with directions that the trial court revise the findings of fact and conclusions of law, taking such further steps and proceedings in the action as may be meet and proper, and render judgment, all in accordance with the views herein expressed; costs to be borne equally by appellant and respondents.

PETERS, P. J., and BRAY, J., concur.

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124 Cal.App.2d 561

HENDERSHOTT et al.

v.

SHIPMAN et al.

Civ. 19881.

District Court of Appeal, Second District, Division 1, California.

April 15, 1954.

Rehearing Denied May 10, 1954.

Hearing Denied June 9, 1954.

Action to quiet title to real property acquired by purchasers at assessment sale. The Superior Court, Los Angeles County, William J. Palmer, J., rendered decree for purchasers and former owners appealed. The District Court of Appeal, White, P. J., held, inter alia, that statute imposing limitation on suits attacking deeds issued under provisions of the Street Improvement Act was not unconstitutional in its application to former property owners whose unoccupied and unimproved land had been made subject to street assessment before passage of the limitation statute, and that such statute barred introduction of evidence attacking validity of procedure culminating in issuance of treasurer's deed.

Judgment affirmed.

1. Appeal and Error ⚷1097(1)

Decision on previous appeal in purchasers' quiet title action that certificate of sale, issued at assessment sale, was a valid and subsisting lien on real estate in question rendered issue of validity of the certificate and proceedings leading up to sale res judicata, and evidence attacking validity of certificate was properly excluded from purchasers' subsequent quiet title action predicated upon new treasurer's deed. Streets and Highways Code, § 500 et seq.

2. Constitutional Law ⚷107

Parties have no vested right in a statute of limitation, unless it has already run in favor of a party, and they contract in the light of the power of the Legislature to modify or change existing remedies or prescribe new modes of procedure, providing a substantial and efficacious remedy remains.

3. Limitation of Actions ⚷4(2)

Statute imposing limitation on suits attacking deeds issued under provisions of Street Improvement Act was not unconstitutional in its application to property owners whose unoccupied and unimproved land had been made subject to street assessment before passage of the statute of limitations. Streets and Highways Code, § 500 et seq.

4. Municipal Corporations ⚷579

Under statute imposing limitation on suits attacking deeds issued under provisions of Street Improvement Act, former owners of property sold at assessment sale could not introduce, in purchasers' quiet title action brought more than six months after issuance of deed, evidence attacking validity of proceedings culminating in issuance of treasurer's deed. Streets and Highways Code, § 6571.

5. Appeal and Error ⚷1056(3)

Where evidence which former owners proferred, in assessment sale purchasers' quiet title action, would not have supported any conclusion against validity of purchasers' deed, exclusion thereof was not reversible error, even if evidence was admissible despite statute limiting actions attacking deeds issued under Street Improvement Act. Streets and Highways Code, §§ 6550, 6571.

6. Equity ⚷65(2)

That purchasers at assessment sale applied for second treasurer's deed before final determination of their title under first treasurer's deed did not invoke doctrine of unclean hands to bar purchasers from bringing quiet title action to determine title under second deed. Streets and Highways Code, § 500 et seq.

Charles Murstein, Los Angeles, for appellants.

John F. Bender, Compton, and Gizella M. Allen, Los Angeles, for respondents.

WHITE, Presiding Justice.

In an action to quiet title to real property plaintiffs prevailed, and the defendants have appealed from the judgment. The cause was tried before the court, sitting without a jury. Plaintiffs' title was based upon a deed issued by the City Treasurer of the City of Los Angeles after proceedings leading to a sale and the issuance of a certificate of sale upon an assessment levied upon the property pursuant to the Acquisition and Improvement Act of 1911.

This is the second action between the same parties involving the same property and the same assessment sale. In the first action the plaintiffs sued to quiet title based upon a deed from the City Treasurer of Los Angeles and the defendants filed an answer but sought no affirmative relief. In the prior action it was adjudged that the deed of the City Treasurer was void, but that the plaintiffs' certificate of sale was a valid and subsisting lien upon the property. Defendants appealed, and the judgment was affirmed by the Supreme Court, Hendershott v. Shipman, 37 Cal.2d 190, 231 P.2d 481, 483. During the pendency of the appeal in the Supreme Court the plaintiffs applied to the City Treasurer of Los Angeles and secured from him a second deed, and the present action to quiet title is based upon this second deed of the City Treasurer of Los Angeles. In this second action, as in the first, defendants sought no affirmative relief, but rested their defense upon their denial of the validity of plaintiffs' title and their own allegations of ownership.

Upon the trial of the instant cause the plaintiffs introduced into evidence their second treasurer's deed and thereupon rested. The defendants then sought to introduce certain records of the office of the City Treasurer of the City of Los Angeles, in an effort to attack the validity of the certificate of sale and the validity of the treasurer's deed. The proffered evidence was rejected.

[1] The trial court properly ruled that no evidence could be received to impugn the validity of the certificate of sale as a valid and subsisting lien upon the property. In the appeal in the first action between these parties, Hendershott v. Shipman, supra, the Supreme Court, noting that the appeal was upon the judgment roll alone, stated that "the validity of the certificate of sale as well as of the treasurer's deed was within the issues, and it must be assumed in the absence of a transcript of the trial proceedings that all issues respecting the validity of the certificate of sale and the deed were tried without objection. Baar v. Smith, 201 Cal. 87, 98, 255 P. 827. Likewise in the absence of a transcript of the evidence it must be assumed that there is no evidentiary or time factor upon or within which the defendants could successfully question the validity of the certificate of sale, and consequently the finding thereon must be deemed supported. * * *" Any issue, therefore, as to the validity of the proceedings leading up to the sale and the issuance of the certificate of sale must be held to be res judicata.

[2–4] With respect to the validity of the second treasurer's deed upon which plaintiffs' title rests, appellants urge that the court erred in excluding evidence offered "for the purpose of attacking the validity of the proceedings subsequent to the issuance of the certificate of sale and culminating in the issuance of the treasurer's deed," their position in this regard being that section 6571 of the Streets and Highways Code, as applied to them, is unconstitutional. The cited section, enacted as part of the Street Improvement Act of 1911, § 75, in 1937, and re-enacted as part of the Streets and Highways Code in 1941 provides that "Any action, suit or proceeding attacking or contesting the validity of any deed issued under the provisions of this division, or the validity of the proceedings subsequent to the issuance of the certificate of sale, must be brought within six months after the issuance of the deed, and if the validity of the deed or of the proceedings is not contested within that six months' period, it shall not be thereafter contested or questioned in any action, suit or proceeding." Appellants rely upon authorities which state that a street assessment is a contract and the provisions of the statute in force at the time prescribing the manner of its enforcement are a part of such contract. Stated another way, appellants urge that since the original act under which the assessment was levied contained no time limitation upon their right to contest the validity of proceedings leading to a sale and the subsequent issuance of a treasurer's deed, their contract rights were fixed when the original street proceedings were taken, and could not thereafter be impaired under the guise of altering their remedy or limiting the time within which they could enforce ther rights. The answer to this contention is found in the following language from Rombotis v. Fink, 89 Cal.App.2d 378, 386, 201 P.2d 588, 593:

"The answer to the argument that the law in existence at the time of the issuance of the bonds or levying of the assessment enters into and becomes an essential part of the contract, is that the rule contended for is subject to the long and well established exception that the parties have no vested right in a statute of limitation * * *; that they contract in the light of the power of the Legislature to modify or change existing remedies or prescribe new modes of procedure, provided a substantial and efficacious remedy remains. National Surety Co. v. Architectural Decorating Co., 226 U.S. 276, 33 S.Ct. 17, 57 L.Ed. 221; that the time 'following the maturity of a cause of action allowed for commencing such action may be cut down by legislation subsequent to the contract * * * provided only that * * * reasonable time still emains'. Security First National Bank of Los Angeles] v. Sartori, 34 Cal.App.2d 408, 93 P.2d 863, 865. In the last-cited case it was said: '* * * A common expression of the rule is that no one has a vested right in any particular allowance of time unless it has already run in his favor. That is as much as to say that, though his substantive right has been already created, he may be required by a change of statute to take affirmative action to preserve and enforce it within a shorter time than would have been allowed him for so doing by the statute in force when his right came into being. By analogy, no reason would appear to exist why, since he may thus be required by legislation subsequent to the initiation of his right to actually bring action to enforce it within a shorter period, such subsequent legislation may not also, without being held to impair his right, require him to do something else, not unreasonably burdensome, to keep his right alive, such, for instance as the giving to the public of some reasonable notice of its continued existence. * * *'"

Furthermore, it was said in Schulman v. Shores, 108 Cal.App.2d 156, 238 P.2d 664, although not necessary to the decision, that objection to the introduction of evidence attacking the validity of the treasurer's deeds should have been sustained, because the six months' period within which the validity of the deeds could have been assailed (under Streets and Highways Code section 6571) had expired.

More recently, in Elbert, Ltd. v. Cross, 41 Cal.2d 322, 260 P.2d 35, the constitutional question was directly presented, and it was held by the Supreme Court (1) that section 6571 applies as well when it sought to attack a treasurer's deed by way of defense to an action as when an action is brought directly attacking the validity of such a deed; (2) that such a limitation does not deprive the property owner of his property without due process of law (when proper notice has not been given the property owner of the purchaser's or lienholder's application for a deed), at least where the property owner is not the occupier of the property. See, also, McCaslin v. Hamblen, 37 Cal.2d 196, 199, 231 P.2d 1. The property involved herein is unoccupied and unimproved.

[5] A further and distinct ground for affirmance of the judgment herein is that an examination of the record fails to disclose how the evidence proffered by defendants and rejected by the trial court could have supported a finding or judgment against the validity of the second treasurer's deed. The learned trial judge suggested that the defendants make an offer of proof in order to complete a suitable record on appeal. The defendants did not file a written statement or have read into the record a statement of what they proposed to prove, but made their offer by offering into evidence and having read into the record various documents from the files of the City Treasurer of Los Angeles. In addition, there was put in evidence the record of the previous action between the parties. A careful reading of the record presented to this court discloses that the evidence proposed to be introduced by defendants wholly fails to support any conclusion against the invalidity of the treasurer's deed, whether for lack of notice as prescribed by section 6550 of the Streets and Highways Code, or otherwise.

[6] Appellants make the final point that respondents did not come into court "with clean hands" for the reason that they secured the issuance of the second treasurer's deed before the decision was rendered by the Supreme Court on the first appeal. There is no merit to this contention. Respondents merely acted diligently and with proper precaution, for the reason that section 6752 of the Streets and Highways Code provides that when a treasurer's deed is held void, the lien continues until a valid deed is issued, but not for longer than two years after the deed is held void. The judgment holding the first treasurer's deed void was entered on May 6, 1949. The decision of the Supreme Court on appeal from that judgment was rendered May 15, 1951. Respondents cannot be held to have acted in bad faith because they took the precaution of securing a second deed within two years after entry of the judgment instead of relying upon a possible ruling that the two-year period prescribed by statute com-

menced to run only when the judgment that the first deed was void became final by affirmance on appeal. Moreover, the record discloses that the second treasurer's deed was held in the office of the City Treasurer and not delivered until the City Treasurer had been advised that the decision of the Supreme Court had become final and the remittitur issued. Appellants' contentions in this regard lack substance.

For the reasons stated, the judgment is affirmed.

DORAN and DRAPEAU, JJ., concur.

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124 Cal.App.2d 602

MARTIN et ux. v. HENDERSON.

Civ. 8284.

District Court of Appeal, Third District, California.

April 19, 1954.

Action by homeowners against contractor to quite title to house and lot and to recover alleged overpayment with cross actions by contractor on an open book account and on an account stated. Homeowners' title was quieted by judgment on the pleadings prior to trial. The Superior Court, Butte County, McGregor, J., rendered judgment for contractor and homeowners appealed. The District Court of Appeal, Schottky, J., held that finding that building of homeowners' house had not been undertaken by contractor on a contract basis but under mutual help arrangement, was sustained by the evidence.

Affirmed.

1. Contracts 🔑28(3)

In action by homeowners against contractor to quiet title to house and lot and to recover alleged overpayment and cross-actions by contractor on an open book account and on an account stated, finding, that the building of homeowners' house had not been undertaken by contractor on a contract basis but under mutual help arrangement, was sustained by the evidence. Business and Professions Code, §§ 7026, 7031.

2. Licenses 🔑39.43

Contractor, who agreed to build house under mutual help arrangement and not on a contract basis, was not barred from maintaining action to recover for labor and materials furnished by him although his contractor's license had expired during building of house and had not been renewed. Business and Professions Code, §§ 7026, 7031.

3. Account, Action on 🔑7

In cross-action by contractor on open book account and on an account stated, findings that contractor had furnished labor and materials to homeowners for construction of house, and that there was a balance due contractor of $1,556.65, were sustained by the evidence.

4. Account, Action on 🔑6(5)

In cross-action by contractor on open book account and on an account stated, wherein contractor's evidence established he had furnished labor and materials to homeowners under mutual help arrangement, no fatal variance existed between contractor's pleadings and proof.

5. Appeal and Error 🔑1039(13)

Even if there had been a variance between pleadings and proof in contractor's action on open book account and on an account stated for labor and materials furnished for construction of house under mutual help arrangement, where homeowners did not plead statute of limitations in answer, made no objections during trial to a variance, and did not show on appeal that they were prejudiced by the variance, reviewing court would not reverse case, which had been tried on the merits. Business and Professions Code, §§ 7026, 7031.

6. Pleading 🔑430(2)

An objection of variance between allegations and proof is deemed to be waived when not raised at the trial.

7. Pleading ⚷398

A variance between allegations and proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits.

8. Pleading ⚷398

A variance between pleading and proof may be disregarded where the action has been fully and fairly tried on the merits as though the variance had not existed.

◆

John W. Finley, Chico, for appellants.

Whitten & Fortino, Chico, for respondent.

SCHOTTKY, Justice.

Plaintiffs, husband and wife, commenced an action against defendant Henderson and several fictitious defendants, the complaint stating two causes of action: the first to quiet title to a house and lot; and the second to recover an overpayment alleged to have been made by plaintiffs to defendants. Defendant Henderson filed an answer substantially admitting the allegations of plaintiffs' first cause of action, denying the material allegations of the second cause of action, and also filed a cross-complaint against plaintiffs stating two causes of action: the first being on an alleged indebtedness for labor and materials furnished on an open book account; and the second being on an account stated. No other defendants were served or appeared in the action. Plaintiffs' title to the house and lot were quieted by a judgment on the pleadings on the first cause of action prior to the trial. The case was tried by the court without a jury and the court found that there was no definite contract between the parties for the construction of a home as alleged by plaintiffs, and that defendant Henderson did furnish labor and materials to plaintiffs for which there was due him a balance of $1,556.65. Judgment was entered in accordance with said findings and plaintiffs have appealed from said judgment.

It appears from the record that appellants wanted to build a house on a lot which they owned in Chico, California, and that in April, 1948, they discussed the matter with respondent who was then a licensed building contractor. Respondent quoted a price of $6,500 as the cost of constructing the house in accordance with blueprints furnished by appellants and plans and specifications prepared by respondent. It was contemplated that the construction would be financed through an F. H. A. loan from one of the local banks, and the papers necessary for the loan were also prepared. One or two local banks were approached in the matter, but the loan was refused. Thereafter, on about May 1, 1948, respondent commenced construction of the house. There was no written contract between the parties regarding this work, and the nature and terms of their agreement are in dispute. Appellants testified that respondent made a firm commitment to building the house for $6,500, appellants to make a down payment of $300 and to pay the balance in installments of $50 per month. Respondent testified that the price of $6,500, quoted by him, was contingent upon the loan being obtained, and that when the loan was refused no specific price was agreed upon. The arrangement, according to respondent's testimony, was one of mutual help, as follows: Mr. Martin, one of the appellants, was to help respondent tear down a building located in Chico, and respondent was to help appellants build their house. Appellants were to reimburse respondent for the cost of new materials and labor (other than his own services) furnished by him, and were to pay him $50 per thousand for lumber obtained from the dismantled building and used in the construction of the house. Appellants were to pay him $300 at the outset, and thereafter at the rate of $50 per month.

Various workmen were employed by respondent in the construction of the house during May and June, 1948, and a couple of them worked there for a short time in August. Respondent, himself, worked on the house from time to time, until early October, 1948, when he quit. At that time the house was only partially completed. Respondent testified that he had received only $400 in cash from appellants and that the last payment, included in this total, had been made on June 6th. He also testified that appellants owed him a balance of $1,666.50 for labor and materials furnished by him. This included the amount paid out by him to his workmen for labor on the house, the amount charged for his own work on the house, and the balance owing for materials after credit had been given for appellants' cash payments and for the amounts earned by Mr. Martin in helping to demolish the other building.

Respondent kept weekly payroll records covering his entire payroll. Work performed on appellants' house was shown by the letter "M" entered after the employee's name on the payroll record. In determining the quantity and kind of materials furnished respondent made his computation from the blueprints, figuring from them how much lumber and other materials would be required for the work done, although the extent of the work was itself in dispute. This computation was made after commencement of the action and in response to appellants' demand for a bill of particulars. Respondent testified that the price of $100 per thousand, which he charged for new lumber, was an average price as shown by the invoices. A charge of $50 per thousand was made for the used lumber, and respondent testified that this was in accordance with the agreement of the parties. There is testimony showing that new lumber was used in certain parts of the structure, and salvaged lumber was used in other parts. It is obvious that respondent kept no records of the materials actually furnished by him. As to the hours which he, himself, worked, respondent apparently entered them in a vest pocket time book which he carried.

Respondent's contractor's license expired on June 31, 1948, and was not thereafter renewed. He testified that he did not complete the construction because he ran out of money, appellants having failed to keep up the promised monthly payments. He denied, on cross-examination, that the expiration of his contractor's license had anything to do with it.

Apparently, application for a building permit was not made until November 3, 1948. Mrs. Martin testified that respondent went with her to get the permit and that the following occurred: "so they asked King, these people, asked Henderson if he was the builder and he said 'No' he said he was just helping my husband out that he wasn't the contractor that he was helping my husband out and my husband was going to help him out or something on a house and that was all and we left, we left the permit there about a week or two weeks because we didn't have money to pay for it." Respondent did not apply for the permit, nor was it issued in his name.

Respondent took out a policy of fire insurance in the amount of $6,500. He testified that he obtained it in order to take care of his own materials in the house and he stated, on cross-examination, that he arrived at that particular amount because he thought the place would be worth that if it were finished. Appellants contend that this policy amount confirms their claim that there was an agreed price of $6,500.

In arguing for a reversal of the judgment appellants make three contentions: First, that there is no evidence to support the finding that there was an open book account; second, that there was no evidence to support the finding that there was an account stated; and, third, that in any event the judgment cannot be sustained because respondent's contractor's license expired during the performance of the contract.

[1, 2] We shall discuss the third contention first. If respondent had entered into a contract to build the house for appellants, he no doubt would have been a contractor within the definition set out in section 7026 of the Business and Professions Code, and therefore would be unable to maintain his cross-action because of the expiration of his license. Bus. and Prof. Code, sec. 7031. However, the court found that the job was not undertaken on a contract basis, and there is substantial evidence to support this finding. Therefore, respondent, not having acted in the capacity of a contractor, was not barred by section

7031 of the Business and Professions Code from maintaining his cross-complaint. Harrison v. Shamalian, 110 Cal.App.2d 500, 502, 243 P.2d 82.

Appellants' remaining contentions are that the evidence does not support the court's findings that there was an open book account and also an account stated. As hereinbefore stated, respondent's cross-complaint contained two counts: one for labor and materials furnished on an open book account; and the other on account stated. The trial court found, in part, "That the defendant King Henderson supports the allegations of the cross-complaint on file herein, and in fact shows that said defendant did furnish certain materials and labor to the plaintiffs in the construction of said residence."

[3, 4] It is clear that the court found that there was no definite contract between appellants and respondent; that respondent had furnished labor and materials to appellants for which there was a balance due of $1,556.65, and it is clear, also, that the evidence amply supports such findings. There is no merit in appellants' contention that there is a fatal variance between pleading and proof. For as stated in Hansen v. Burford, 212 Cal. 100, at page 107, 297 P. 908, at page 911:

> "* * * The distinction, as a matter of pleading, between a book account and an ordinary contract debt not founded on a writing, is only important when, as in Wright v. Loaiza, 177 Cal. 605, 171 P. 311, the statute of limitations is involved and where the question arises whether suit may be commenced within four years, or must be begun within two years after the cause of action has accrued. In the present case, all the transactions were had within two years before the complaint was filed. In these circumstances the distinction between pleading a book account and pleading an indebtedness generally seems to us inconsequential."

[5] In the instant case all of the transactions were had within two years prior to the filing of the cross-complaint and would not be barred by the statute of limitations whether the complaint was based upon an open book account or an ordinary contract. Furthermore, appellants did not plead the statute of limitations in their answer to the cross-complaint.

[6-8] It appears from the record that the case was fully tried on its merits, there being a sharp conflict in the evidence. Appellants at no time during the trial made any objection or contention that there was a variance between the pleadings and the proof, and we are convinced that if such objection had been made, the variance could easily have been cured by an amendment deleting the phrase "on an open book account" from the first paragraph of the first count of the cross-complaint. An objection of variance between allegations in the pleadings and the proof is deemed to be waived where it is not raised at the trial. Colbert v. Colbert, 28 Cal.2d 276, 281, 169 P.2d 633. Furthermore, as stated in Hayes v. Richfield Oil Corporation, 38 Cal.2d 375, 240 P.2d 580, a variance between the allegations of a pleading and the proof will not be deemed material unless it has actually misled the adverse party to his prejudice in maintaining his action or defense on the merits, and a variance may be disregarded where the action has been as fully and fairly tried on the merits as though the variance had not existed, citing Code Civ. Proc., sec. 469, and cases. Appellants have not shown wherein they were prejudiced by the variance. And in Swanson v. Hempstead, 64 Cal.App.2d 681, 682-683, 149 P.2d 404, 405, the court said:

> "We recognize that in the administration of justice pleadings are a means to an end, not an end in themselves, and that an issue which has been tried and determined should not be removed from the foundation of the resulting judgment just because it was not an issue within the framework of the pleadings. Where, however, the judgment rests upon the determination of issues which were neither foreshadowed by the pleadings nor understood by the parties to be in dispute at the trial, and which determination is the result of one party's failure to produce evidence of whose need he has had no

warning, we have a case where the departure from the pleadings may not be merely technical, but substantial, resulting in a miscarriage of justice."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

124 Cal.App.2d 551

LOEWEN
v.
CITY OF BURBANK et al.

Civ. 19932.

District Court of Appeal, Second District, Division 1, California.

April 14, 1954.

Rehearing Denied May 3, 1954.

Hearing Denied June 9, 1954.

Action by ten year old boy against city for crushed foot sustained when tree, which city had felled in such manner as to permit its upper end to rest in street, on branches that had been partly cut off, so that upper end was elevated at about 45° angle, and which plaintiff, unnoticed by city employees, climbed, canted over and pinned plaintiff's foot to ground beneath stump of branch. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the accident did not happen in the ordinary, usual and customary use of the street, and so was not within the Public Liability Act.

Affirmed.

1. States 🔑191(1.3)

In every case against governmental agency, plaintiff must bring himself within provisions of public liability statutes. Government Code, § 53051.

2. States 🔑191(1.13)

It is only by express statutory permission that any governmental agency may be sued. Government Code, § 53051.

3. Highways 🔑187(1), 193

Municipal Corporations 🔑755(1), 790

Neither the state nor any of its agencies is liable for negligence on highways or streets unless accident happens in ordinary, usual and customary use of such ways, and governmental or managing board, officer or person in charge must have knowledge or notice of defective or dangerous condition, and after acquiring such knowledge, or receiving such notice, must fail to take such action as may be reasonably necessary to protect public against such dangerous or defective condition. Government Code, § 53051.

4. Municipal Corporations 🔑790

In order for municipal corporations to be liable in negligence action arising out of street condition, municipal representatives must not only have had notice of condition which caused the injury, but must also have had notice of dangerous character of such condition. Government Code, § 53051.

5. Municipal Corporations 🔑779

Where city, in felling trees, permitted upper end of felled tree to rest in street, on branches that had been partly cut off so that upper end was elevated at about 45° angle, and ten year old boy, unseen by city employees, climbed tree and sustained crushed foot when tree canted over and pinned boy's foot to ground beneath stump of branch, such accident did not happen in the ordinary, usual and customary use of the street, and was not, therefore, within the Public Liability Act. Government Code, § 53051.

Culver Van Buren, Burbank, and Thomas W. Le Sage, Pasadena, for appellant.

Belcher, Kearney & Fargo, George M. Henzie, Los Angeles, of counsel, for respondent.

DRAPEAU, Justice.

Paul Loewen, the minor plaintiff in this case, was ten years of age when he suffered a terrible accident.

Employees of the Park Department of the City of Burbank were removing eucalyptus trees on Keystone street in that city. They followed a method or routine that had been used by the city for many years. First, branches would be cut off up the trunk of the tree, and it would be topped. Then the workmen would dig the dirt from around the base of the tree and cut off its roots. And then they would pull the tree over with a truck and winch. No ropes or barriers and no warning signs were placed upon the sidewalk. Two signs were on tripods in the street to warn vehicular traffic.

Usually three trees at a time were felled in this manner, sawed into lengths, and trucked away.

On the morning this accident occurred work was being done on the first three-tree batch of the day. The trees had been trimmed and topped the day before. The first and second trees of the batch had been pulled down. Some of the men were working around the first tree; others around the third tree.

At this time Paul scooted up the first tree. No one warned him to stay off. But all the crewmen had been instructed to keep back any children they saw near the trees. No one saw Paul going up the tree except another playmate who was sitting at the base of the tree.

This tree was twenty or thirty feet in length, with a diameter of approximately 2½ feet. It was at right angles to the sidewalk, with its butt at the sidewalk and its top out in the street, the upper end elevated at about a 45° angle. The upper end was held up by two or three branches that had been partly cut off.

Paul straddled the tree at its base, and shinnied up and along it until past more than half of its length. Then he slid off the main trunk and put his weight onto a branch that extended out from the trunk. And then the tree canted over and pinned the boy's foot to the ground beneath the stump of the branch.

Paul's foot was crushed. He was in bed for a long time; on crutches for months; and he will have to go limping through the rest of his life with one defective foot. The expense to his parents has been enormous, and in their station in life most difficult to pay. All in all, the pitiful case thus presented appeals to the sympathy of everyone.

At the close of plaintiff's case the trial court granted a motion for nonsuit, and dismissed the jury. Plaintiff appeals from the judgment that followed.

Plaintiff in his brief asserts "The facts in the case disclose overwhelming evidence that the city created a dangerous and defective condition in leaving a 20 or 30-foot eucalyptus tree, with a diameter of 2½ feet at its base, extending out into the street, resting like a 'sawhorse' on two branches 8 or 10 feet long." Plaintiff earnestly contends that this is a question of fact, not of law, and that under familiar legal rules the question should have been presented to the jury for decision.

[1] As the trial judge carefully and properly informed the jury, this is not the ordinary negligence case. At the threshold of every case involving a governmental agency, every plaintiff must bring himself within the provisions of the public liability statutes of this state.

[2] The City of Burbank was taking down the trees in the exercise of its governmental function. It is only by express statutory permission that any governmental agency may be sued. At common law no one could sue the king, nor any part of the king's government. This state follows the common law, except and only except when by statute it permits its citizens to sue it.

So in this case we must look to the law to see whether plaintiff's case comes within its scope.

[3] Neither the state nor any of its agencies is liable for negligence on highways or streets unless the accident happens in the ordinary, usual and customary use of such ways; and the governmental or managing board, officer or person in charge must have knowledge or notice of the defective or dangerous condition, and after acquiring such knowledge, or receiving such notice, must fail to take such action as may be reasonably necessary to protect

the public against such dangerous or defective condition. Public Liability Act, Section 53051, Government Code.

[4] Moreover, municipal representatives must not only have notice of the condition, but also notice of the dangerous character of such condition. Howard v. City of Fresno, 22 Cal.App.2d 41, 70 P.2d 502.

[5] Plaintiff in this case does not bring himself within these requirements; consequently the judgment must stand. The boy's conduct was obviously not the usual and ordinary manner in which the law contemplates that streets are to be used.

In Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, it was held that the legislature intended to limit the liability of the city for injuries resulting from defective streets, works, or property to damages suffered in the ordinary, usual, and customary use thereof. In that case a ten-year-old climbed into a storm drain to use it as a playground, lost his life, and his parents were denied recovery.

And in Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472, plaintiff could not state or prove a cause of action for the same reason. In that case another ten-year-old climbed onto a log floating on a pond on public property, fell off, and was drowned.

Plaintiff suggests that the method of taking down trees by the city supplies the knowledge required by the statute. But, as a matter of law, nothing appears in the method used that may be said to be dangerous in any respect.

Having come to this conclusion it is unnecessary to comment upon the many cases cited in plaintiff's briefs. All are to be distinguished, either because they involve rules of negligence in cases not involving governmental agencies, or injuries were suffered after the governmental agency had notice of defective or dangerous conditions on public property.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

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124 Cal.App.2d 512

ROYAL INDEMNITY CO.
v.
SHERMAN et al.

Civ. 19891.

District Court of Appeal, Second District,
Division 3, California.

April 12, 1954.

Action by partners' surety to recover amounts paid for produce shipped to and sold by partners for which they had failed to pay. The Superior Court, Los Angeles County, Clarence L. Kincaid, J., entered judgment of nonsuit on ground that partners' liability to surety had been discharged by bankruptcy adjudication. Surety appealed. The District Court of Appeal, Shinn, P. J., held that partners, engaged in business as produce dealers or commission merchants, were not acting in "fiduciary capacity" with respect to debts owed shippers, and that there was no evidence that partners maliciously injured property.

Judgment affirmed.

1. Bankruptcy ⚿426(2)

Where partners were engaged in business as produce dealers or commission merchants, and they received and sold produce for which they failed to pay shippers, with respect to debts thus created, partners were not acting in "fiduciary capacity" within Bankruptcy Act. Bankr. Act, § 17, sub. a (4), 11 U.S.C.A. § 35, sub. a(4).

See publication Words and Phrases, for other judicial constructions and definitions of "Fiduciary Capacity".

2. Bankruptcy ⚿424

Embezzlement and conversion of property are not in all cases "malicious acts" within Bankruptcy Act. Bankr. Act, § 17, sub. a(2), 11 U.S.C.A. § 35, sub. a(2).

See publication Words and Phrases, for other judicial constructions and definitions of "Malicious Acts".

3. Bankruptcy ⚿436(1)

In action by surety of produce dealers to recover amount paid for produce received and sold by dealers for which they failed to pay shippers, surety, to show that liability resulted from willful or malicious injury within Bankruptcy Act, had burden of overcoming presumption of fair dealing by proof of facts which would have justified inference that dealers, in withholding payment, intended thereby to injure shippers. Agricultural Code, §§ 1261 et seq., 1265; Bankr. Act, § 17, sub. a(2), 11 U.S.C.A. § 35, sub. a(2); Code Civ.Proc. § 1962, subd. 1, 1963, subd. 19.

4. Evidence ⟹77(1)

Where surety's right to recover amounts paid for produce shipped to dealers for which dealers failed to pay depended upon showing that dealers failed to pay with intention to injure shippers, and no evidence was offered to show nature of transactions between shippers and dealers, it was fair presumption that shippers' testimony, if produced, would have been adverse to surety. Bankr. Act, § 17, sub. a(2), 11 U.S.C.A. § 35, sub. a(2); Agricultural Code, §§ 1261 et seq., 1265; Code Civ.Proc. § 1963, subds. 5, 6.

5. Bankruptcy ⟹436(3)

In action by surety of produce dealers, who had been discharged in bankruptcy, to recover on ground that liability resulted from willful and malicious injuries to property, amount paid for produce shipped to dealers for which dealers failed to pay, wherein there was no evidence as to conditions under which dealers received shipments or circumstances in which debts to shippers accumulated, there was no evidence that dealers maliciously withheld payment with intention to injure shippers. Bankr. Act, § 17, sub. a(2), 11 U.S.C.A. § 35, sub. a(2); Agricultural Code, §§ 1261 et seq., 1265; Code Civ.Proc. § 1962, subd. 1, 1963, subd. 19.

6. Bankruptcy ⟹421(3)

In action, by surety of produce dealers who had been discharged in bankruptcy, to recover amount paid for produce shipped to, but not paid for, by dealers, who were not acting in fiduciary capacity with respect to debts thus created, wherein there was no evidence that dealers had acted maliciously, discharge in bankruptcy constituted good defense. Agricultural Code, §§ 1261 et seq., 1265; Bankr. Act, § 17, sub. a(2), (4), 11 U.S.C.A. § 35, sub. a(2), (4).

Anderson, McPharlin & Connors, Los Angeles, for appellant Royal Indemnity Co.

Pearlson & Pearlson, Herbert D. Pearlson, Los Angeles, for respondent Jack Sherman.

Myron W. Curzon and Alex Chernow, Los Angeles, for respondents William Fogel and Joseph W. Wolf.

SHINN, Presiding Justice.

William Fogel, Joseph W. Wolf and Jack Sherman, as partners, were engaged in the business of selling farm products as produce dealers or commission merchants from April 1, 1947 to July 16, 1949, when Fogel and Wolf withdrew from the firm. Sherman carried on the business until September 24, 1949. Defendants received and sold products for which they failed to pay the shippers. Plaintiff had bonded the three partners, and later Sherman, pursuant to the provisions of Division 6, chapter 6 of the Agricultural Code. The bond ran to the state for the benefit of shippers of produce to the defendants. Claims were filed with the Director of Agriculture under section 1265 of the code and in due course plaintiff paid to the Department of Agriculture $5,000 for the license period April 1, 1948 to March 31, 1949; $581.71 for the license period April 1, 1949 to July 16, 1949 and $4,193.27 for the license period July 16, 1949 to September 24, 1949.

The three defendants were adjudged bankrupt and they scheduled the debts owed to their several shippers and also their liabilities to plaintiff as their surety. They received discharges in bankruptcy.

The complaint alleged the foregoing facts, except the fact of bankruptcy, and also that the several defendants "embezzled, willfully misapplied and converted to their own use money and other property belonging to produce consignors of farm products grown in the State of California," etc. The answers denied the latter allegation, and alleged the discharges in bankruptcy and scheduling of the debts. It was stipulated that these allegations were true.

The question is whether the debts were discharged.

Section 17 of the Bankruptcy Act (11 U.S.C.A. Sec. 35) sets forth the effect of respondents' discharge in bankruptcy:

"(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, * * * except such as * * * (2) are liabilities * * * for willful and malicious injuries to the person or property of another, * * * or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; * * *."

Plaintiff says the debts were not discharged because (1) they were created by fraud, embezzlement, misappropriation and defalcation while acting in a fiduciary capacity, and (2) they were liabilities for willful and malicious injuries to property. Defendants resist these contentions, claiming (1) A commission merchant is not a fiduciary within the purview of the above provision of the Bankruptcy Act, (2) there was no evidence as to the conditions or agreements under which the produce was sent them, and (3) there was no evidence of willful or malicious injury to property.

[1] We have concluded that defendants were not fiduciaries with respect to the debts in question. In Young v. Clark, 1907, 7 Cal.App. 194, 196, 93 P. 1056, 1057, the court held that discharges in bankruptcy released defendants from liability for money which they held as agents of the plaintiff and which they had refused to pay over. After quoting subdivision a, 4 of section 17 of the Bankruptcy Act of 1898, as amended, the court said: "It has been often held that the term 'fiduciary capacity' as used in this subdivision of section 17 applies only to technical trusts, such as those arising from the relation of attorney, executor, or guardian, and not to debts due by a bankrupt in the character of an agent, factor, commission merchant, and the like." The opinion cited cases so holding, namely, In re Basch, D.C., 97 F. 761, Knott v. Putnam, D.C., 107 F. 907, Chapman v. Forsyth, 2 How. 202, 43 U.S. 202, 11 L.Ed. 236; Palmer v. Hussey, 119 U.S. 96, 7 S.Ct. 158, 30 L.Ed. 362; Upshur v. Briscoe, 138 U.S. 365, 11 S.Ct. 313, 34 L.Ed. 931; Noble v. Hammond, 129 U.S. 65, 9 S.Ct. 235, 32 L.Ed. 621 and Bracken v. Milner, C.C., 104 F. 522.

In Hennequin v. Clews, 111 U.S. 676, 4 S.Ct. 576, 578, 28 L.Ed. 565, the court quoted from the decision in Chapman v. Forsyth, 2 How. 202, 207, 43 U.S. 202, 207, 11 L.Ed. 236, as follows: "If the act embrace such a debt, [of a factor] it will be difficult to limit its application. It must include all debts arising from agencies; and, indeed, all cases where the law implies an obligation from the trust reposed in the debtor. Such a construction would have left but few debts on which the law could operate. In almost all the commercial transactions of the country confidence is reposed in the punctuality and integrity of the debtor, and a violation of these is, in a commercial sense, a disregard of a trust. But this is not the relation spoken of in the first section of the act. The cases enumerated—'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee'—are not cases of implied, but special trusts, and the other 'fiduciary capacity' mentioned must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract. A factor is not, therefore, within the act." The words "'executor,' 'administrator,' 'guardian,' or 'trustee,'" employed in the act of 1841, 5 Stat. 440 which the court construed in Chapman, were not used in later bankruptcy acts (1867 to date). In Hennequin the court was considering exceptions reading the same as those first heretofore quoted, and the court agreed that if the excepting clauses were construed to include debts "arising from agencies; and the like", there would remain few debts on which the law could operate.

In Davis v. Aetna Acceptance Co., 293 U.S. 328, 333, 55 S.Ct. 151, 153, 79 L.Ed. 393, 397, Justice Cardozo, in referring to the holding in Chapman v. Forsyth, wrote for the court as follows: "The scope of the exception was to be limited accordingly. Through the intervening years that precept has been applied by this court in varied situations with unbroken continuity." (Citing many cases of the U.S. Supreme Court.) In all of these years (since the Act of 1867), Congress has not seen fit to broaden the scope of the exceptions by including defalcations by those who, although not trustees in a technical sense, yet enjoy the trust and confidence of persons with whom they deal in business.

Plaintiff cites Treadwell v. Holloway, 1873, 46 Cal. 547, as holding that the term "fiduciary character" used in the Bankruptcy Act of 1867, meant not only technical fiduciary relationships but also all those in which trust and confidence is reposed. It also cites Mayberry v. Cook, 1898, 121 Cal. 588, 54 P. 95, which held, upon the authority of Treadwell v. Holloway, that the term "fiduciary capacity" in section 52 of the California Insolvent Act, Stats. 1880, p. 82, which employed the same phraseology as the Bankruptcy Act, had application to factors and commission merchants who failed to remit the proceeds of sales of consigned goods. As between the cryptic opinion in the Treadwell v. Holloway case, which contains no discussion of the question, and states no reasons for the decision, and the carefully considered opinion in Young v. Clark we must accept the latter as much the better authority on the point. The same is true of Mayberry v. Cook which merely followed the holding in Treadwell v. Holloway.

The decisions of the U.S. Supreme Court are the best authority as to the intentions of Congress in framing the National Bankruptcy Act. They were accepted as such in Young v. Clark, but were either overlooked or disregarded altogether in the earlier cases. If the Congress had disapproved of the construction which the U.S. Supreme Court for nearly a century has consistently placed upon the term "fiduciary capacity", section 17 of the Act would have been amended to give the term a broader meaning. We pretend to no wisdom superior to that of the many learned justices of that high court who have unanimously held to that construction, and we therefore hold that there was no evidence that the defendants were acting in a fiduciary capacity within the meaning of that term as used in section 17, sub. a, 4.

[2-5] It is claimed that the failure of the defendants to pay their consignors was a willful and malicious injury to property which would prevent discharge from liability in bankruptcy. The complaint alleged that defendants "embezzled, willfully misapplied and converted to their own use money and other property belonging to produce consignors", in various stated amounts. There was no allegation that defendants acted maliciously. The embezzlement described in the Act is misappropriation while acting in a fiduciary capacity, and although it implies willfulness it does not necessarily imply malice. And a conversion of property is not in all cases a malicious act. Davis v. Aetna Acceptance Co., supra. There was no evidence that defendants acted maliciously.

If it had been proved that defendants' failure to pay was "the deliberate commission of an unlawful act, for the purpose of injuring another", malice would have been presumed. Code Civ.Proc. sec. 1962, subd. 1. There was no evidence as to the circumstances in which the debts to the shippers accumulated, nor as to the circumstances and conditions under which defendants received shipments of produce. None of the shippers was called as a witness. Their verified claims were received in evidence for no purpose other than to prove that they had filed claims. No documentary evidence as to the terms or conditions of the shipments was received. A representative of the department testified that it was a common practice of commission merchants to use their own funds to pay consignors without awaiting payment for goods sold. If it be assumed that the produce was received on consignment to be paid for when sold, the mere failure to pay the consignors was no evidence that defendants were actuated by malice. Sherman, when questioned by an attorney for the Department of Agriculture, who called the money received "trust funds", admitted that the money received on the sale of consigned goods was used in the business. But there was no evidence of its use in any other manner, nor that any of the partners made any improper use of partnership funds. If it was found necessary to use the money in order to carry on the business it was to be presumed that defendants were endeavoring to retrieve their fortunes rather than to defraud their creditors. The presumption in favor of honest dealing, Code Civ.Proc. sec. 1963, subd. 19, was a presumption that under the course of business of defendants with their customers, and the circumstances of the particular transactions, defendants honestly believed they had a right to use the proceeds of sales in their business, and had every intention of paying their debts in full. It may be that the relationship between the defendants and their several consignors, or shippers, had developed into merely one of debtor and creditor, and that credit was extended at least to the extent of excusing defendants from remitting each sum as it was received. It may be that a course of dealing had been developed under which the parties understood the shippers to be sellers and the defendants buyers of the produce. The presumption of honest dealing was evidence that defendants did not act maliciously. Malice was not to be presumed. Plaintiff had the burden of overcoming the presumption of fair dealing by proof of facts which would have justified an inference that defendants, in withholding payment, intended thereby to injure their consignors, or shippers. Perhaps the latter, if they had testified, would have established such facts, but, since none was produced, and no excuse offered for failure to obtain testimony of the shippers, it was a fair presumption that their testimony, if produced, would have been adverse to plaintiff. Code Civ.Proc. sec. 1963, subds. 5, 6.

[6] The absence of facts proved renders inapplicable the authorities relied on by plaintiff. It has been held that the failure of an agent to pay over money collected for his principal is a willful and malicious injury to the latter's property. In re Stenger, D.C.1922, 283 F. 419; that a stockbroker who makes an unauthorized sale of his client's securities and secretly appropriates the money to his own use is guilty of willful and malicious injury to property. McIntyre v. Kavanaugh, 242 U.S. 138, 37 S.Ct. 38, 61 L.Ed. 205; and that criminal conversion is a willful and malicious injury to property of a husband. Tinker v. Colwell, 193 U.S. 473, 24 S.Ct. 505, 48 L.Ed. 754. But in these and other cases cited by plaintiff facts showing unlawful conduct were before the court from which the motive of the debtor could be inferred. The case made out by plaintiff was, at most, one of commission merchants, with a failing business, who fell behind in meeting their obligations. The trial court properly refused to presume that the defendants were embezzlers, or otherwise guilty of willful and malicious conduct. The discharges in bankruptcy constituted a good defense and warranted the judgment of nonsuit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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124 Cal.App.2d 631

GERING
v.
CHURCH OF REALIZATION OF HOLLYWOOD et al.
Civ. 19636.

District Court of Appeal, Second District,
Division 2, California.
April 20, 1954.
Hearing Denied June 16, 1954.

Action to recover, inter alia, damages for loss of use of premises which, plaintiff alleged, were leased to him for one year by defendants who deprived him of the actual use thereof during a period of the term, although plaintiff remained in possession until end of term. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fox, J., held that the reasonable value of loss of use of such premises which plaintiff sought to recover was required to be determined by ascertainment of reasonable value of plaintiff's use and occupancy of the premises during the period in question, and deduction thereof from total rental value, and judgment in amount of total rental value, in absence of any evidence of reasonable value of plaintiff's use, was improper.

Judgment reversed.

1. Landlord and Tenant 🔑**132(3)**

In action to recover, inter alia, damages for loss of use of premises which, plaintiff alleged, were leased to him for one year by defendants, who deprived him of actual use thereof for a period of the term, although plaintiff remained in possession until end of term, reasonable value of loss of use of premises was required to be determined by ascertainment of reasonable value of plaintiff's use and occupancy of premises during period in question, and deduction thereof from total rental value, and judgment for total rental value, in absence of any evidence of reasonable value of plaintiff's use, was improper.

2. Appeal and Error ⚷171(1)

Plaintiff who, although successful in trial court, realized weakness of his position, could not change theory of his case on appeal.

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John C. Miles and J. Wallace McKnight, Los Angeles, for appellants.

Charles C. Montgomery, Jr., Burbank, for respondent.

FOX, Justice.

In the first cause of action of his amended complaint[1] plaintiff alleged that on or about December 10, 1948, the defendant church, acting through its duly authorized agent, defendant Lawrence Elliott, "entered into a lease" with him whereby the church agreed that plaintiff could use a hall belonging to the church for a period of one year in return for plaintiff's agreement to produce plays in said hall and give the church the income from the sale of tickets. A copy "of such lease" was attached. Plaintiff took possession of the hall the next day and began to conduct his business therein, viz., casting, directing and producing plays. He remained in possession and continued to conduct his business therein until the end of the term, December 10, 1949, and performed all his obligations "under the lease." He alleged that defendants, however, by a series of harassments, some of which he enumerated, made it impossible for him to conduct his business in an orderly manner. He charged that his business was destroyed, and that he suffered "general damages in the sum of $3,000.00 for breach of the implied covenant of quiet enjoyment." Plaintiff further alleged that he "was deprived of the actual use of said premises to conduct his business in an orderly manner after May 19, 1949"; that "the reasonable value of *the loss of the use* of said premises is, and has been, at all times herein mentioned, $150.00 per week"; and that "by reason of said *deprivation of use,* plaintiff was damaged in said sum every week between May 19, 1949, and December 10, 1949, or a total of $4,200.00." (Italics added.)

The trial court found all the allegations of the amended complaint true. It concluded, however, that plaintiff was not entitled to recover any general damages, but was entitled to judgment for $4,200 on his first cause of action. This makes up the principal portion of the judgment, from which defendants appeal.

[1] Defendants contend there is no evidence to support the finding of $4,200 damages on the first cause of action. Their position must be sustained.

Plaintiff's amended complaint is based on a writing which he designated "a lease," and which he repeatedly referred to as such. The landlord-tenant relationship is further emphasized by plaintiff's allegation that he "suffered general damages * * * for breach of the implied covenant of quiet enjoyment." At the outset of the trial the court's attention was focused on the theory that plaintiff's cause of action grew out of a lease, for his counsel advised the court in his opening statement that the acts of the defendants resulted in a constructive eviction of plaintiff. In its findings the court adopted plaintiff's lease theory of the transaction. Thus the allegation that the church, through its duly authorized agent defendant Lawrence Elliott, "entered into a lease with the plaintiff," is found to be true, as, of course, are all the other allegations which similarly characterize the transaction.

It was, however, found that "plaintiff remained in possession at all times up to December 10, 1949," which was the end of the term, and that he "continued to conduct his business in said hall" during all of this time. Plaintiff sought recovery upon two theories: (1) general damages, and (2) "loss of use" of the hall from May 19, 1949, to the end of the term, viz., the tenth of the following December. General damages were specifically denied. Damages for "deprivation of use" were alleged to be $150 per week after May 19th to the end of the term. At this weekly rate such damages totaled $4,200, which is the amount of the court award. It will be recalled that "the lease" did not fix any rental rate or value. There was, however, testimony that the reasonable rental value of such a hall for little theater purposes was from $125 to $150 per week. It is obvious that the court based its finding and judgment on such testimony, allowing the higher figure. It failed, however, to take into account the fact that plaintiff "remained in possession at all times" up to the end of the term and "continued to conduct his business" there during such period. There was *no evidence* of the reasonable value of plaintiff's use of the hall during the time here in controversy. The reasonable value of plaintiff's use and occupancy of the premises during the period in question should have been ascertained and deducted from the total rental value of $4,200. Only in this manner could the court ascertain "the reasonable value of the loss of use of said premises" which plaintiff seeks to recover.

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[1] There is a second cause of action for reimbursement of alleged expenditures, but it is not material on this appeal.

[2] Realizing the weakness of his position, plaintiff has sought to shift his position on appeal. He now emphatically declares that the writing signed by the parties "is *not a lease.*" He thus seeks to detach the judgment from his allegation and the finding that he had a one-year lease on the hall and that he is seeking to recover "the reasonable value of the loss of the use of said premises" for 28 weeks. He then proceeds to "speculate as to several possible theories which the trial court might have adopted" in arriving at the amount of $4,200 damages. None of these speculative theories relate to the "loss of use" of the hall on which he based his right of recovery. They relate to entirely different matters. Thus plaintiff has attempted to change the theory of his case on appeal. This he may not do for it would be manifestly unfair to the defendants. In re Estate of Raphael, 115 Cal.App.2d 525, 528, 252 P.2d 979; Corcoran v. San Francisco, etc., Retirement System, 114 Cal.App.2d 738, 745–746, 251 P.2d 59; Townsend v. Wingler, 114 Cal.App.2d 64, 68, 249 P.2d 613.

In view of our conclusion it becomes unnecessary to consider other questions the parties have raised.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

124 Cal.App.2d 611

TURLOCK IRR. DIST.
v.
TUOLUMNE COUNTY (two cases).

Civ. 8400.

District Court of Appeal, Third District, California.

April 19, 1954.

Hearing Denied June 16, 1954.

Actions by irrigation district against county to recover for taxes paid on property within county and without boundaries of district. The Superior Court, Tuolumne County, J. T. B. Warne, J., rendered judgment denying recovery but enjoining county from collecting second installment for fiscal year in which district extended its boundaries to include property in question, and district appealed. The District Court of Appeal, Paulsen, J. pro tem., held that irrigation district was a municipal corporation within constitutional provision excepting from tax exemption certain property of municipal corporations beyond their boundaries.

Judgments affirmed.

1. Taxation ⚿611(8)

That injunction was entered restraining county from collecting second installment of tax upon property of irrigation district for fiscal year in which district extended its boundaries so as to include property in question did not establish that tax levy for first installment for that fiscal year was void. Water Code, § 23800 et seq.; Const. art. 13, § 1, as amended in 1944.

2. Taxation ⚷217

Change of boundary of irrigation district so as to include property owned by district could not work retroactively to render property exempt from tax for part of fiscal year previous to the extension. Water Code, § 23800 et seq.; Const. art. 13, § 1, as amended in 1944.

3. Taxation ⚷217

Irrigation district was a "municipal corporation" within constitutional provision excepting from tax exemption certain property of municipal corporations beyond their boundaries. Water Code, § 23800 et seq.; Const. art. 13, § 1, as amended in 1944.

See publication Words and Phrases, for other judicial constructions and definitions of "Municipal Corporation".

4. Judgment ⚷585(5)

Injunction which restrained collection of tax upon property of irrigation district beyond its boundaries and which was granted upon determination that irrigation district was not a municipal corporation within constitutional provision excepting from tax exemption certain properties of municipal corporations beyond their boundaries, depended upon the state of the law that gave rise to it, and issue of taxability of the property was not res judicata after the overruling of the decision determining property to be exempt. Water Code, § 23800 et seq.; Const. art. 13, § 1, as amended in 1944.

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Jeremy C. Cook, Turlock, Vernon F. Gant, Modesto, for appellant.

T. R. Vilas, Dist. Atty., Ross A. Carkeet, Sonora, for respondent.

PAULSEN, Justice pro tem.

The appeals herein are taken from two judgments which denied recovery of real property taxes paid under protest to the county by the irrigation district.

The corporate boundaries of appellant district, until December 13, 1948, were the counties of Merced and Stanislaus. For the purpose of carrying on its activities in those counties, the district acquired property in respondent county, and it is admitted that the property so acquired was on the tax rolls and was being taxed by the county at the time. In 1924 appellant constructed the Don Pedro Dam in said county, and ever since its property there has been used in the performance of its functions as an irrigation district and for power development. It is also used and so held on behalf of the Modesto Irrigation District.

The county continued to assess and collect taxes on the property after it was acquired by the district. These taxes were paid under protest and some time before the year 1921 appellant brought suit for the recovery of the taxes so paid and for injunctive relief. They prevailed in the action and in 1921 the Supreme Court, in Turlock Irrigation Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A.L.R. 72, affirmed the judgment which permanently enjoined the county and its officers from levying taxes on the property, and held that the tax levies theretofore made were void.

The sole question involved in that case was whether or not the irrigation district was a municipal corporation within the meaning of Section 1 of Article XIII of the Constitution of California as that section stood after the amendment of 1914.

The pertinent parts of said section read:

> "All property in the State except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided * * * provided, that property * * * such as may belong to the United States, this State, or to any county, city and county, or municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the county, city and

county or municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said county, city and county, or municipal corporation; provided, that no improvements of any character whatsoever constructed by any county, city and county or municipal corporation shall be subject to taxation. All lands or improvements thereon, belonging to any county, city and county or municipal corporation, not exempt from taxation, shall be assessed by the assessor etc. * * *."

After an exhaustive review of the authorities and the history of the amendment of 1914, the court held that an irrigation district was not a municipal corporation within the meaning of the section as amended, and that the district was therefore exempt from taxation of its property in Tuolumne County. The county thereupon ceased to tax it.

Section 1 of Article XIII of the Constitution was again amended in 1944, but the provisions quoted above were not changed and continue in that form to the present time.

In 1946 the Supreme Court again had occasion to review the section and the purposes of the 1914 amendment in the case of Rock Creek Water District v. County of Calaveras, 29 Cal.2d 7, 172 P.2d 863, 864. Upon a reconsideration of the situation that gave rise to the amendment and the purpose for its adoption, the holding in Turlock Irrigation Dist. v. White, supra, was expressly disapproved and it was held that a Water District *and Irrigation District* also, were municipal corporations within the meaning of the amendment and therefore subject to the kind of taxation here under attack.

As a result of the decision in the Rock Creek case the property was again taxed by respondent county. Appellant paid both installments of the 1947–1948 tax and on December 3, 1948, paid the first installment of the 1948–1949 tax, all such payments being made under protest.

A proceeding to have the said real property included within the boundaries of the district, in accordance with the 1947 amendment to the Irrigation District Act, Water Code, § 23800 et seq., was completed on December 13, 1948, and said real property is now, and ever since has been, within the boundaries of the district.

Appellant brought these actions to recover for the taxes paid; the first for taxes paid for 1947–1948 and the second for taxes paid for 1948–1949. The Court held that appellant had no right to recover taxes paid for 1947–1948; or to recover the first installment paid for 1948–1949, but enjoined the county and its officers from collecting or attempting to collect the second installment for that fiscal year.

[1, 2] Appellant now argues that the action of the court enjoining collection of the second installment referred to proved that the whole tax levied for that fiscal year was void. There is no merit to this argument. The change of boundaries could not work retroactively, and whether the court was correct or not concerning the effect of the change prospectively, after the first installment became due and was paid the injunction could not effect the payment of the first installment if it was valid and collectible at the time of payment.

[3] Appellant's principal contention on these appeals is that the Rock Creek case did not overrule the Turlock Irrigation Dist. case inasmuch as the Rock Creek case involved a *water district*. The pivotal question in each case was the meaning of the term "municipal corporation" as used in the Constitutional provision, and it was specifically construed to include *irrigation districts*. It was there pointed out that—

> "Plaintiff district's chief function, like irrigation districts, is to supply water for irrigation to landowners within its boundaries. It operates substantially the same as an irrigation district under the California Irrigation District law. Water Code, § 20500 et seq."

And if there was any doubt as to whether or not the Turlock Irrigation Dist. case was overruled by the Rock Creek case * * * and we do not think there was * * * the Supreme Court removed that doubt in County of Mariposa v. Merced Irr. Dist., 32

Cal.2d 467, where it said at page 470, 196 P.2d 920, at page 922, referring to the Rock Creek case:

> "This Court held on September 14, 1946, that an irrigation district fell within the term 'municipal corporation' as used in that constitutional provision and hence property owned by such districts situated outside their boundaries was subject to taxation by the county in which it was located."

[4] Finally, appellant contends that in view of the injunction granted in the Turlock Irrigation Dist. case, the matter is res judicata. The effectiveness of the injunction depended upon the state of the law that gave rise to it. As soon as the court in the Rock Creek case had ruled that the property was taxable, it became the duty of the taxing officals under the constitutional provision cited, and the laws made pursuant thereto, to assess all the property in the county not exempt from taxation.

The judgments are affirmed.

SCHOTTKY and PEEK, JJ., concur.

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124 Cal.App.2d 425

MARTIN et ux.

v.

AJAX CONST. CO. et al.

AJAX CONST. CO. v. MARTIN et ux.

Civ. 19764.

District Court of Appeal, Second District, Division 2, California.

April 8, 1954.

Hearing Denied June 3, 1954.

Actions involving question whether certain transaction constituted a usurious loan. The Superior Court, Los Angeles County, George Francis, J., held that the transaction constituted a joint adventure, and from adverse judgment, the aggrieved parties appealed. The District Court of Appeal, Moore, P. J., held, inter alia, that where construction company, in exchange for $5,000, executed promissory note for $10,000, payable within one year, and the $5,000 was to be used in building houses on tracts selected by the company, the transaction was a loan, not a joint adventure, and the loan was usurious.

Affirmed in part and reversed in part.

1. Appeal and Error 🔑110

Order denying motion for new trial was not appealable.

2. Usury 🔑121

General findings that agreement under which suit was brought was not usurious, that it was joint venture, and that usury law was never intended to be applicable to the transaction were legal conclusions and did not impair contrary specific findings of fact established by competent evidence. Gen. Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

3. Joint Adventures 🔑1.13

Usury 🔑18

Where construction company, in exchange for $5,000, executed promissory note for $10,000, payable within one year, and the $5,000 was to be used in building houses on tracts selected by the company, the transaction was a "loan," not a "joint adventure" and the loan was usurious. Gen.Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Adventure" and "Loan".

4. Bills and Notes 🔑47

Even though parties indicated by contemporary writing the fund from which repayment of loan should be made and thereby set forth circumstances which gave rise to note of borrower, the note was an unconditional promise to pay. Civ.Code, § 3084(1, 2).

5. Usury 🔑82

Usury, inherent in instrument, may be asserted by its guarantors as well as by the maker. Gen.Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

6. Usury 🔑103

In order to bar defense of usury, illegal provisions in instrument must have been knowingly and fraudulently inserted by borrower, without knowledge of lender, for purpose of enabling borrower to thereafter defeat recovery on the instrument. Gen.Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

7. Usury ⚷113

Intent to exact a usurious rate of interest is conclusively presumed from instrument which on its face clearly shows usurious character of agreement and no evidence of intent or lack thereof is required. Gen.Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

8. Usury ⚷18

The fact that parties to loan did not recognize it as being usurious when it was entered into does not prevent it from being so, unless fraudulent representations were made concerning the transaction. Gen. Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

9. Money Lent ⚷1

In case of loan, lender does not share in the profits of enterprise, and does not run risk of loss of his capital other than that of insolvency of borrower.

10. Joint Adventure ⚷1.7

In joint adventure, no financial return is promised party supplying capital, and in exchange for share in earnings and residue, he takes risk of failure of enterprise and of total loss.

11. Usury ⚷65

Charge of $250 for 90-day extension of one-year, $10,000 note, given for $5,000 loan, was usurious, in view of fact that, because of invalidity of $5,000 interest charge, the extension resulted in forbearance only as to the $5,000 principal. Gen. Laws, Act 3757, §§ 1 et seq., 2; Const. art. 20, § 22.

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W. M. Freiburghouse, Freiburghouse & Woodard, South Gate, Richard A. Perkins, Los Angeles, of counsel, for appellants.

John O. Akin, Long Beach, for respondents.

MOORE, Presiding Justice.

The question posed for decision is whether it is usurious where an agreement to loan $5,000 to a construction company and to receive $10,000 in return in any event "on or before one year from the date hereof" where the money is to be used in building houses on tracts specified by the company or on "such other tracts as might be selected by" the company, the money to be secured by irrevocable assignments of specified sums to be payable to the lender, where, contemporaneously with the agreement, the company executes and delivers its promissory note in the sum of $10,000, causes its principal stockholders to execute a guaranty of its payment, and where, at the expiration of the year, the company executes an agreement of similar tenor for the payment of the sum of $250 as a bonus for the payee's extension for ninety days of the loan period of the $10,000 note.

On November 21, 1947, appellant Ajax Construction Company a corporation herein referred to as "Ajax," and respondents, Mr. and Mrs. Martin, signed a writing which contained the following: Ajax "is about to engage in a larger, more active program of construction." Martins are "willing to loan" Ajax money to assist this program. The Martins do "hereby loan the first party the sum of $5,000." Ajax represents that "it is about to commence a construction program of 150 duplex or double bungalows, together with 40 single family residences" on certain tracts if available, or "such other tract or tracts as might be selected" by Ajax "until 150 duplex * * * and 40 single residences shall have been built." Ajax "agrees that upon completion of each building * * * it will execute and deliver * * * an irrevocable assignment" of $100 or $50 upon each duplex or single so completed. Ajax agreed that the Martins "shall be entitled to have and receive, in consideration of said loan * * * the total sum of $10,000.00, payable * * * on or before one year from the date hereof."

Pursuant to such agreement and coeval therewith, Ajax executed its promissory note in the sum of $10,000 in favor of respondents and caused its principal stockholders, C. W. Beck and W. H. Beck, to execute a guaranty of the note on the reverse side thereof.

When one year had elapsed and appellants were unable to go through with their original building plan, Mr. Chris W. Beck called on respondents, made his explanations for the delays and offered to execute an agreement to pay respondents $250 as a bonus for their extension of the maturity date of the original note. Pursuant to respondents' acceptance of such offer, Ajax executed its written agreement to pay $250 for such extension and agreed to pay both notes "from the sales proceeds of the Compton duplexes or upon our receipt of the loan residue, whichever event occurs first"—which agreement was accepted by respondents.

[1] After the note had matured, appellants paid only $6,000 on account of a total indebtedness of $10,250. Thereafter, on October 17, 1950, respondents sued in the superior court for the unpaid balance. In their answer, appellants alleged usury in the loan transaction and at the same time filed their action in the municipal court for treble damages for the usurious interest allegedly already paid. Respondents counterclaimed in the municipal court action with allegations identical with those of their complaint in the original suit. The actions having been consolidated for trial, the result was a judgment against Ajax and its guarantors and in favor of respondents for $4,250, on the theory that the money was paid to Ajax on a joint adventure contract. Also, Ajax' claim for treble damages was rejected. The appeal is from such judgment in its entirety and from the order denying appellants' motion for a new trial. The latter order is nonappealable and the purported appeal therefrom will be dismissed.

[2] Appellants have expressly waived their appeal from that part of the judgment denying relief under their action for treble damages. However, they contend that there is no substantial evidence to support the finding of a joint adventure.[1] Such language is purely a conclusion of law and in no particular finds the presence of the essential elements. Neither do the other findings nor the facts in proof justify the judgment. Under the Usury Act, Deerings General Laws, Act 3757, respondents made a contract in violation of section 2 which forbids any person to receive in money "any greater sum * * * for the loan or forbearance of money * * * at the rate of [ten] dollars upon one hundred dollars for one year."[2] The general findings that the agreement was not usurious, that it was a joint venture, and that "the usury law was never intended to be applicable to the transaction" are legal conclusions and therefore do not impair the specific findings of fact established by competent evidence. Such general findings, having no legal status, must yield to the findings of specific acts which effectually declare a nullity the "stipulation" in the contract to pay interest at any rate in excess of ten per cent per annum.

[3] The vital core of a usurious action is the charge that the alleged usurer advanced or loaned money and contracted with the recipient thereof that interest on the loan should exceed the maximum charge allowed by law. The findings that respondents and Ajax entered into a written agreement whereby the former would advance to Ajax the sum of $5,000 and Ajax agreed to pay respondents $10,000 "on or before one year from the said date" of the loan; that Ajax agreed to, "upon the completion of each building, execute and deliver unto plaintiffs an irrevocable assignment" of a

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[1] "VIII. That it is true that the transaction herein was in a fair sense a joint adventure rather than a loan and that the usury law was never intended to be applicable to the transaction which is the basis of the two cases herein consolidated for trial, and so tried, and that said written contract is not an usurious one and the venture contemplated therein has been successfully completed."

[2] Ten per cent per annum. Const., art. XX, sec. 22; Stats.1919, p. 83; Penziner v. West American Finance Co., 10 Cal.2d 160, 74 P.2d 252, holds that the adoption of section 22 of Article XX of the Constitution supersedes only those portions of the Usury Act which are repugnant to the latter.

definite sum to be paid respondents through an escrow or disbursing agency; that at the same time Ajax "executed and delivered to respondents its promissory note in the principal sum of $10,000 and that by the terms of said promissory note the said defendant agreed to pay to plaintiffs, or their order, said sum twelve months after said date"; that said Chris W. and W. H. Beck in writing guaranteed payment of $10,000 to respondents; that on November 22, 1948, Ajax and respondents agreed in writing upon a ninety-day extension of the due date of the $10,000—for which appellants should pay a bonus of $250; that Ajax has paid a total of $6,000 on the amount of its debt—such findings spell out a usurious loan and a repayment of the principal with interest in excess of the lawful rate.

Respondents contend that by virtue of the fact that the contract for the loan referred to the Ajax construction projects, the transaction was not a loan. Now, it was agreed and found that Ajax represented that it was about to commence construction upon a tract to be selected by it. There was no agreement that respondents would specify the tracts, or would be consulted with reference to such lands as might be used for building sites. The loan character of the transaction was not altered by the fact that the parties agreed upon the use to which the money should be applied. Such provision serves to forestall a borrower from investing the proceeds of a loan in an illegal or ill-advised enterprise.

[4] Ajax' agreement to make partial prepayments on account from funds derived from the sales of houses did not affect its unconditional obligation to pay $10,000 within a year, nor entitle Ajax to a discount on the principal of its debt. The compulsory partial prepayment scheme was a type of security for respondents and a safety valve for appellants, but with it or without it, Ajax according to its note owed respondents the $10,000 until it should be paid. The note of Ajax was a definite agreement to pay, and this action is proof that respondents so regarded it. Even though the parties indicated by a contemporary writing the fund from which repayment should be made and thereby set forth the circumstances which gave rise to the instrument, the note was still an unconditional promise to pay. Civil Code, sec. 3084(1, 2).

[5, 6] The findings that appellants solicited the money and that they prepared the contract for its repayment with interest at 100 per cent per year do not diminish the rigor of the usury. An illegal contract cannot have the vital spark of legality infused into it by the mere hand of the man who subsequently asserts its nullity. The voice of him who induces an unlawful transaction has never attained to such virtue as will validate an unlawful contract; nor will the application of his hand to the preparation of an instrument evidencing an agreement effect the interference of divinity. The very finding that Ajax executed the unconditional promissory note for $10,000 payable one year from its date fixes the transaction as a loan and the vices of the instrument may be asserted by its guarantors as well as by the maker. In order to bar the defense of usury, the illegal provisions in the instruments must have been knowingly and fraudulently inserted. Nikkel v. Lindhorst, 85 Colo. 334, 276 P. 678, 63 A.L.R. 959, 962; 55 Am.Jur. 394.

For the same reasons, the writing which extended the due date of the $10,000 note for ninety days in consideration for Ajax' payment of $250 was likewise a violation of the Usury Act and it also is a nullity. It is a part of the enterprise evidenced by the first note and bears all the markings of an illicit deal.

In support of their contention that the original agreement is not usurious, respondents cite authorities which announce the following rules:

1. Courts will not permit an evasion of the Usury Law by any subterfuge.

2. It is always permissible to show that a transaction ostensibly lawful actually constitutes a usurious loan.

3. The test is whether there was an intent to evade the law, and the circumstances and negotiations which preceded or accompanied the transaction may be material in determining such intent. Carter v. Seaboard Finance Co., 33 Cal.2d 564, 203 P.2d 758; Milana v. Credit Discount Co., 27

Cal.2d 335, 340, 163 P.2d 869, 165 A.L.R. 621; Harris v. Pollack, 101 Cal.App.2d 26, 29, 224 P.2d 824; Batchelor v. Mandigo, 95 Cal.App.2d 816, 820, 213 P.2d 762.

4. Any doubt as to the usurious character of a transaction will be resolved in favor of its legality. Coley v. Wolcott, 103 Cal. App. 140, 146, 284 P. 241.

5. While the question of whether the contract involved was usurious was one of fact for the trial court, its determination must be based upon substantial evidence. Thomas v. Hunt Mfg. Co., Cal.App., 263 P.2d 22 [hearing granted S.Ct.]; Harris v. Pollack, supra.

6. The burden of establishing the evasion of the usury statute rested upon the party alleging that the transaction was usurious. Thomas v. Hunt Mfg. Co., supra; Harris v. Pollack, supra, 101 Cal.App.2d at page 30, 224 P.2d 824.

7. The presumptions of law are in favor of legality. Rose v. Wheeler, 140 Cal.App. 217, 220, 35 P.2d 220.

But the controversy at bar may be distinguished on its facts from the decisions cited by respondents. In each of them a transaction termed "a partnership," "a sale" or "a joint venture" and ostensibly lawful is alleged to be in reality a loan or forbearance of money with interest paid in excess of that allowed by law. In contrast, the action here is based upon instruments which entitle the transaction a "loan" and disclose a usurious interest rate on their faces.

[7, 8] Under such circumstances, rules of law different from those urged by respondents are applicable. Intent to exact a usurious rate of interest is conclusively presumed from an instrument which clearly shows the character of the agreement and no evidence of intent or lack of same is required. Martin v. Kuchler, 212 Cal. 536, 539, 299 P. 52; Wood v. Angeles Mesa Land Co., 120 Cal.App. 313, 324, 325, 7 P.2d 748; Smith v. G. Cavaglieri Mortgage Co., 111 Cal.App. 136, 143,[3] 295 P. 366. The fact that the parties to the loan did not recognize it as being unlawful when it was entered into does not prevent it from being so, unless fraudulent representations were made concerning the transaction. Stock v. Meek, 35 Cal.2d 809, 818, 221 P.2d 15. There are no allegations of or contentions as to the existence of fraud and no evidence of any was introduced.

Respondents base their claim of right to recover upon the theory that the written instruments containing the promises to pay $10,250 are the indicia of a joint adventure relationship existing between them and appellants. Inasmuch as they rely upon writings which violate the Usury Act and which, as evidences of debt, are, to the extent of $4,375, void, it devolved upon respondents to establish the existence of a joint adventure. While the court made a finding "that the transaction herein was in a fair sense a joint adventure rather than a loan" the record reveals no substantial evidence to support such finding. Neither does the term "advance" nor the word "invest" have such significance as will indicate that the contracting parties intended to form a partnership or to engage in a joint venture. Both words are ambiguous. Each applies equally to a loan or a joint venture. The same may be said of the statement of the purpose for which the money was to pass from respondents to appellants. To determine the issue, one must look to those elements of a transaction which exist in a loan but not in a joint adventure and vice-versa.

[9, 10] In the case of a loan, the lender does not share in the profits of the enterprise; neither does he run any risk of loss of his capital other than that of insolvency of the borrower, attendant upon all loans. Here there is an unconditional promise to pay on the part of Ajax and its guarantors. Respondents had no control over the management of the building enterprise; they could not designate the lands on which the houses should be built, the materials to be used, the laborers that should be employed. They had no voice in arranging terms for the sales of the new homes. There was no responsibility on their part for any tort or

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[3] A reading of this opinion in 111 Cal.App. discloses that the word *not* or its equivalent has been omitted in line 25, page 143. The sentence should begin, "Not to call such a transaction a loan * * *."

contract liabilities appellants might incur. In contrast, with the joint adventure no financial return is promised the party supplying the capital. In exchange for a share in the earnings and residue, he takes the risk of failure of the enterprise and of total loss. When, in a joint venture, total loss occurs, the financier has no claim against the assets of his co-adventurers and in many situations he will be personally liable for their acts. While it is true that the presence or absence of one or more of these identifying characteristics is not conclusive as to the nature of a transaction, yet, when as in the present action, the record discloses evidence of each of the elements of a loan transaction, but no evidence of any of the elements of a joint adventure, we are constrained to conclude that the judgment is without substantial support in the evidence and that the pertinent findings of the essential facts require a reversal. Indeed, as final proof of the character of the transaction, Mr. Martin testified that he desired the guaranty of C. W. Beck and W. H. Beck on the note. "I requested signatures be placed on the back side of the note—we just felt we wanted a little more security."

Parol testimony as to the intent of the parties was received but no item of such proof tends to change this conclusion. Mr. Martin testified that he thought of the transaction as an investment. In law, this does not contradict the terms of the instruments; loans of money, often secured by mortgage or trust deed, are considered very good investments. Respondents' failure to require immediate security for their money indicates nothing more than a willingness to sacrifice security for a chance to satisfy their greed or it was the fruitage of a near horizon in the world of business.

[11] If ninety days is considered to be one quarter of a year, a charge of $250 for a ninety-day extension of a $10,000 note would not be usurious, being exactly ten per cent per annum. But since the promise to pay $5,000 for the use of $5,000 for one year was null and void, respondents had a right to collect only $5,000 on the note. As to the $5,000 interest, there was no forbearance; as to the $5,000 principal, the $250 was a usurious charge and therefore null and void.

The purported appeal from the order denying the motion for a new trial is dismissed.

That part of the judgment ordering that Ajax Construction Company take nothing by reason of its complaint is affirmed.

That part of the judgment providing for plaintiffs Martin to recover the sum of $4,250 together with costs is reversed and it is ordered that the judgment be so modified that plaintiffs take nothing by their complaint.

McCOMB and FOX, JJ., concur.

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124 Cal.App.2d 519

JACKSON

v.

BURKE et al.

Civ. 8315.

District Court of Appeal,
Third District,
California.

April 12, 1954.

Rehearing Denied May 5, 1954.

Hearing Denied June 9, 1954.

Judgment creditor of corporation brought action against officers, directors, and stockholders of corporations to have trust deed executed by corporations set aside, on ground that trust deed was executed for purpose of injuring, delaying and defrauding corporation's creditors, and on ground that encumbrance was made without adequate or any consideration. The Superior Court, Plumas County, Macmillan, J., entered judgment adverse to judgment creditor, and he appealed. The District Court of Appeal, Schottky, J., held that evidence sustained Superior Court's finding that trust deed was executed for an adequate and valuable consideration and was not executed in fraud of creditors.

Judgment affirmed.

1. Appeal and Error ⚷1001(1), 1010(1)

In reviewing sufficiency of evidence to support a judgment, test to be applied by reviewing court is whether or not there is any substantial evidence to support the findings of jury or trial court.

2. Appeal and Error ⚷994(2, 3), 1003, 1012(1)

All questions of weight of evidence and credibility of witnesses are for jury or trial court as trier of facts.

3. Appeal and Error ⚷1001(1), 1010(1)

If there is any substantial evidence to support verdict or finding, it cannot be set aside by reviewing court, though reviewing court believe the greater preponderance of the evidence was the other way.

4. Appeal and Error ⚷989

Power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion of trier of facts.

5. Appeal and Error ⚷930(1)

All conflicts in evidence must be resolved in favor of respondent on appeal, and all legitimate and reasonable inferences must be indulged in to uphold the verdict if possible.

6. Appeal and Error ⚷996

Where two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of trial judge or jury.

7. Corporations ⚷547(4)

In action by judgment creditor of corporation against officers, directors, and stockholders of corporation to set aside trust deed executed by corporation, on ground that trust deed was executed to hinder, delay, and defraud corporation's creditors, and on ground that encumbrance was made without adequate or any consideration, evidence sustained finding of trial court that trust deed was not executed in fraud of creditors and that it was executed for an adequate and valuable consideration. Civ.Code, § 3439.07.

8. Fraudulent Conveyances ⚷308(1)

Whether transfer is in fraud of creditors is a question of fact and not of law. Civ.Code, § 3439.07.

9. Fraudulent Conveyances ⚷273, 298

Where there is a consideration for transfer allegedly made in fraud of creditors, burden is on party attacking transfer to establish an actual intent, and though burden may shift when prima facie case is made out, fraud must ultimately be proved by a preponderance of the evidence. Civ. Code, § 3439.07.

Robert E. Laughlin, of Laughlin, McKalson & Crable, Chico, for appellant.

Walter F. Pettit, San Francisco, for respondents.

SCHOTTKY, Justice.

Plaintiff, a judgment creditor of Plumas Land Company, a Nevada corporation, commenced an action against defendants to set aside a deed of trust executed by said company, defendant Coleman Burke being named as beneficiary under said deed of trust. The complaint alleged that defendants were officers, directors and stockholders of said company and that said deed of trust "was placed upon said real property for the purpose of hindering, delaying and defrauding the creditors of said corporation, including this plaintiff, and that said encumbrance was made without adequate or any consideration."

Defendants Burke and Barry filed an answer denying all of the material allegations of the complaint, and defendant Wilson filed a separate answer also denying said allegations.

The action was tried before the court, sitting without a jury, defendants Burke and Barry being represented by counsel at the trial but defendant Wilson not appearing at or participating in the trial as a party. The trial court found, in substance, that defendants had not wasted or dissipated the assets of the land company, and that all of the assets had been sold and the company was insolvent; that the real property described in plaintiff's complaint was not an asset of the land company when the subject action was commenced, the property having been sold at a trustee's sale, on about August 12, 1948, pursuant to the terms of a deed of trust dated September

23, 1946, and duly executed by the company to secure its promissory note in the sum of $50,000; that the deed of trust was made and executed for an adequate and valuable consideration and was not placed upon the property for the purpose of hindering, delaying or defrauding any creditor of the company; and that defendants did not sell or transfer any assets of the company to defraud appellant or any other creditor of the company. Judgment was entered in favor of defendants in accordance with said findings and, after his motion for a new trial was denied, plaintiff filed this appeal from said judgment.

[1–6] Appellant makes a vigorous attack upon the judgment, the burden of his argument being that the record does not sustain the findings of the trial court. Before discussing the specific contentions of appellant it is well to point out once more that in reviewing the sufficiency of evidence to support a judgment, the test to be applied by an appelllate court is whether or not there is any substantial evidence to support the findings of the jury or trial court. All questions of the weight of the evidence and the credibility of the witnesses are for the jury and the trial court, and if there is any substantial evidence to support the verdict or finding it cannot be set aside by the reviewing court, although said court may believe the great preponderance of the evidence was the other way. The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion of the trier of the facts. All conflicts must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial judge or jury. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384.

Bearing in mind the familiar rule just stated, which we are constrained to say is too often disregarded by many counsel who pay lip service to the rule and then proceed to argue the weight of conflicting evidence before an appellate tribunal, we shall summarize briefly the factual situation as disclosed by the record.

The evidence shows that in 1945, R. Pierce Wilson, who was one of the defendants but is not a party to this appeal, had some options to purchase certain mining property and equipment located in Plumas County and known as the Walker Mine property. He was able to interest three New York residents in a plan to purchase and operate the property, the latter agreeing to invest certain moneys in the venture. These three investors were W. Gibson Carey, Fred Dunning and respondent Barry, and for convenience we will refer to them collectively as the "New York group" or the "group." Two Nevada corporations were formed, i. e., Plumas Land Company and Plumas Mining Company. Later, Plumas Lumber Company was set up. We are primarily concerned with the affairs of the land company in this appeal.

It appears that the New York group originally proposed to invest not more than $50,000 in the venture and to participate therein with Wilson on a fifty-fifty basis. Accordingly, the initial stock subscription and issue was 250,000 shares to the New York group and members of their families, and a like number of shares to Wilson. The stock subscriptions were made in early December, 1945, and the par value of the stock was ten cents per share. The evidence shows that the New York group made early advances totalling some $30,000 or $31,000, $25,000 of which was used to take up certain of the options, on behalf of the land company, and the remainder was a loan to the company, although there is some dispute as to the loan. Respondent Barry testified that the first $25,000 so advanced was for payment of the group's 250,000 shares. Wilson was to assign his options to the land company and receive his shares in payment. In order to obtain a promise of additional financial support, Wilson gave up 25,000 shares, thus insuring stock control in the New York group. Fifty thousand additional shares were issued to Carey and Dunning on August 20, 1946; respondent Barry referred to these shares as bonus shares, but it appears that cash payment was made at par value. It further appears that the New York group did not get the 25,000 shares surrendered by Wilson, for its total stock holdings in the land company were 550,000 shares, including the 50,000 subsequently issued. In December, 1945, officers of the land company were elected and Wilson became president, George B. Thatcher, the Reno attorney who handled the formation of the company, became vice president, respondent Barry became treasurer, Coleman Burke, a New York attorney, became secretary, and a V. Morby became assistant secretary.

Sometime in the summer or early fall of 1946 (appellant says it was on September 20, 1946), the land company acquired record title to the Walker Mine real property. Thereafter, on September 23, 1946, the company executed a demand promissory note in the principal sum of $50,000, payable to Burke, which note was secured by a deed of trust to the company's real property. Both the note and deed of trust were signed by respondent Barry as treasurer of the company, and Burke, as secretary, attested the execution by affixing his signature. California Trust Company was named trustee, and Burke was named beneficiary, in the deed of trust. This latter instrument was executed in several counterparts; one copy was recorded on January 14, 1947, and sometime thereafter Wilson signed another copy as president of the company. Wilson resigned this office in January, 1947, and there is some dispute as to whether he was president when he signed. However, respondent Barry testified positively that Wilson was still in office as president at the time. Barry also testified that the deed of trust was authorized at a meeting of the directors held in New York on August 20, 1946, at which Wilson was present and expressed his agreement to the proposal. Wilson, Burke and respondent Barry were directors when the deed of trust was executed.

The evidence shows that many thousands of dollars were advanced to the company by the New York group both prior and subsequent to the execution of the deed of trust and that the subsequent advances would not have been made in the absence of the note and deed of trust. The exact amount of these advances is not clear from the record, although there are numerous vouchers and cancelled checks in evidence showing substantial sums. Respondent Barry testified that as of November 19, 1946, some two months after the note and deed of trust were given, the New York group had advanced $64,794.20, and that between that time and March 5, 1947, the group advanced another $16,000 or $17,000. Wilson attempted to controvert these amounts at the trial, but admitted that he did not know what the amount of the advances was. These advances do not include the $25,000 paid out by the group for the stock initially issued to it.

The deed of trust was foreclosed by trustee's sale held in August, 1948. The notice of default was dated August 27, 1947, and was recorded on February 27, 1948. The property was bid in by Burke, the beneficiary, who received a deed from the trustee, and, in turn, gave a deed to Dunning and respondent Barry. Neither of these deeds has been recorded because of pending litigation. Carey, the other member of the New York group, had died in October, 1947, and apparently Eleanor Carey succeeded to his interest. Burke, himself, had no interest in the property, but was acting for the New York group. Since the foreclosure sale, respondent Barry has been in charge of liquidating the property. Barry testified that both when the deed of trust was executed and at the time of the foreclosure sale, the land company had no creditors except the New York group and Sugarman-Randolph, and the latter was secured by conditional sales contracts. There is no showing in the record that Sugarman-Randolph ever questioned the deed of trust.

Apparently the venture never was profitable, although the New York group did advance further moneys after the filing of the notice of default. Charges of mismanagement were made by Barry against Wilson, and the latter made countercharges. In any event, Wilson was elevated to the chairmanship of the company, to serve without salary, and he was succeeded as manager by a Los Angeles banker by the name of Cannon. Subsequently (appellant says it was on August 20, 1948), Wilson brought an action against the land company, Barry and others, for recovery of the property, which action was pending before the same trial court when the instant case was tried.

Appellant is a judgment creditor of the land company. He was in the company's employ from April, 1947, until at least November, 1948, and perhaps later. He was hired by Cannon, then the manager, and apparently replaced Cannon as manager in October, 1947. Appellant's claim, which was reduced to judgment, was for wages for the period from April, 1947, to November, 1948. His employment commenced some seven months after the deed of trust was given.

Appellant contends that at the time the deed of trust was executed he was a future creditor of the Plumas Land Company and as such is entitled to have said deed of trust set aside as fraudulent by reason of section 3439.07 of the Civil Code, which reads: "Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Appellant then argues that the evidence shows fraudulent intent and takes exception to the trial court's findings on the following grounds: (1) That the wrongful intent to defraud creditors was admitted by respondent Barry and defendant Wilson; (2) that the trial court did not take into consideration the manifest irregularities in the making of the deed of trust or the circumstances surrounding the transaction and the relationships and interests of the parties; (3) that the directors of the company afforded to themselves an unlawful preference in the payment of their claims; and (4) that the trial court was influenced by the New York group's claims against Wilson, whereas the latter's misdeeds should not be visited upon appellant. Appellant then proceeds to make an able and earnest argument to prove that the record does not sustain the findings of the trial court. If the judgment had been in favor of appellant his argument would be very helpful in pointing out evidence in support of such judgment, but in the face of the adverse findings of the trial court the testimony pointed out and relied upon by appellant merely accentuates the conflict in the testimony, and as hereinbefore pointed out it was the province of the trial court to weigh the evidence. Therefore, we deem it unnecessary to discuss at length the argument of appellant as to the insufficiency of the evidence. We are convinced that the evidence, though highly conflicting, supports the conclusion of the trial court that the deed of trust was not executed in fraud of creditors. The following statement of the trial court in its memorandum opinion is amply supported by the evidence:

> "Prior and subsequent to the execution of the deed of trust many thousands of dollars were advanced by defendant Barry and his New York associates, primarily to pay off obligations incurred against the Company, first by said Wilson, and after his removal from management, secondly by Sam B. Jackson, the plaintiff in this action, who succeeded Wilson as manager of said properties.
>
> "The deed of trust was executed more than one year prior to the time that plaintiff became manager of the properties for the Plumas Land Company. It was executed to secure moneys advanced by defendant Barry and his associates, to pay off obligations of said Company and to secure such future advances as might be made.
>
> "The Company was not then obligated to plaintiff, and insofar as the record discloses, was not obligated to any creditors, save those whose claims were being thus paid by said advances."

[7–9] We are convinced that the evidence supports the finding that the deed of trust was executed for an adequate and valuable consideration and was not executed in fraud of creditors. The following quotation from Arnold v. Hadgis, 102 Cal. App.2d 88, at page 93, 226 P.2d 641, at page 643, is quite applicable to the instant case:

> "Whether a transfer is in fraud of creditors is a question of fact and not of law, and where there is a consid-

eration for the transfer the burden is on the party attacking it to establish an actual fraudulent intent. Though the burden may shift when a prima facie case is made out, fraud must ultimately be proved by a preponderance of the evidence. Asadoorian v. Kludjian, 210 Cal. 564, 565, 292 P. 644. Defendant did not make out a prima facie case of fraud and did not sustain the burden resting upon him.

"Defendant's assertion of fraud is based on inferences which he alone has drawn from the evidence. The trial court drew contrary inferences and made its findings thereon. The evidence and the inferences to be drawn therefrom must be regarded in the light most favorable to the support of the judgment [citing cases], and the conclusions of the trial court are binding on us."

No other points raised require discussion. The judgment is affirmed.

PEEK, J., and PAULSEN, J. pro tem., concur.

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124 Cal.App.2d 639

ADAMS et al. v. ALBANY et al.

Civ. 4654.

District Court of Appeal, Fourth District. California.

April 20, 1954.

Rehearings Denied May 19, 1954.

Hearing Denied June 16, 1954.

Action for damages for alleged civil conspiracy and fraud in the sale of houses to veterans of World War II and their wives, and in the construction of said houses. The Superior Court, Fresno County, George M. De Wolf, J., sustained defendants' demurrers and entered judgment of dismissal, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that where community of interest in law and fact was presented, 40 sets of plaintiffs could properly be joined in one action against contractor, realtors, and bank for damages for alleged conspiracy to defraud plaintiffs by failing to construct homes, which plaintiffs purchased, in conformity to required plans and specifications and in accord with representations made, even though homes were purchased individually, on separate contracts, and on 25 different dates.

Judgment affirmed in part and reversed in part with directions.

1. Army and Navy 🔑51

Statute imposing limitation on actions by veterans against builders of homes, to recover, under Veterans' Emergency Housing Act, money allegedly paid for homes in excess of maximum selling prices, is not a mere statute of limitations, but a condition upon which a new right was given to a special group, and upon which the exercise of that right depended. Veterans' Emergency Housing Act of 1946, § 1 et seq., 50 U.S.C.A. Appendix, § 1821 et seq.; Servicemen's Readjustment Act of 1944, § 1 et seq., 38 U.S.C.A. § 693 et seq.; Civ.Code, § 3343.

2. Limitation of Actions 🔑104(1)

One-year limitation barring actions by veterans against builders of homes, to recover, under Veterans' Emergency Housing Act, money allegedly paid for homes in excess of maximum selling prices, was not tolled by builder's alleged fraudulent concealment of alleged fact that prices were in excess of maximum selling prices. Veterans' Emergency Housing Act of 1946, § 1 et seq., 50 U.S.C.A. Appendix, § 1821 et seq.; Servicemen's Readjustment Act of 1944, § 1 et seq., 38 U.S.C.A. § 693 et seq.; Civ.Code, § 3343.

3. Conspiracy 🔑17

Where community of interest in law and fact was presented, 40 separate plaintiffs could properly be joined in one action for damages for alleged conspiracy to defraud plaintiffs by failing to construct homes, which plaintiffs purchased, in conformity to required plans and specifications and in accord with representations made, even though homes were purchased individually, on separate contracts, and on 25 different dates. Code Civ.Proc. §§ 378, 427.

4. Conspiracy ⚷9

An action will lie against persons who conspire to defraud plaintiffs, by failing to construct homes, which plaintiffs purchased, in conformity to required plans and specifications and in accord with representations made.

5. Pleading ⚷225(1)

Complaint, for damages for alleged conspiracy to defraud plaintiffs by failing to construct homes, which plaintiffs purchased, in conformity to required plans and specifications and in accord with representations made, while defective, was sufficient to indicate that it was amendable so as to state a cause of action, and the sustaining of demurrers on grounds of misjoinder, without leave to amend, thus preventing proper amendment, was error.

◆

James W. Harvey, San Francisco, L. Kenneth Say, Fresno, Dorothy E. Handy, San Francisco, for appellants.

Samuel B. Stewart, Jr., Christopher M. Jenks, San Francisco, Charles E. Cooper, San Francisco, Stutsman, Hackett & Nagel, Ray W. Hays, Claude L. Rowe, Fresno, for respondents.

BARNARD, Presiding Justice.

This is an action for damages for "civil conspiracy and fraud in the sale of houses to certain veterans of World War II and their wives, and in the construction of said houses." There are 78 plaintiffs, consisting of 38 couples and two single plaintiffs. The defendants are William C. Albany, a contractor; Howells and Vail, real estate agents; Southern Realty Company, original owner of a subdivision in Fresno; and the Bank of America, with five of its officers.

The action was filed on February 7, 1949, and demurrers were sustained with leave to amend. The amended complaint alleges that the 40 sets of plaintiffs entered into separate house purchasing agreements with the defendants on certain dates, the earliest being July 10, 1946, and the latest October 4, 1946. The first cause of action, alleging conspiracy and fraud, seeks to recover damages to the extent of the sums charged in excess of the maximum prices fixed pursuant to the Veterans' Emergency Housing Act of 1946, 50 U.S.C.A. Appendix, § 1821 et seq. A second cause of action is based on the theory that all of the defendants conspired to defraud the plaintiffs, by intentionally failing to construct these houses in conformity with the required plans and specifications, and in accordance with the representations made.

Demurrers to both causes of action were sustained, some with leave to amend and some without. The plaintiffs elected not to amend, and they have appealed from a judgment of dismissal which followed.

Briefly stated, the following facts were alleged in the first cause of action. In July, 1946, Albany agreed to purchase certain lots in this tract from Southern Realty Company upon which he proposed to construct homes for sale to veterans. Prior thereto and continuing thereafter, the defendants, intending to cheat and defraud the plaintiffs, fraudulently conspired to induce plaintiffs to purchase homes at prices in excess of maximum ceiling prices fixed by the federal government, and in excess of their reasonable value. In furtherance of this conspiracy defendants arranged for the construction, financing and sale of homes in this tract. They secured plaintiffs' signatures on various documents by representing that they would construct and sell homes to plaintiffs at prices below the maximum ceilings fixed by the government. Among the documents thus secured were applications for priorities for building materials, and contracts signed by the respective plaintiffs as "Owner" and by Albany as "Contractor". These contracts purported to be building contracts, and provided that the contractor was to build a house on a designated lot in accordance with certain plans and specifications, and that the owner was to pay a certain sum in installments as the work progressed, with the final payment 35 days after completion. Defendants, by using these documents and representing to the government that the plaintiffs were having these houses constructed and were not merely purchasing them, obtained priorities under the provisions of the Veterans' Emergency Housing Act of 1946 and other acts, and used these priorities to secure materials for the construction of said dwellings. The defendants sold these houses to the plaintiffs for prices in excess of the maximum prices which had been fixed under the statutes, concealing the facts from the plaintiffs, and representing that the prices charged were below the fixed maximum prices. These representations were false, and knowingly made to induce the plaintiffs to act thereon. The defendant bank, in concert with the codefendants and in furtherance of this common plan, financed the purchase of the homes by the plaintiffs on a 100% basis, knowing that these loans were for amounts in excess of the maximum sale price and in violation of the federal acts. The papers and documents disclosing the true nature of the transactions were concealed from the plaintiffs, but were finally disclosed to them by employees of the government on February 8 and 9, 1948. Relying on these representations, and acting individually at times and dates thereafter set forth, the plaintiffs entered into a series of separate agreements with the defendants for the purchase of said homes at prices in excess of said maximum ceiling prices. A list of the various plaintiffs is then set forth showing, in each instance, the description and location of the dwelling so purchased, the represented maximum sales price, the actual maximum sales price, and the amount of the overcharge. The prayer is for damages in the amount of the overcharge with respect to each purchaser, ranging from about $1000 to about $2000, and for a reasonable attorney's fee as to each plaintiff.

The court sustained general demurrers to the first cause of action with leave to amend, and also sustained demurrers on the ground that said first cause was barred by section 7(d) of the Veterans' Emergency Housing Act of 1946. Prior to its repeal, section 5 of that act made it unlawful for any person to sell any housing accommodations at a price in excess of the maximum sales price applicable to such sale. Section 7(d) read as follows:

> "(d) If any person selling housing accommodations violates a regulation or order prescribing a maximum selling price, the person who buys such housing accommodations may, within one year from the date of the occurrence of the violation, bring an action for the amount by which the consideration exceeded the maximum selling price, plus reasonable attorney's fees and costs as determined by the court."

The appellants contend that the allegations of the first cause of action are sufficient to set forth a cause of action for conspiracy and fraud; that fraud tolls the running of the statute of limitations contained in the statute; that it was alleged that the defendants fraudulently concealed the facts upon which their cause of action was based; and that the action was brought within one year after discovery of the facts. They rely on Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F.2d 253, 15 A.L.R.2d 491, and upon such cases as Twining v. Thompson, 68 Cal.App.2d 104, 156 P.2d 29, in which it has been held that the fraudulent concealment of an essential fact was sufficient, under the circumstances, to toll the running of a statute of limitations.

The first cause of action is based entirely on a claimed violation of the federal statute, and clearly seeks to recover the statutory overcharge provided for therein. Attorneys' fees are also demanded, as permitted by that statute. No attempt was made to allege any damage otherwise recoverable, to allege the actual value of the properties, or to allege facts complying with the requirement of section 3343 of the Civil Code. While the general demurrers were sustained with leave to amend, the real question presented is whether the requirement that the action be brought within one year is controlling. This action was not filed until some two years and four months after the last of these sales, and one day less than a year after the alleged discovery of the true facts.

A prior action between these same parties, involving these same transactions, was dismissed in the federal court. Adams v. Albany, D.C. 80 F.Supp. 876. In that case it was held that this statute conferred special benefits upon a group of persons who could not otherwise claim such benefits, that the right to such benefits was conditioned upon a prompt exercise of that right, and that the right is destroyed by the expiration of the time during which the statute provides it may be exercised. It was further held that the fraudulent concealment alleged was not sufficient, in any event, to toll even a statute of limitations. It was pointed out that the concealment charged was that of the maximum selling price fixed by the housing administrator under authority of federal statutes and regulations; that his action was the official act of a public officer and his records were open to inspection by all interested parties; that the plaintiffs were charged with knowledge of the statutes and regulations which they set forth as the basis of their claim; that it was not alleged that any act was done by the defendants to prevent the plaintiffs from having access to such records, which would have disclosed the prices fixed; that the facts with respect to concealment were not alleged; and that there was a mere allegation of discovery without any facts showing that an earlier discovery was prevented.

[1, 2] A similar holding appears in Sedivy v. Superior Home Builders, 7 Cir., 188 F.2d 729, where it was held that no cause of action was stated since the action was not commenced within the one year period, as required by the act. Under a similar statute, covering rent control, it was held in Kravitz v. Nankin, 200 Misc. 219, 105 N.Y.S.2d 577, 580, that the time limitation was not extended by allegations of fraud. It was there said:

> " 'The gravamen of the plaintiff's cause of action is the alleged overcharges and the statute, section 205 of the Rent Act of 1947, created a cause of action * * * provided such action be brought within one year from the date of such overpayment. It did not create a cause of action in fraud, and plaintiff derived no common law rights from the statute' ".

The principles of the Scarborough case and the other cases relied on by the appellants are not applicable here. This was not a mere statute of limitations, but a condition upon which a new right was given to a special group, and upon which the exercise of that right depended. No such cause of action for the return of the overcharge existed at common law or otherwise. The allegations of concealment and belated discovery were not only insufficient in themselves, but they could add nothing to the statute which created the benefit and right relied on, and which specially provided that the right so conferred must be exercised within the time specified. We conclude that the demurrer to the first cause of action on this ground was properly sustained without leave to amend.

Briefly stated, the following facts were alleged in the second cause of action. Between May 1, 1946 and December 31, 1947, the defendants fraudulently conspired to obtain priorities for materials and to build houses not in conformity with the plans and specifications submitted with the applications for said priorities, while representing to the plaintiffs that they would build the houses according to these plans and specifications and sell them to plaintiffs at prices not in excess of their reasonable value. In furtherance of said conspiracy the defendants arranged for the construction, financing and sale of homes in this tract and submitted said plans and specifications to the federal government in making application for such priorities, and such plans and specifications were not delivered to plaintiffs and were not available to them. Upon the representations so made to the federal government the defendants obtained such priorities and used such materials to build homes not in conformity with the plans and specifications thus submitted. The defendants represented to the federal government and to plaintiffs that said houses were to be and were constructed in conformity with these plans and specifications, with materials of a specified quality and in a good and workmanlike manner. Relying on these representations the plaintiffs, acting individually, purchased homes in this tract from the defendants. In constructing these houses the defendants willfully used inferior and unsuitable materials, omitted many items and materials required by the specifications, and erected said houses in such an unskillful and negligent manner as to cause them to be defective and structurally unsound and entirely unfit for use other than as temporary dwellings. The defendant bank, in concert with its codefendants, certified to the veterans' administration that these homes were built in conformity with the plans and specifications submitted, certified that the security required by Title III of the Servicemen's Readjustment Act of 1944, 38 U.S.C.A. § 693 et seq., had been obtained, and further certified that the purchase price of each of said homes was not in excess of its reasonable value. The bank knew that said certifications were false and were made in violation of the provisions of the Servicemen's Readjustment Act. The plaintiffs, in reliance upon said certifications, and upon representations made to them by the bank, were induced to and did authorize the bank to make payments to its codefendants from plaintiffs' funds. The papers and documents relating to these various transactions were in the possession of the defendants, were not accessible to the plaintiffs, and were concealed from them. The facts relating to said transactions were disclosed to the plaintiffs by agents of the federal government on February 8 and 9, 1948. The houses thus constructed by the defendants have no permanent value other than salvage value. It will be necessary for the plaintiffs to tear down and rebuild said houses in their entirety, using such material as can be salvaged.

These general allegations are followed by specific allegations relating to the house purchased by each of the 40 separate sets of plaintiffs. In each instance it is alleged that on a certain date a specific plaintiff purchased a certain house which defendants represented would be constructed according to certain plans and specifications, and that the house constructed does not conform to those specifications. In each instance some variations from the specifications and some claimed defects in material are specifically alleged, and other defects in quality and workmanship are alleged in general language. The cost of dismantling and rebuilding the house is also alleged, with the cost of securing other accommodations over the period required for such rebuilding. In each instance that set of plaintiffs prays for damages in connection with that transaction, the amounts ranging from about $12,000 to about $23,000, and for an additional $10,000 because of the inconvenience and distress of mind suffered.

General demurrers to that cause of action, and special demurrers on various grounds, were sustained with leave to amend. Another special demurrer on the ground of misjoinder of plaintiffs was sustained without leave to amend.

The appellants contend that the demurrer on the ground of misjoinder of plaintiffs was improperly sustained without leave to amend, with the practical effect of making it impossible for them to amend; that in this action for civil conspiracy and fraud all the plaintiffs have a common interest in the subject of the action and a right of relief arising out of the same transaction or series of transactions; and that questions of law and fact exist, and would exist even if separate actions were brought, which were common to all parties. It is also contended that they were entitled to allege all their causes of action which arose out of the same tort, civil conspiracy and fraud, without separately stating them; and that the demurrers on the ground of unintelligibility, uncertainty and ambiguity were improperly sustained since the facts involved were peculiarly within the knowledge of the defendants.

The respondents contend that the demurrer on the ground of misjoinder of plaintiffs was properly sustained; that 40 sets of plaintiffs bought separate houses under separate contracts on 25 separate dates, and it was alleged that each was "acting individually"; that there was here no "well-defined 'community of interest' in the questions of law and fact", as was held to be necessary in Weaver v. Pasadena Tournament of Roses Ass'n, 32 Cal.2d 833, 198 P.2d 514, 517, that the torts here alleged did not take place at the same time and place, with the same persons present, and were separate torts; and that the evidence as to one house would have no probative value as to any other house. It is further contended that separate causes of action were not separately stated; that fraud in the sale of the houses is alleged, which would involve misrepresentation as to existing facts; that fraud based upon promises to construct the houses in a specified manner is also alleged, which would involve promises made without the intention of performing; and that a further attempt is made to state a cause of action against the bank for breach of its duty under the federal statutes, although that duty was to the federal government and not to the plaintiffs as borrowers merely because they happen to be veterans. In support of other rulings on the demurrers it is argued that the second cause of action contained no allegations disclosing the value or selling price of the various houses, and that the claimed defective conditions were alleged only in general terms which failed to disclose what items or materials were omitted, what substitutions of materials were made, and in what respects the plumbing, concrete and other matters failed to comply with the specifications.

[3] While these demurrers were sustained with leave to amend, with respect to most of the rulings, they were sustained without leave to amend on the ground of misjoinder of plaintiffs. The practical effect of this was to prevent any amendment insofar as this action is concerned, and to require the filing of 40 separate suits if further litigation of these claims was desired. This ruling was erroneous, and a community interest in the questions of law and fact presented sufficiently appears to meet the statutory requirement and to justify and permit these plaintiffs to join in this action. Section 378 of the Code of Civil Procedure authorizes such joinder where the plaintiffs have a common interest in the subject of the action, where a right to relief arising out of the same transaction or series of transactions is alleged and where, if separate actions were brought any question of law or fact would arise which is common to all the parties to the action. Section 427 of that code permits the uniting of several causes of action where they all arise out of the same transaction or transactions connected with the same subject of action, or where they all arise out of claims for injuries arising out of a conspiracy.

In view of the present wording of these statutes, we do not regard the decision in Noroian v. Bennett, 179 Cal. 806, 179 P. 158, as controlling here. One scheme is alleged, based on conspiracy and fraud, depending upon the same basic misrepresentations, and leading to a series of transactions exactly similar in kind and manner of operation which have affected all of the plaintiffs. The agreements and instruments involved are the same except for incidental variations in details affecting the different plaintiffs. The controlling questions of law, relating to liability, are the same with respect to each of the plaintiffs. A very large part of the evidence as to one of the series of incidents would be equally applicable to the others. While some of the evidence, as to details and amounts, would vary with respect to the different plaintiffs, no good reason appears in law or in reason to compel the filing of 40 separate actions, with a resulting duplication, that many times, of all of the evidence.

[4, 5] While the allegations of the second cause of action are deficient in many respects, as contended by the respondents and as indicated by the rulings of the court, a cause of action could be stated and no valid reason appears why the plaintiffs should have not been permitted to make proper amendments and to proceed in this action. If they desire to set up separate causes of action these should be separately stated, with the necessary allegations as to each. The making of possible and proper amendments should not have been prevented by sustaining the demurrers on the ground of misjoinder of plaintiffs without leave to amend. Whether or not some of the necessary allegations as against the

bank and its officers could be proved is not involved on this appeal.

The judgment is affirmed with respect to the first cause of action, and is reversed with respect to the second cause of action, with instructions to the trial court to permit the plaintiffs to amend within a reasonable time. Each party to pay his own costs.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; CARTER, J., dissenting.

LYONS
v.
SUPERIOR COURT OF STATE, IN AND FOR LOS ANGELES COUNTY.*

Civ. 20212.

District Court of Appeal, Second District, Division 2, California.

April 22, 1954.

Rehearing Denied May 12, 1954.

Hearing Granted June 17, 1954.

Alleged contemner brought certiorari proceeding to review order of Superior Court adjudging alleged contemner guilty of contempt of court. The District Court of Appeal, McComb, J., held that order reciting that alleged contemner was ordered to return to court at certain time, but did not return at such time, was a valid order of commitment for contempt committed in presence of court.

Writ discharged.

1. Contempt 🔑63(4)

Order reciting that alleged contemner was ordered to return to court at certain time, but did not return at such time, that he stated that reason he did not return on time was because he was asleep, and that no reason was given for his being asleep and that court declined to believe his statement, that on ten prior occasions he had either been substantially late or had wholly failed to attend court when his presence was necessary, and that on one previous occasion he had been guilty of contempt of court, and that court adjudged him guilty of contempt, was a valid order of commitment for contempt committed in presence of court.

2. Contempt 🔑63(4)

A valid order for contempt of court occurring in presence of court must recite facts which show actual occurrence of contempt and state that they happened in immediate view and presence of court or judge.

3. Contempt 🔑63(3)

A valid order for contempt occurring in presence of court must state facts and not mere conclusions.

4. Contempt 🔑57, 66(3)

Where alleged contemner requested court to hear him on matter of contempt and presented to court his purported excuse for alleged contempt, he thereby waived any technical objection there might be to court's jurisdiction and waived any right to determination on appeal of question whether his conduct constituted a direct contempt committed in the presence of the court.

5. Contempt 🔑57

Where alleged contemner voluntarily appears and presents evidence in contempt proceedings and argues matter to court without calling court's attention to any objections, which alleged contemner may have to having the matter heard, he is presumed to have waived any technical objections.

Lowell Lyons, Los Angeles, A. Brigham Rose, Los Angeles, of counsel, for petitioner.

Harold W. Kennedy, county counsel, John B. Anson, David D. Mix, deputies county counsel, Los Angeles, for respondent.

McCOMB, Justice.

This is a proceeding in certiorari to review an order of the respondent court adjudging petitioner guilty of contempt of court.

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* Subsequent opinion 278 P.2d 681.

Petitioner, an attorney at law, was representing a defendant in a case entitled People of the State of California v. Frank Pardini, which was on trial before the respondent court on February 24, 1954. After the noon recess he did not appear at two o'clock when the court reconvened, and thereafter the following commitment for contempt was signed by the trial judge:

"Be it remembered, that on February 24, 1954, there was pending and on trial before the court and jury in Department 43 of this court a criminal prosecution and trial entitled People v. Frank Pardini, No. 160665, in which said Lowell Lyons, a member of the State Bar, was sole counsel for the defendant.

"That at the hour of 12 noon of said date the court ordered a recess of said trial until 2 p. m. of the same day, said order being made orally, the hour being twice repeated in a tone sufficiently loud to be heard in every person in the court room and that at the time said Lowell Lyons was at the counsel table within 20 feet of the bench and that 2 p. m. is the regular established hour for the resumption of trials after noonday recesses.

"That at the hour of 2 p. m. on said day the Court resumed the bench and the jury was in the jury box and the prosecuting attorney and witnesses were present in the court room but said Lowell Lyons failed to appear although said counsel had the ability to do so and that said counsel did not appear in said court room until the hour of 2:45 p. m., whereupon the Court, the jury having retired to the jury room, inquired of said Lowell Lyons whether there was any cause why he should not be punished for contempt, to which said Lowell Lyons responded that he had been asleep. That said statement was not supported by any evidence or testimony and which statement the Court declined to believe. That on not less than ten prior occasions the said Lowell Lyons has either been substantially late or wholly failed to attend said Court in Department 43 at times when cases in which he was counsel of record were set for trial or other proceedings when his presence was necessary and that on October 28, 1953, said Lowell Lyons was adjudged guilty of contempt of court for failing to appear in said Court, in a trial in which he was counsel of record and which was set for trial at 9:30 a. m. until the hour of 9:55 a. m. and for which contempt said Lowell Lyons was sentenced to serve twenty-four hours in the County Jail of said County, which sentence was suspended, with an admonition against a repetition of such conduct.

"Therefore, it is ordered and adjudged that said Lowell Lyons is guilty of contempt of Court and sentenced to serve five days of twenty-four hours each in the County Jail of this County.

"Dated: February 24, 1954,

"Charles W. Fricke, Judge of the Superior Court."

Questions: First: *Is the foregoing order a valid order of commitment for contempt committed in the presence of the court?*

[1-3] *Yes.* A valid order for contempt of court occurring in the presence of the court must recite facts which show the actual occurrence of contempt and state that they happened in the immediate view and presence of the court or judge. It must state facts and not mere conclusions. (Overend v. Superior Court, 131 Cal. 280, 284 et seq., 63 P. 372; In re Wells, 29 Cal. 2d 200, 202 [3], 173 P.2d 811; In re Mackay, 140 Cal.App. 400, 402 [3], 35 P.2d 385; Cf. Otis v. Superior Court, 148 Cal. 129, 130, 82 P. 853.

In the present case the applicable rule pertaining to an order punishing an attorney for contempt of court for failure to appear at the time of trial is succinctly stated by this court in In re Mackay, supra, 140 Cal.App. at page 402, 35 P.2d at page 387, as follows: "In the instant proceeding it should have been recited, not merely that the attorney was not present at the hour for court to convene or for some time thereafter, and that he failed to give any sufficient excuse therefor, but also what excuse he did give, if any, and, if none, what was said and done showing affirmatively that he had opportunity to present an excuse."

Here the commitment conforms to the requirements of the rule above stated. It is recited that petitioner was present in court, ordered to return to the court at 2:00 p. m., did not return, was interrogated as to the reasons for his not returning to which he replied that he was asleep; no reason or excuse was given for his being asleep, and the trial court declined to believe petitioner's statement in view of the fact that on ten prior occasions petitioner had either been substantially late or wholly failed to attend court at times when he was attorney of record in cases and his presence was necessary, and that in fact on one previous occasion he had been guilty of contempt of court in a case in which he was attorney of record.

Clearly these facts all set forth in the commitment constituted a contempt of court, and the order is valid.

Second: *Did defendant's contemptuous conduct constitute a direct contempt committed in the presence of the court?*

[4] This question need not be answered for the reason that petitioner waived any technical objection there might be to the court's jurisdiction by requesting the court to hear him upon the matter of contempt and by presenting to the court his purported excuse for having been late. Therefore it is immaterial whether the contempt was a direct contempt or an indirect contempt, and petitioner has waived any right to urge error in not having the facts pertaining to the contempt set forth in affidavits and an order to show cause issued.

[5] A petitioner is presumed to have waived any technical objections upon a hearing for contempt where he voluntarily appears and presents evidence and argues the matter to the court without calling to the court's attention any objections which he may have to having the matter heard. (In re McHugh, 152 Mich. 505, 116 N.W. 459, 461.)

In the cited case in 116 N.W. at page 461, the court accurately states the rule thus: "If the respondents had refused to appear in court, as was the case in Re Wood, 82 Mich. 75, 45 N.W. 1113, or if they had been arrested upon the capias and had denied the jurisdiction of the court for the reason that no affidavit or petition was presented to the court setting forth the facts, the respondents would have been in position to raise this question, but their conduct waived it. They voluntarily placed themselves in precisely the same position as they would have been if the proceeding had been such as they now contend was necessary." (Cf. Roe v. Superior Court of City and County of San Francisco, 60 Cal. 93, et seq.)

For the foregoing reasons the writ heretofore issued is discharged.

MOORE, P. J., and FOX, J., concur.

GILEO
v.
SOUTHERN PAC. CO. *
Civ. 15612.

District Court of Appeal, First District, Division 2, California.

April 28, 1954.

Hearing Granted June 23, 1954.

Action by railroad employee under Federal Employers' Liability Act. The railroad had loaned employee's services to a corporation which built railroad cars and indirectly leased them back to the same or a subsidiary railroad for operation. Employee had been engaged in welding on new cars for the other corporation for about five months until the time of his injury. On trial in Superior Court, San Francisco County, Clarence W. Morris, J., the parties stipulated for damages subject to ruling on whether the Federal Employers' Liability Act applied and on affirmative ruling the railroad appealed. The District Court of Appeal, Dooling, J., held that in view of the employee's long period of work in intrastate commerce the mere possibility of his having been assigned during that period or at some future time to work affecting interstate commerce was not sufficient to establish Federal Employers' Liability Act coverage.

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* Opinion vacated 282 P.2d 872.

Judgment reversed.

Commerce ⟹27(8)

Railroad employee who was loaned to another corporation and assigned to construction of new cars and who was so assigned for about five months until time of injury, was not engaged in interstate commerce and was not entitled to benefits under Federal Employers' Liability Act for injury, notwithstanding he could have been assigned to interstate commerce at any time. Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq.

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Arthur B. Dunne, Dunne, Dunne & Phelps, San Francisco, for appellant.

Sheridan Downey, Jr., Hildebrand, Bills & McLeod, Oakland, for respondent.

DOOLING, Justice.

This is an appeal from a judgment of $7,000 awarded to plaintiff Gileo for injuries suffered while working as a carman welder for defendant railroad. Plaintiff's action was based on Federal Employers' Liability Act, 45 U.S.C.A. § 51.

Southern Pacific (SP) following World War II undertook a program of acquiring new equipment. Some of the equipment was to go to an SP subsidiary, the Texas & New Orleans Railroad Company (T & NO). In August of 1950 the Board of Directors of SP adopted a resolution to acquire 5,000 units of freight train equipment. Some of the equipment was assigned to SP and some to T & NO. Included in the assignment to the latter were 1,000 gondola freight cars (gons). The gons were to be built in the SP shops at Sacramento. The Southern Pacific Equipment Company (SPEC) determined to build 2,000 of the units including the 1,000 gons assigned to T & NO. The SPEC purchased the necessary materials and entered into a contract with SP under which SP agreed to supply the shop facilities and labor. The labor force worked for SP. SP paid them and billed SPEC for such labor costs.

The SPEC contracted with George Smith and H. J. Wylie, purchasers, to construct, sell and deliver the cars to them. The purchasers then assigned the contract to the Pennsylvania Company for Banking and Trusts pursuant to an agreement made by Smith and Wylie with the Pennsylvania Banking Company and the SP. The Bank was trustee of the Southern Pacific Company Equipment Trust. The SPEC billed the Bank and transferred title to it as trustee.

The Bank then leased the equipment to the SP or to T & NO, as the case might be.

At Sacramento SP has general shops separate from the operating or transportation division. One of these general shops was car shop No. 9, and the new cars were to be constructed there.

Construction began on July 1, 1950. The car shop was divided into two departments, one doing repair work and the other doing new car construction.

The new car construction was done in assembly line fashion on two tracks. The work was interrupted only two days by inclement weather and once due to shortage of materials for approximately one month from the time the work began to the time of trial. During the period when there was a shortage of materials for new construction the construction crews were assigned to repair work in order to keep the force intact. This was before Gileo was assigned to new car construction.

All the men working for SP were on one seniority list and there was no bidding done for an individual job as such. If a man bid for a job in shop No. 9, he would be assigned to a particular job by the supervising staff.

Because of the importance of new car construction, a man assigned to this work was assigned on a continuous basis. However the number of men working on construction varied with the type of car being built. For example 425 men worked on the construction of automobile cars, but only 270 men worked on gons. There was approximately a 10% absenteeism rate and in order to keep the assembly line moving these vacancies were temporarily filled with men working in the repair department. But the men assigned to new construction were not moved temporarily to other jobs in case of short breakdowns and if assigned to other departments were done so on a permanent basis.

Gileo first went to work for SP in the car shop at Sacramento in October 1941. He worked as a helper and apprentice learning the business and became a journeyman carman in April 1946. He also became qualified as a welder.

In February 1951 Gileo bid in for a job as welder in car shop No. 9. He worked on new automobile cars and after that worked on new gondola cars up until the time he was hurt on July 11, 1951. Gileo returned to work on the second day after the accident and again worked on gons until he bid in as an inspector in the car machine shop. Later as a result of the injury he began having recurrent headaches which forced him to leave work from time to time.

Gileo began working on the construction of new gons in April 1951 and from that time until he was hurt he was never assigned any repair work. From February to July he remembers a couple of times in which he did repair work. This work consisted of repairing a machine that had broken down and this machine was used in the construction of new cars.

It was stipulated by both parties that the issue of negligence be decided in favor of plaintiff, that if given judgment he recover $7,000 in damages, that the court discharge the jury and rule as a matter of law whether or not the Federal Employers Liability Act (FELA) applies in this fact situation. The court ruled that as a matter of law at the time plaintiff was injured defendant with respect to its activities connected with the injury was a common carrier engaged in interstate commerce and that the plaintiff's duties as employee included the furtherance of interstate commerce and directly and substantially affected such commerce. It therefore held that FELA is applicable as a matter of law.

The sole contention of appellant is that FELA is not applicable in this fact situation and therefore the trial court had no jurisdiction.

FELA was first passed in 1906 but was declared unconstitutional by the Supreme Court because it gave Congress the power to regulate subjects outside of its scope of authority. In 1908 the Act was made more restrictive in its application to interstate commerce and therefore its constitutionality was sustained. In 1939 the Act was amended because under the case decisions it was necessary that the employee be engaged in interstate commerce at the very moment of injury to fall under the Act. This brought about harsh results in many cases. Therefore the amendment provided that employees "any part of whose *duties as such employee* shall be the furtherance of interstate * * * commerce; or shall in any way *directly* or *closely* and *substantially affect such commerce* * * * shall * * * be considered as entitled to the benefits of this chapter." (Emphasis ours.)

The only change made by the 1939 amendment was to give a new definition to the term "employee". In 10 A.L.R.2d 1279 beginning at page 1,281 a quotation from the Senate Judiciary Committee's deliberations on this amendment is made. This quotation recognizes that the difficult question of fact presented in many cases of whether or not at the moment of injury the injured person was engaged in interstate commerce resulted in unfair consequences because of needless expensive litigation and statute of limitations barriers if the plaintiff chose the wrong remedy. Consequently by this amendment Congress wished to abolish the requirement that the employee must be actually engaged in interstate traffic at the moment of injury. However the change from the "moment of injury" test to the "duties as such employee" test still leaves a twilight zone in which the courts must make difficult fact decisions. Both parties agree that the only case squarely considering the question whether an employee of a railroad engaged exclusively in new construction is covered by the FELA is Moser v. Union Pacific Railroad Co., 65 Idaho 479, 147 P.

2d 336, 153 A.L.R. 341. In that case the Idaho Supreme Court held that a member of a construction crew engaged in the construction of new tracks and switches and a large icing dock was not covered by the FELA. This decision was by a closely divided court.

We need not decide whether this case was correctly decided on its facts, because in our case SP was not engaged in directly manufacturing new cars for its own use. It was manufacturing the cars under contract with a separate corporation and after their manufacture title was transferred to another corporation which in turn leased the cars to SP or, in the case of the gons on which Gileo was working for a considerable period before his injury, to T & NO, a different railroad company. Under the facts of this case we are satisfied that SP was in no different position than a manufacturer, not engaged in railroading, which was manufacturing railroad cars to be delivered to any purchaser.

The more difficult question arises from the facts that Gileo was employed generally in the carshop and that he could at any time have been assigned to the repair work being done in the carshop, as evidenced by the fact that before he entered the carshop the crew engaged in new car construction was in fact transferred to repair work in the shop during the period when there was a shortage of material for new car construction. From these facts can it be said that a "part" of Gileo's "duties" "directly or closely and substantially" affected interstate commerce?

The question is pointed up by three decisions which seem most closely in point. In Wright v. New York Cent. R. Co., 263 App. Div. 461, 33 N.Y.S.2d 531, quoting from the opinion: "Claimant usually worked in intrastate commerce for five days a week and in interstate commerce for one day a week * * * when injured, he was engaged in intrastate commerce." The court held that since a part of the claimant's duties were in interstate commerce he was covered by the FELA even though on the day of his injury he was engaged exclusively in intrastate commerce. This case was affirmed by the Court of Appeals, 288 N.Y. 719, 43 N.E. 2d 97, and the U. S. Supreme Court denied certiorari, Industrial B'd of State of N. Y. v. New York Cent. R. R. Co., 317 U.S. 668, 63 S.Ct. 73, 87 L.Ed. 537.

In Scarborough v. Pennsylvania R. Co., 154 Pa.Super. 129, 35 A.2d 603, a railroad signalman whose duties were generally in interstate commerce had for three weeks been engaged in installing new station lights when he was injured. The court held that even if this installation work did not fall under the definition of the FELA, i. e., if at the time of injury his work was exclusively intrastate, a part of his duties were in interstate commerce. The court said in 35 A.2d at page 606: "Taking into consideration that Scarborough's general duties were in interstate commerce, and that he was subject to call at all times for such service * * * he continued to be employed as a signalman * * *. He was subject to call to do temporary work, such as he was doing when injured, but the fact remains that he was always available to perform his general duties, which were in the furtherance of interstate commerce."

In Robinson v. Pennsylvania R. Co., D.C., 113 F.Supp. 863 a railroad carpenter was a member of a bridge repair crew which at times worked on railroad bridges and at times on highway bridges which crossed the railroad tracks. For almost 2 months before his injury he had been engaged exclusively in repairing a highway bridge. The court assumed that this work was exclusively intrastate, but none the less held that a part of the claimant's duties were in interstate commerce, saying in 113 F.Supp. at page 865:

"Perhaps there may be situations where a railroad employee, whose work includes duties of both an interstate and intrastate nature, is engaged in work of an intrastate nature for so long a period that he will lose the coverage of the Act, but the present case, in my opinion, does not involve one of these situations."

These three cases have broadly construed the FELA to include within its scope employees who for a considerable period of time (5 days, 3 weeks, nearly 2 months) have been employed exclusively in intrastate commerce, where the general scope of duties performed by them over a longer period has included and would continue to include interstate employment.

The line must still be drawn somewhere. By adopting the "any part of whose duties" test the Congress has abolished the "moment of injury" test, but it has still left open the question under what circumstances may it be said that any part of an employee's duties closely affect interstate commerce.

In each of the three cases above discussed the employee was not only subject to assignment to interstate duties, but had previously been engaged in interstate duties in the very employment and presumably would soon be engaged in interstate duties again. In the case before us, under the practice adopted by SP, Gileo from the moment he entered the carshop on February 12, 1951 and was assigned to new car construction until the time of his injury 6 months later was employed exclusively in new car construction. He could have been assigned to repair work but in practice he was not, and would not be, so long as the new car construction continued and the materials for new car construction were available. The bare possibility of future assignment to repair work standing alone, does not seem to us sufficient to make "any part of his duties" affect interstate commerce within the meaning of the FELA. The test must be a practical, not a purely theoretical one. No case has gone so far as to hold that an employee whose immediate work over a long period of time has been exclusively in intrastate commerce, and no part of whose work in the past in that particular employment has been in interstate commerce, is covered by the FELA because of the possibility only that he might have been assigned to interstate employment at any time. We are satisfied under the facts of this particular case that respondent was not covered by the FELA.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

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124 Cal.App.2d 622

HINTON v. STATE et al.

Civ. 15827.

District Court of Appeal, First District,
Division 1, California.
April 20, 1954.

Action against state officer having duty of maintaining electric crossing signals, for injury received by pedestrian when struck by automobile. The Superior Court in and for the City of San Francisco, Theresa Meikle, J., entered judgment from which defendant appealed. The District Court of Appeal, Bray, J., held that under statute making state officer liable for injury caused by dangerous condition of public property only if injury was direct and proximate result of the condition, lack of customary instruction sign at push-button electric crossing signal, which defendant had duty of maintaining, with result that plaintiff crossed on green light without pushing button for purpose of giving her longer period for crossing, and was injured when struck by automobile, was the "direct cause" of such injuries as well as the proximate cause in that it was the active, efficient cause that set in motion the train of events which resulted in the injury, without intervention of any force started and working actively from a new and independent source.

Judgment affirmed.

1. Automobiles ⚷306(2)

In action against state official responsible for maintenance of electrical signals on highways, for injuries received when plaintiff was struck by automobile while crossing street at which there was a push-button traffic signal control device from which sign indicating manner in which it might be operated was allegedly missing, evidence was sufficient to warrant finding that the sign was missing at the time of the accident. Government Code, § 1953.

2. Evidence ⚷586(3)

The weight to be given negative evidence, such as evidence that sign informing pedestrians of manner of operation of push-button signal at pedestrian crossing was missing, is for the jury, and there is no inherent weakness in such evidence which requires its exclusion.

3. States ⚩79

Provision of Government Code making state officer liable for injuries received from alleged defective or dangerous condition of public property, only if, inter alia, the injury is a direct and proximate result of the defective or dangerous condition, does not use the word direct as synonymous with the word proximate, but intent is manifested to impose burden of showing negligence beyond that required in the ordinary case, by requiring proof not only that injury was proximate result of the dangerous condition but also that it occurred as a direct result of the dangerous condition. Government Code, § 1953.

4. Negligence ⚩56(1.12)

A "direct cause" may be defined as the active efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source, or, as one without which the injury would not have happened.

See publication Words and Phrases, for other judicial constructions and definitions of "Direct Cause".

5. Automobiles ⚩290

Under statute making state officer liable for injury caused by dangerous condition of public property only if injury was direct and proximate result of the condition, lack of customary instruction sign at push-button electric crossing signal, which defendant had duty of maintaining, with result that plaintiff crossed on green light without pushing button for purpose of giving her longer period for crossing, and was injured when struck by automobile, was the "direct cause", as well as the proximate cause, of such injuries in that it was the active, efficient cause that set in motion the train of events which resulted in the injury, without intervention of any force started and working actively from a new and independent source. Government Code, § 1953.

Bronson, Bronson & McKinnon, San Francisco, for appellant.

Howard Magee and Philander B. Beadle, San Francisco, for respondent.

BRAY, Justice.

After a judgment against him in the sum of $10,000 and the denials of motions for judgment notwithstanding the verdict and for new trial, defendant Richardson (apparently the only defendant served with process) appeals.

Questions Presented.

1. Sufficiency of the evidence to show that the push-button traffic signal control device was defective or dangerous.

2. Was plaintiff's injury the direct and proximate result of such condition?

Facts.

The action is brought pursuant to section 1953, Government Code, against a state officer for injuries received from alleged defective or dangerous condition of public property. Defendant is Superintendent of Electrical and Signal Maintenance of the Division of Highways, State of California, and as such in supervision of the signal device in question. At the southwest corner of El Camino Real and Santa Cruz Avenue in Menlo Park, there is installed, in addition to the common traffic-actuated signal there, a push-button signal device. The traffic-actuated signal is operated by the vehicular traffic approaching El Camino going east along Santa Cruz, tripping the timing device. Thereafter the green signal goes on for that traffic for about 10 seconds. The push-button device is erected on a pole and is for the use and protection of pedestrians. When the button is pressed and the green signal comes on a pedestrian has 24 seconds to cross El Camino. It takes about 22 seconds to do so. It is undisputed that the 10 second interval is insufficient to enable a pedestrian to complete his crossing before the signals controlling northbound and southbound traffic on El Camino would invite the movement of that traffic through the intersection by displaying a green light. Normally there is on the pole about 4½ feet above the sidewalk an instruction sign about 4 inches in width and 7 inches in height. This is attached by two screws. This sign is readily visible to pedestrians. The plate is painted white and in easily read black lettering states "To cross the street push button and wait for green light." El Camino is 84 feet wide from curb to curb but the distance by the crosswalk is 90 feet. One Kemper, under defendant's supervision, was required to maintain, among others, the signals at this intersection. Included in his duties is the determination of whether the instruction signs are in position and to replace them if missing. There was a set schedule of inspections at least once a week and probably oftener because there was a great deal of trouble due to "kids stealing the signs." Sometimes two or three will be missing at a time and sometimes none missing for two or three months. The signs can be removed with a screwdriver. There was considerable conflict in the evidence as to when the sign was last inspected. There was evidence that the last inspection was 7 days before the accident. Plaintiff testified that about two weeks before the accident she passed the pole and saw no sign on it, and saw none at the time of the accident. Four days thereafter defendant found that the sign was gone. Plaintiff testified that she did not know there was such a thing as a push-button type of signal. She had never crossed El Camino here before. As the sign was missing she was uninformed as to the necessity for pushing the button. As she reached the southwest corner she saw no sign on the pole. She did see the traffic signal across the street on the southeast corner. It was dusk, the lights were on the cars, but it was not dark. When the light across the street showed green she started to cross El Camino. As the push-button had not been pressed she had only 10 seconds to cross. When she had reached just beyond the dividing strip at the center of the street, the light in front of her changed to yellow and almost immediately became red. At this instant there was a car stopped at the crosswalk in the first lane beyond the dividing strip. Plaintiff hesitated in front of this car. Its driver motioned to her to go on. She could see no other cars coming. Just as she cleared this car, another one just beyond which approached the intersection on the green light for El Camino, struck her, badly injuring her.

1. Sufficiency of the Evidence.

[1, 2] Defendant contends that the evidence is not sufficient to show that the sign was missing at the time of the accident. Taking the evidence and the reasonable inferences therefrom most strongly in favor of plaintiff, the evidence was sufficient. It shows that the sign had not been inspected for at least 7 days; that it and similar signs were frequently removed by children; that two weeks before when she passed the pole plaintiff did not see it there; that it was not there 4 days after the accident; and most important of all, although plaintiff looked at the pole twice the evening of the accident she did not see the sign. Such matters as the fact that she was not specially looking for a sign as she did not know there was a push-button device, had never crossed this intersection before (although she had been near the pole once before), and that it was dusk on the evening in question, were matters for the jury to take into consideration in weighing her testimony, but do not compel a finding against her. Defendant's criticism of negative evidence is not justified by the authorities. "* * * the weight to be given to negative testimony often arises in railroad and other accident cases where it is claimed that signals were not given, and * * * in such cases, the question is purely for the jury, and it has frequently been held that negative evidence of this character is sufficient to sustain a verdict (Jones on Evidence [Horowitz], § 893, p. 400), even though it conflict with other evidence to the effect that a warning was actually given." Keena v. United Railroads of San Francisco, 197 Cal. 148, 154, 239 P. 1061, 1063. See also Rogers v. City of Los Angeles, 6 Cal.App.2d 294, 44 P.2d 465, and Thompson v. Los Angeles etc. R. Co., 165 Cal. 748, 134 P. 709 (failure to hear signals claimed to have been given); Taka-

hashi v. White Truck etc. Co., 15 Cal. App.2d 107, 59 P.2d 161, and O'Neal v. Kelly Pipe Co., 76 Cal.App.2d 577, 173 P.2d 685 (absence of lights). "Courts have often been asked to exclude testimony based on what may be called *negative knowledge, i. e.* testimony that a fact did not occur, founded on the witness' failure to hear or see a fact which he would supposedly have heard or seen if it had occurred. Yet there is no inherent weakness in this kind of knowledge. It rests on the same data of the senses. It may even sometimes be stronger than affirmative impressions. The only requirement is that the witness should have been so situated that *in the ordinary course of events he would have heard* or seen the fact had it occurred. This sort of testimony is constantly received,—particularly in proof of the failure to give railroad signals, the loss of a chattel, the absence of a witness, the non-existence of a fictitious person, the non-payment of money, and other negative facts." II Wigmore on Evidence, 3rd ed., § 664, p. 778.

2. Direct and Proximate Result.

[3, 4] Section 1953, Government Code, requires that the injury be a *direct* as well as a *proximate* result of the dangerous or defective condition. While there are cases, Sivertson v. City of Moorhead, 119 Minn. 467, 138 N.W. 674, 675; Missouri, K. & T. Ry. Co. of Texas v. Lyons, Tex.Civ.App., 53 S.W. 96, 97; King v. City of St. Louis, Mo.Sup., 157 S.W. 498, 501; Godwin v. Atlantic Coast Line R. Co., 120 Ga. 747, 48 S.E. 139, 141; Texas & P. R. Co. v. Coutourie, 2 Cir., 135 F. 465, 473; Davis v. Spicer, 27 Mo.App. 279, 301; Lovett v. City of Chicago, 35 Ill.App. 570, 571, holding that the words "direct" and "proximate" in the phrase "direct and proximate cause" are synonymous, we doubt that such construction can be given to the phrase in section 1953. We must assume that the Legislature intended the one to mean something different from the other. In Osborne v. Imperial Irr. Dist., 8 Cal.App.2d 622, 47 P.2d 798, it was pointed out concerning the predecessor of section 1953, Gen. Laws, Act 5618, Stats.1919, p. 756, that the statute imposing liability on a public officer increased the burden of showing the negligence required in the ordinary case as it "increases this burden on a plaintiff by particularly requiring proof that the injury occurred as a *direct* result of the dangerous condition * * *." 8 Cal.App.2d at page 629–630, 47 P.2d at page 801, emphasis added; see also Moore v. Burton, 75 Cal. App. 395, 400, 242 P. 902. Defendant contends that the absence of the instructional sign was not a direct cause of plaintiff's injury, because, he contends, the car which struck her was an independent intervening cause. Both parties accept the definition of "direct cause" in Anderson v. Steinle, 289 Ill.App. 167, 6 N.E.2d 879, 881: "The phrase 'direct cause' has been held to mean, 'the active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source,' Lynn Gas & Electric Co. v. Meriden Fire Ins. Co., 158 Mass. 570, 33 N.E. 690, 691, 20 L.R.A. 297, 35 Am.St.Rep. 540; and in Tuff v. Waman, 5 C.B. (N.S.) 573, it is said: 'The direct cause of an injury is one without which the injury would not have happened.'"

Prosser on Torts, p. 347, in discussing "Direct Causation," states: "In dealing with this problem, many courts and writers have made a distinction, easier of comprehension than of any exact definition, between consequences which may be regarded as caused 'directly' by the defendant's act, and those which result from the intervention of other causes at a later time." As to "intervening force," he states (p. 353): "'Intervening force,' like 'direct causation,' is a term easier of general comprehension than of any exact definition. An intervening force is one which comes into active operation in producing the result *after* the negligence of the defendant. 'Intervening' is used in a time sense; it refers to later events."

[5] The facts in our case come within the above definitions. The purpose of the push-button signal was to protect a pedestrian crossing El Camino from the traffic which would be on him before he could cross under the time permitted by the traf-

fic-actuated signal. Unless he knew of the purpose of the push-button signal he would naturally assume that the traffic-actuated green light would allow him sufficient time to safely cross. Without such knowledge and without an instruction sign he would be justified in disregarding the push-button (if he saw it—plaintiff did not), and to act on the invitation to cross held out to him by the traffic-actuated signal. The failure to give the necessary instruction then would be the direct cause of sending a pedestrian into a dangerous stream of traffic which could reasonably be expected to start across the crosswalk before the pedestrian could clear the stream. If the pedestrian is struck by a car in that stream obviously the lack of the instruction sign is a cause "'* * * without which the injury would not have happened'" which in Anderson v. Steinle, supra, 6 N.E.2d 880, 881, is held to be a direct cause. It likewise fits Prosser's definition. "'Direct' consequences are those which follow in sequence from the effect of the defendant's act upon conditions existing and forces already in operation at the time, without the intervention of any external forces which come into active operation later." (P. 347.) The condition existing when defendant's acts caused plaintiff to venture into a position of danger is the dangerous stream of traffic and the forces already in operation at that time are the fast moving vehicles which are approaching the intersection and if given the green light will not even stop there, as well as those already stopped but waiting for the green light to signal them to go. Prosser states further (p. 357): "The risk created by the defendant may include the intervention of the foreseeable negligence of others. As we have seen above, the standard of reasonable conduct may require the defendant to protect the plaintiff against 'that occasional negligence which is one of the ordinary incidents of human life, and therefore to be anticipated.' Or the circumstances of the particular case may indicate the danger of unusual negligence. * * *" Certainly with the heavy traffic on El Camino Real, the possibility of negligence on the part of some operators of that traffic must be foreseen. In our case, it is doubtful if the driver of the car which struck plaintiff was negligent. He testified that his view of her was obstructed by the car stopped at the crosswalk to his left. Thus, the absence of the sign contributed more directly to plaintiff's injury than if the person striking her had also been negligent. The lack of the sign, paraphrasing the words of Anderson v. Steinle, supra, 6 N.E.2d 879, 881, was a direct cause of the accident because it was "'the active, efficient cause that sets in motion a train of events which * * * [brought] about a result without the intervention of any force started and working actively from a new and independent source.'" The force which actually struck plaintiff was one into which defendant's neglect precipitated plaintiff. The situation in Churchman v. County of Sonoma, 59 Cal.App.2d 801, 140 P.2d 81, is somewhat analogous. There, due to its defective condition, the edge of the highway pavement gave way as Churchman's car was passing another one, causing his car to topple over into the ditch. It did not fall flat on its side but was left teetering at an angle of about 45 degrees. Churchman was able to climb out on the left running board and stand partly on it and partly on the body. As the edge of the running board was more than waist high above the pavement and Churchman was an elderly man he decided that the distance was too far to jump. He then started around the front of the car, intending to slide over the hood towards the low side. In attempting to do so he slipped and fell, badly injuring himself. It was contended that as the cause of action against the road commissioner required proof that the injury was the *direct* and proximate result of the defective condition of the highway, Churchman's act in falling "in the simple act of leaving the automobile", 59 Cal.App.2d at page 807, 140 P.2d at page 84, initiated a new chain of causation from that started by the defective condition of the road, so that the injury was not the direct result of that condition. The court stated that no other reasonable conclusion could have been reached than that the injury was a direct and proximate result of the defective condition of the highway.

In Mosley v. Arden Farms Co., 26 Cal. 2d 213, 157 P.2d 372, 158 A.L.R. 872, the defendant milk distributor had been in the habit of piling milk crates containing empty bottles on the parking of a city street. Sometime before the accident two of the crates became displaced and hidden by others than defendant in a growth of weeds in the space between the cement walk and the property line across the 5-foot pavement from where the crates were stacked. The plaintiff drove a tractor while mowing weeds for the city. In order to avoid the piled crates he ran his tractor into the hidden boxes, causing him to be injured. While, of course, the plaintiff there was only required to show that the defendant's negligence was a proximate rather than a direct cause of the accident, it is interesting to note that the court held that a man of ordinary prudence should have known that crates from the pile might reach the spot where the plaintiff was injured. Moreover, the concurring opinion of Mr. Justice Traynor contains an excellent discussion of liability under a chain of circumstances bringing about a result. He, like Prosser, objects to the use of terms like "proximate cause." He states concerning "proximate cause", 26 Cal.2d at page 221, 157 P.2d at page 376: "In any event, application of the doctrine to cases like the present one only leads to confusion, for the considerations that determine whether a defendant was negligent with respect to a plaintiff define the limits of his responsibility. 'Almost invariably these cases present no issue of causation in fact, since the defendant has created a situation acted upon by another force to bring about the result; and to deal with them in terms of "proximate cause" is only to avoid the real issue. The question is one of negligence and the extent of the obligation: whether the defendant's responsibility extends to such interventions, which are foreign to the risk he has created. It might be stated as a problem of duty to protect the plaintiff against such an intervening cause. A decision that the defendant's conduct is not the "proximate cause" of the result means only that he has not been negligent at all, or that his negligence, if any, does not cover such a risk.' "

While, because of the language of section 1953 we are required to deal with "direct and proximate" cause, we must do so with reference to a correct understanding of them and their part in the law of negligence.

In the instant case, there was existing in the highway a condition potentially dangerous to those who wished to cross. Exposing plaintiff to this dangerous condition created a foreseeable risk of harm. It is illogical to say that that harm which, in fact, resulted, is not the direct result of the acts of defendant in exposing plaintiff to that harm. The situation may be likened to a situation where at the end of a highway there is a dangerous stream and the responsible authorities have failed to erect barriers or post warning signs. See Brooks v. City of Monterey, 106 Cal.App. 649, 654, 290 P. 540, applying the Public Liability Act to such circumstances.

A case analogous to ours is Jones v. City of South San Francisco, 96 Cal.App.2d 427, 216 P.2d 25. There the city negligently permitted a large pool of water to exist making the sidewalk area and half the street impracticable for pedestrians to use. The city knew that a large number of pedestrians had to walk along that street. While walking in the street to avoid the water, the plaintiffs were struck and injured by an automobile. While the court there had to consider proximate cause only, the decision is appropriate for the reason that it was contended that the negligence of the driver of the automobile broke the chain of causation. The court held that it did not. As long ago as Pastene v. Adams, 1874, 49 Cal. 87, it was held that circumstances somewhat analogous to those in our case constituted a direct cause of injury. There the defendants had piled tiers of lumber in the street in such manner that the ends of some timbers projected more than others. The plaintiff was walking down the street alongside the lumber pile. One Randall drove a wagon so close to the pile that a wheel caught the end of one of the timbers, causing it to fall on the plaintiff, injuring him. In an action against the lumber company for negligence in piling the lumber in the street it was contended that a subsequent intervening cause was solely responsible for the injury. The court held that as the timbers were negligently piled by the defendants such negligence continued until they were thrown down and concurring with Randall's action, was a *direct* and proximate cause of the injury.

Under the circumstances of this case, the jury could, and did, find that the dangerous and defective condition of the push-button signal device was the direct as well as the proximate cause of plaintiff's injury.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

124 Cal.App.2d 807

In re Guardianship of MARSHALL.

DUPRAY v. MARSHALL et al.

Civ. 19968.

District Court of Appeal, Second District,
Division 3, California.
April 28, 1954.

Rehearing Denied May 12, 1954.
See 269 P.2d 936.

Hearing Denied June 23, 1954.

Proceeding on petition of natural mother of child under age of 14, against child's stepmother, to terminate stepmother's guardianship of person of child, and for child's custody. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered order denying petition, and the petitioner appealed. The District Court of Appeal, Vallée, J., held that evidence sustained findings that petitioner had abandoned child and had thus forfeited all rights to guardianship of child, that the stepmother was a fit and proper person to have custody, care and control of child, that there was no ground for her removal, and that it was in best interests of child that stepmother remain as guardian.

Affirmed.

1. Guardian and Ward 🔑10

"Abandonment", within statutory provision that a parent who abandons child under 14 years of age forfeits all right to guardianship of such child, is not established by acts of relinquishment committed under circumstances of coercion, caprice, and discouragement, nor by mere acquiescence in support of child by relatives, but only by an actual desertion, accompanied by intention to entirely sever, so far as possible, the parental relation and throw off all obligations growing out of such relation. Probate Code, § 1409.

See publication Words and Phrases, for other judicial constructions and definitions of "Abandonment".

2. Guardian and Ward 🔑10

In determining whether parent has abandoned child so as to forfeit, under the statute, all right to guardianship of child, intent is the decisive factor, and intent may be shown by facts and circumstances, regardless of declarations of parent. Probate Code, § 1409.

3. Guardian and Ward 🔑13(4)

In proceeding on petition of natural mother of child under age of 14, against child's stepmother, to terminate stepmother's guardianship of person of child, and for child's custody, evidence sustained finding that the natural mother had abandoned child and had thus forfeited all rights to guardianship of child. Probate Code, § 1409.

4. Guardian and Ward 🔑13(7)

A decree that a child is an abandoned child within statutory provision that parent who abandons child under age of 14 forfeits right to guardianship of child, made after proceedings duly had, is a final adjudication of status of child as of date of decree. Probate Code, § 1409.

5. Guardian and Ward 🔑25

In proceeding on petition of natural mother of child under age of 14, against child's stepmother, to terminate stepmother's guardianship of person of child, and for child's custody, evidence sustained finding that the stepmother was a fit and proper person to have custody, care, and control of the child, that there was no ground for her removal, and that it was in best interests of child that the stepmother remain as guardian. Probate Code, § 1409.

6. Guardian and Ward ⇐25

Whether a showing of sufficient cause to deprive a guardian of his trust has been made is a question of fact.

George L. Hampton, Van Nuys, for appellant.

Le Sage & Bowman, Thomas W. Le Sage, Pasadena, for respondent.

VALLÉE, Justice.

Appeal from an order denying a petition of Margaret Dupray to terminate the guardianship of the person of Diane Marshall, a minor, and for her custody. The order adjudges: 1. Letters of guardianship were issued to Lorraine Bridges Marshall, as guardian of the person of Diane, on March 15, 1950. 2. The petitioner, the natural mother, had abandoned Diane. 3. Lorraine Bridges Marshall, the stepmother, is a fit and proper person to have the custody of Diane, and no grounds for her removal have been proved. 4. It is for the best interests of Diane that Lorraine Marshall remain as her guardian. Margaret Dupray appealed. Her principal contention is that the evidence does not support the finding of abandonment.

On April 30, 1939, Margaret and John R. Marshall, Jr., were married. On January 19, 1941, Diane was born the issue of the marriage. Later in 1941, Margaret went to live with Theodore Bunn, an entertainer. Sometime in December 1941, John filed an action for divorce against Margaret. On February 18, 1942, an interlocutory decree of divorce was granted and John was given custody of Diane, with the right of reasonable visitation by Margaret. Margaret and John cohabited together as man and wife until sometime in April or the first part of May 1942. Later Margaret resumed living with Bunn. From May 1942 until 1947, Margaret lived with Bunn. With the exception of two months, he supported her during that period of time.

On March 19, 1943, a final decree of divorce between John and Margaret was entered. The final decree adopted the provisions of the interlocutory decree concerning custody and visitation.

When Margaret finally separated from John, Diane was 15 months old. John was about 19 years old. John took Diane to the home of his mother, Mrs. Edna Marshall, in Brentwood, where Diane lived until John married Lorraine on August 28, 1946. From the time that John married Lorraine until the present time, Diane has been in the custody of Lorraine. John had told Margaret that Diane was at Edna's home. Margaret knew where Edna lived; she lived at 235 Homewood Road, Brentwood. Prior to the divorce, Margaret had visited at this home "many, many times."

During the period that Diane lived with her grandmother, Margaret did not write or inquire of Edna concerning Diane. In 1946, John took Margaret to visit Diane at his mother's home in Brentwood "of which he had been wanting to do." Margaret did not tell Diane she was her mother. From 1942 to the time of trial, Margaret has been continuously a resident of the county of Los Angeles. At no time during this period did she communicate with Diane or provide for her welfare, except on that one occasion in 1946. She never sent cards nor gifts to her on her birthdays or at Christmas.

From 1942 to 1945, John served in the United States Army and Margaret knew it. He was absent from the Los Angeles area for one year, during which time he was eight months in England. John did not correspond with Margaret while he was overseas. At no time during this period did Margaret visit or attempt to communicate with Diane. On September 9, 1947, Margaret married her present husband, John Dupray.

On January 27, 1950, John Marshall committed suicide. He stated in his will that Lorraine should be appointed guardian of the person of Diane.

On March 15, 1950, letters of guardianship of the person of Diane were issued to Lorraine. In May 1950, Margaret filed a petition to revoke the letters of guardianship issued to Lorraine. This petition was not heard. In June 1952, she filed the present petition.

Although Margaret had filed her first petition in May 1950, she did not send cards or gifts to Diane at Christmas in either 1950 or 1951, nor did she make any effort to see her.

Margaret claims she never intended to abandon Diane; the whereabouts of Diane were concealed from her; she was kept in a state of terror; John threatened to hurt her and her minor children (she has two children by Dupray), to smear her name and reputation, and make Diane hate her; she "always" wanted to see Diane and begged John to allow her to visit her; she believed it was impossible for her to enforce her rights of visitation.

Section 1409 of the Probate Code provides: "A parent who knowingly or wilfully abandons or, having the ability so to do, fails to maintain his minor child under fourteen years of age, forfeits all right to the guardianship of such child; * * *."

[1, 2] In order to constitute abandonment " 'there must be an actual desertion, accompanied with an intention to entirely sever, so far as it is possible to do so, the parental relation and throw off all obligations growing out of the same.' " Guardianship of Snowball, 156 Cal. 240, 243, 104 P. 444, 446. There must be more than a mere temporary absence or neglect of parental duty. In re Cordy, 169 Cal. 150, 153, 146 P. 532, 534; In re Estate of Moore, 179 Cal. 302, 176 P. 461. Abandonment is not established by acts of relinquishment committed under circumstances of coercion, caprice, and discouragement, nor by mere acquiescence in the support of a child by relatives. In re Green, 192 Cal. 714, 221 P. 903; In re Estate of Akers, 184 Cal. 514, 194 P. 706. Intent is the decisive factor and it may be shown by facts and circumstances, regardless of the declarations of the parent. In re Cordy, 169 Cal. 150, 146 P. 532, 534.

[3, 4] It is argued that John prevented Margaret "from enforcing her legal rights" and concealed Diane's whereabouts from her, and that Margaret did not know where Diane was. The court found to the contrary. In 1941, when Diane was only a few months old, Margaret deserted her and went to live with Bunn. For a short period of time, Margaret went back to John and Diane; but in May 1942, she again left and returned to her paramour, with whom she cohabited until 1947. When Margaret left John, Diane was only 15 months old. John's mother, Edna, and his sister lived in Brentwood. Margaret and Edna were on friendly terms. After Margaret and John separated, Diane lived with Edna until John married Lorraine in 1946. Diane has been living with Lorraine at all times since. John told Margaret that Diane was in his mother's home. Margaret saw Diane in Edna's home in 1946 when John took her there. She did not tell her she was her mother. She made no effort to see Diane prior to that time. Margaret knew John was in the army from 1942 to 1945 and that he was in England part of that period. She testified she made no effort to see Diane during that time. After John and Lorraine were married Margaret did nothing to learn where Diane was living. The divorce decree gave Margaret the right of reasonable visitation of Diane. She did not, at any time, seek to enforce the decree. These and the other facts we have related amply support the finding that there was no concealment and that John did not prevent Margaret from enforcing her legal rights. Contrary to Margaret's contention, the implied finding that she was not persuaded from seeing Diane by threats or coercion of John is supported by the evidence. As we have said, John was in the army between 1942 and 1945, and she did not see him after November 1947. The court was not compelled to believe Margaret's uncorroborated testimony that she had been so persuaded. There was evidence from which

the court could infer that Margaret's sudden interest in Diane was prompted by the fact that under John's will Diane was a beneficiary of a trust appraised at $51,000, and that she was also a beneficiary under several other trusts. There is abundant evidence supporting the finding that Margaret abandoned Diane. A decree that a child is an abandoned child, made after proceedings duly had, is a final adjudication of the status of the child as of the date of the decree. Matter of Guardianship of Michels, 170 Cal. 339, 342, 149 P. 587.

[5, 6] Margaret contends the court should have removed Lorraine as guardian. The court found that Lorraine is a fit and proper person to have the custody, care, and control of Diane; that no ground had been proved for her removal; and that it is in the best interests of Diane, with respect to her temporal, mental, and moral welfare, that Lorraine remain as guardian. It also found that Margaret is now a fit and proper person and is maintaining a fit and proper home, but that she is not a fit or proper person to have the custody of Diane. The finding with respect to Lorraine is amply supported. Whether a showing of sufficient cause to deprive a guardian of his trust has been made is a question of fact and not of law. In re Guardianship of Reynolds, 60 Cal.App.2d 669, 680, 141 P.2d 498.

The record is replete with testimony of relatives, friends, and neighbors that Lorraine is a fit and proper person to have the custody of Diane. The evidence is uncontradicted that she keeps a very neat and clean home and that she looks after Diane's material and spiritual welfare. Diane regards Lorraine as her mother and the latter's parents as her grandparents. Diane addresses and refers to Lorraine as "mother," "mom," or "mommie." There appears to be a deep and genuine affection between Diane and Lorraine, such as would be found between a mother and her natural daughter. Diane stated she was happy with Lorraine and expressed a strong preference to remain with her. Lorraine is the only mother she has ever known.

The questions in this proceeding are purely factual. The trial court having decided the facts adverse to Margaret, the matter is at an end.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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124 Cal.App.2d 731

KOLODZIEJSKI
v.
HOVER et al.
Civ. 20120.

District Court of Appeal, Second District,
Division 2, California.
April 26, 1954.
Rehearing Denied May 11, 1954.
Hearing Denied June 23, 1954.

Action for damages for negligence, brought against corporate defendant and others designated by fictitious appellations, wherein plaintiff filed an amended complaint naming a specified individual as defendant. The Superior Court, Los Angeles County, Ellsworth Meyer, J., sustained certain individual defendant's demurrer without leave to amend and denied plaintiff's motion to file a second amended complaint. Plaintiff appealed from the ruling on the demurrer. The Court of Appeals, McComb, J., held that where individual defendant was designated only by a fictitious name in the original complaint and no attempt was made therein to state any cause of action against such fictitious defendant, and, more than one year after the injury, an attempt was made in an amended complaint to state a cause of action against such fictitious defendant, the statute of limitations would be computed from the date of the alleged act to the date of the filing of the amended complaint and not to the date of the filing of the original complaint.

Affirmed.

1. Limitation of Actions ⚷127(12)

Where individual defendant in negligence action was designated only by a fictitious name in the original complaint and no attempt was made therein to state any cause of action against him, and more than one year after the injury, complaint was amended to state a cause of action against him, statute of limitations would be computed from date of injury to date of filing of amended complaint. Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions ⚷127(2)

A bona fide attempt to state a cause of action against a party which fails by reason of some imperfection may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of statute of limitations in the interim. Code Civ.Proc. § 340, subd. 3.

3. Appeal and Error ⚷874(4)

Where trial court sustained a demurrer without leave to amend and denied plaintiff's application to file a second amended complaint, but plaintiff appealed only from the ruling on the demurrer, question of the propriety of the denial of plaintiff's application was not properly before reviewing court.

◆

Aaronson & Shapero, Beverly Hills, for appellant.

Title & Tannenbaum, Beverly Hills, for respondent.

McCOMB, Justice.

From the sustaining without leave to amend of defendant Herman Hover's demurrer to the first amended complaint, plaintiff appeals.

Chronology

i.

January 30, 1953, plaintiff filed a complaint against Hotels El Rancho, Inc., and a number of John Does, alleging a cause of action for personal injuries resulting from the alleged negligence of defendant. The alleged negligent acts were stated to have occurred on February 2, 1952. Defendant Herman Hover was not named as a defendant.

ii.

April 2, 1953, plaintiff filed her first amended complaint in which she named Herman Hover as a defendant.

iii.

May 14, 1953, defendant Hover filed a demurrer to the first amended complaint on the ground that any alleged cause of action against him was barred by subdivision 3 of section 340 of the Code of Civil Procedure in that the action had not been filed against said defendant within one year from the date the alleged negligent acts had taken place.

iv.

May 21, 1953, defendant's demurrer was sustained without leave to amend.

v.

June 8, 1953, an order was made denying plaintiff's motion to file a second amended complaint.

Questions: First: *Did the trial court err in sustaining without leave to amend the demurrer to plaintiff's first amended complaint on the ground that the statute of limitations barred the alleged cause of action set forth therein?*

No. In plaintiff's original complaint defendant Hover was not named as a defendant. Neither was there any attempt made in such complaint to state a cause of action against any of the John Does named therein. Therefore when the first amended complaint was filed on April 2, 1953, more than one year had elapsed from the date of the alleged wrongful acts on February 2, 1952, with the result that section 340, subdivision 3 of the Code of Civil Procedure constituted a bar to any cause of action against defendant Hover.

[1] The rule is established in California that where a defendant is designated only by a fictitious name in an original complaint and no attempt is made therein to

state any cause of action against such fictitious defendant, if more than one year after the injury an attempt is made in an amended complaint to state a cause of action against such fictitious defendant, the statute of limitations is computed from the date of the alleged acts to the date of the filing of the amended complaint and not to the date of the filing of the original complaint. (Gates v. Wendling Nathan Co., 27 Cal.App.2d 307, 314[2] et seq., 81 P.2d 173.)

[2] The statement in Gates v. Wendling Nathan Co., supra, 27 Cal.App.2d at page 315, 81 P.2d at page 177, is here apropos: "We are not, of course, unmindful of the settled rule that a *bona fide* attempt to state a cause of action against a party, which fails by reason of some imperfections, may be remedied by amendment so that the amended pleading will relate back to the date of the filing of the original defective pleading and avoid the running of the statute of limitations in the *interim* (Ruiz v. Santa Barbara Gas & Electric Co., 164 Cal. 188, 194, 195, 128 P. 330; Rauer's Law, etc., Co. v. Leffingwell, 11 Cal.App. 494, 105 P. 427), but we have yet to read of a case where the running of the statute has been held to be avoided by filing a complaint wherein a defendant is designated by a fictitious name and the only allegations as to him are that the plaintiff is ignorant of the defendant's true name and, when he knows it, will amend by substituting it, and at that future time make some charge against such defendant. Yet that seems to us precisely what appellants, as to these four defendants, have attempted here. If procedure of that description can be tolerated, all statutes of limitation might as well be at once and forever repealed."

Day v. Western Loan & Building Co., 42 Cal.App.2d 226, 108 P.2d 702, relied on by plaintiff, is clearly distinguishable from the Gates case. In the Day case actual charging allegations were contained in the original complaint against the fictitious defendants. Such was not true in the case at bar. The distinction between the Day case and the present case is clearly indicated by the court, wherein it is said by Mr. Presiding Justice Peters, 42 Cal.App.2d at page 234, 108 P.2d at page 706, "This case [Gates v. Wendling Nathan Co.] differs fundamentally from the instant one in that in the Gates case the original complaint did not disclose that plaintiff was seeking any recovery at all against those subsequently named, while in the instant case the original and amended complaints did disclose, defectively it is true, that plaintiff was seeking recovery not only against the driver, but also against all who 'owned' and 'controlled' the car. The Gates case recognized that under such circumstances the amendment is proper."

[3] Second: *Did the trial court err in denying plaintiff's application to file a second amended complaint?*

This question is not properly before this court for the reason that plaintiff has not appealed from the order of June 8, 1953, whereby plaintiff was denied the right to file a second amended complaint. The sole appeal is from the judgment sustaining the demurrer to the first amended complaint without leave to amend.

Affirmed.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, J., dissenting.

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124 Cal.App.2d 690

WESTERN TITLE INSURANCE & GUARANTY CO.

v.

BARTOLACELLI et al.

Civ. 15802.

District Court of Appeal, First District, Division 1, California.

April 26, 1954.

As Amended April 29, 1954.

Rehearing Denied May 28, 1954.

Hearing Denied June 23, 1954.

Action by title insurance and guaranty corporation based on a check given by purchasers of real estate pursuant to an agreement whereby corporation was to receive the check for the vendors as a deposit. From judgment of Superior Court, San Francisco County, William T. Sweigert, J., based on sustaining of demurrers, without leave to amend, to corporation's second amended complaint, the corporation appealed. The District Court of Appeal, Peters, P. J., held that count which alleged the giving, presentment and dishonor of the check, stated a cause of action, notwithstanding additional allegations which showed the corporation to be a mere stakeholder.

Reversed.

1. Bills and Notes 🔑443(1)

Holder-payee of check may sue thereon in his own name even though he is not beneficial owner.

2. Bills and Notes 🔑427(1)

Payment to holder-payee of check will discharge check, even though holder is not beneficial owner.

3. Assumpsit, Action of 🔑19

Where facts are pleaded in one count of complaint and common count follows, if count alleging facts is demurrable, cause predicated on common count is likewise demurrable.

4. Pleading 🔑204(2)

Generally, each count of complaint stands or falls on its own allegations, and if any count states cause of action, complaint as a whole is not demurrable.

5. Pleading 🔑53(1)

Complaint may set forth several causes of action and may even include inconsistent counts.

6. Pleading 🔑204(2)

Where any one count of complaint pleads facts alleging good cause of action, complaint as a whole will not be demurrable.

7. Vendor and Purchaser 🔑45

Where alleged agreement for sale of realty was written on two sheets of paper, and party to it signed first sheet but not the second, whether signature on one sheet bound him to conditions on the other was question of fact and not of law.

8. Contracts 🔑35

Signature need not appear at end of agreement to be valid.

9. Bills and Notes 🔑462(1)

Where count in complaint alleged indirect delivery of check payable to plaintiff as trustee for another, and presentment and dishonor of check, count stated cause of action and plaintiff had capacity to sue on check, notwithstanding additional allegations claimed by defendant to show plaintiff had no interest in check.

10. Appeal and Error 🔑1040(3)

Where first and third counts of second amended complaint each stated cause of action, sustaining of demurrer without leave to amend was error, though complaint might be subject to special demurrers.

11. Attachment 🔑5

Where complaint stated cause of action on check payable in the state and unsecured, attachment would lie. Code Civ. Proc. § 537.

12. Attachment 🔑248

On motion to dissolve attachment, merits of action cannot be considered.

◆

Royal E. Handlos, San Francisco, for appellant.

Hyman & Hyman, San Francisco, for respondents.

PETERS, Presiding Justice.

This is an appeal from a judgment based on the sustaining of demurrers without leave to amend to plaintiff's second amended complaint.

Plaintiff, Western Title Insurance and Guaranty Company, filed its original complaint in this action naming Delindo Bartolacelli as the sole defendant. That complaint stated but two causes of action. The first alleged that Bartolacelli, on December 1, 1951, executed a check payable to plaintiff in the sum of $8,500; that the check was presented, and that payment was refused. The second cause of action was a common count for the amount of the check. Bartolacelli answered this complaint, admitting the drawing of the check, its presentment and dishonor, but denied that he was indebted to the title company, and alleged that there had been no consideration for the check. By leave of court plaintiff was permitted to file an amendment to the complaint, which will be referred to hereafter as the first amended complaint. By this amendment plaintiff brought into the action, as additional defendants, the wife of Delindo Bartolacelli, and also Peter T. Fisher, and William E. Doud doing business as Wm. E. Doud & Co., and added two new causes of action, that is, a third and fourth, to the two already pleaded. The third cause of action purported to allege some of the underlying facts of the transaction. It alleged that the check was executed pursuant to an agreement between defendant Fisher and defendant Bartolacelli to sell to Bartolacelli a certain piece of real property; that plaintiff was designated as escrow agent in that transaction; that payment of the check has been refused; and that defendants, other than the Bartolacellis, had made demand on plaintiff for the $8,500. The fourth cause of action was for declaratory relief. To this first amended complaint Delindo Bartolacelli demurred, generally and specially. This demurrer was sustained with leave to amend. Thereafter, the plaintiff filed an amended complaint, hereafter referred to as the second amended complaint, naming as defendants the same persons named in the first amended complaint, and containing three causes of action. Attached to this pleading as an exhibit is a copy of the deposit agreement signed by the parties. To this complaint the two Bartolacellis demurred, generally and specially. These demurrers were sustained without leave to amend, and judgment entered in favor of the Bartolacellis. Plaintiff appeals.

The first cause of action in the second amended complaint alleges the facts in reference to the real estate transaction between Fisher and Bartolacelli at some length. It alleges that Doud is a real estate agent and that on November 27, 1951, the two Bartolacellis entered into the deposit agreement attached to the complaint as an exhibit. That agreement is on a form of appellant and is entitled "Uniform Agreement of Sale and Deposit Receipt." The agreement shows signatures of the Doud firm as agent for the seller, of the two Bartolacellis as purchasers, and of Fisher, as seller. A second page entitled "Conditions of Sale Continued" is signed only by the Bartolacellis. The agreement acknowledges receipt from the Bartolacellis of $1,000 as a deposit on the purchase price of $95,000 of the real property owned by Fisher, subject to certain enumerated conditions, some of which appear on the first page of the agreement and the balance on the second page. Twenty days are given to the purchasers to examine title and to report to Doud any objections. If none is so reported the balance of the purchase price is to be paid to Doud or to "a title insurance company" for the account of the seller. After providing for certain matters not here relevant it is provided that "Deposit to be increased to $9,500.00 upon approval" by the seller. Such approval by Fisher appears on the face of the agreement.

After alleging the execution of this deposit agreement, it is then alleged, upon information and belief, that Doud, as agent for the seller, at the special instance and request of the Bartolacellis, secured telegraphic approval of the contract and thereafter Fisher executed it; that upon acceptance by Fisher respondent Delindo Bartolacelli delivered to Doud "as agent for the seller" a check for $8,500, payable to appellant "as trustee for Peter T. Fisher"; which check, dated December 1, 1951, is pleaded *in haec verba;* that as agent for the seller Doud deposited the check with appellant "to hold the same and the funds due thereunder, for the account of Peter T. Fisher"; that appellant "as such trustee" presented the check to the bank, but payment was refused; that demand has been made on Bartolacelli for payment but he has refused to pay. It is further alleged that Doud and Fisher have made demand upon appellant for the $8,500. There is no reference in this pleading to any escrow, nor any allegation that appellant was acting as an escrow holder, or even that an escrow had been opened. Appellant's capacity is alleged to be "trustee" for Fisher.

The second cause of action incorporates the allegations of the first, and then prays for declaratory relief. The third cause of action makes no reference at all to the underlying transaction, but alleged that appellant is the holder-payee of the check, and then alleges its due execution, presentment and dishonor.

[1, 2] There can be no doubt at all, and respondents concede, that the third count, considered alone, pleads a cause of action not subject to demurrer. Under the law applicable to negotiable instruments it is well settled that the holder of such an instrument may sue thereon in his own name even though he is not the beneficial owner, and that payment to such holder will discharge the instrument. Reinert v. Proud, 8 Cal.App.2d 169, 47 P.2d 491; see cases collected 10 C.J.S., Bills and Notes, § 533, page 1164.

As already pointed out, respondents concede that the third cause of action properly pleads a cause of action not subject to demurrer. They point out that they recognized this rule when plaintiff originally sued on the dishonored check. Respondents did not then demur, but answered. But it is their theory that the underlying transaction is fully pleaded in the first cause of action, that those allegations disclose that appellant has no capacity to sue in that it has no interest in the check or in its proceeds, and that the first count is therefore subject to a general demurrer. They argue that it is the law that, where the plaintiff alleges in one count all of the underlying facts, and that count is subject to a demurrer, the other counts of the complaint based on the same facts, even though such count or counts standing alone would be immune from attack, are likewise subject to demurrer. It will be noted that these arguments are predicated on two fundamental premises: First, that the first count here pleaded is subject to a general demurrer, and second, that since the third count is based upon the check referred to in the first, it too is subject to demurrer. Both premises are unsound.

[3–6] In support of the second premise respondents cite Rose v. Ames, 53 Cal.App.2d 583, 128 P.2d 65, Neal v. Bank of America Nat. Trust & Savings Ass'n, 93 Cal.App.2d 678, 209 P.2d 825, Orloff v. Metropolitan Trust Co., 17 Cal.2d 484, 110 P.2d 396, Hays v. Temple, 23 Cal.App.2d 690, 73 P.2d 1248, and Cunha v. Anglo California Nat. Bank, 34 Cal.App.2d 383, 93 P.2d 572. These cases do not support the broad legal proposition urged by respondents. All but the last of these cases[1] involve complaints where in one count all of the facts are alleged, and then a common count is pleaded. In that event if the fact count is demurrable, so is the cause of action predicated upon the common count. But that rule is limited to pleadings involving a common count. The general well settled rule is that if any count of a multicount complaint states a cause of action, it is error to sustain a demurrer to the complaint as a whole. Each count stands or falls upon its own allegations. Lord v. Garland, 27 Cal.2d 840, 168 P.2d 5; Shook v. Pearson, 99 Cal.App.2d 348, 221 P.2d 757. The rule based on the common count exception is predicated on the anomalous nature of the common count in our system of pleading. The common count states simply a conclusion of law and discloses none of the facts upon which it is predicated. But here the third cause of action discloses that it is predicated on a dishonored check of which the appellant is the payee-holder. Under our system of pleading the plaintiff is permitted to set forth several causes of action and to include in the complaint even inconsistent counts. The exception involving a common count cannot be extended to cases where any one count pleads facts alleging a good cause of action. That is this case. The third count alleges a good prima facie case against Bartolacelli. Fisher and Doud did not demur, and the judgment appealed from does not run in their favor.

[7, 8] The first premise, that is, that the first count does not state a cause of action, is also unsound. Respondent argues that no valid contract between Fisher and Bartolacelli is alleged, because the telegraphic acceptance alleged did not constitute a valid acceptance, and because the deposit agreement was not signed by Fisher or Doud on the second page. It is also argued that

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[1] The Cunha case does not seem relevant to the point under discussion.

appellant held the check as an escrow holder, and title to it remained in respondents until the completion of the deal. Whether the deposit agreement did or did not create a valid contract cannot be determined as a matter of law from the face of the complaint. The telegraphic acceptance of Fisher is alleged to have been secured by Doud at the request of respondents. Respondents may want to plead and prove that such was not a valid acceptance, but that is a matter of defense that cannot be determined solely from the face of the complaint. The fact that Fisher did not sign the second sheet of the agreement but did sign the first does not, as a matter of law, render the agreement invalid. The first sheet, a form contract, did not contain sufficient space for all the desired conditions to be enumerated. Several conditions were listed on the first sheet, and then appears the word "over," obviously referring to the second sheet. That second sheet starts off "Conditions of Sale Continued," and then lists the balance of the conditions. Whether Fisher's signature on the first sheet bound him by the conditions listed on the second is obviously a fact question and is not a question of law. A signature does not have to appear at the end of an agreement to be valid.

[9] But the basic fallacy of respondents is their argument that the first cause of action shows, as a matter of law, that appellant does not have the capacity to sue because it is a mere stakeholder in an uncompleted escrow. That may be and probably is the fact. But there is not one word in the first count that refers to an escrow. To the contrary it is alleged that the check was delivered to Doud as "agent" for Fisher, and made payable and delivered to appellant as "trustee" for Fisher. There is no further reference to the nature of this trust. For this reason the allegations in reference to the trust are probably defective and certainly subject to a special demurrer, and probably to a general demurrer. But if the trust allegations be deleted from the complaint, then there appears in the first count allegations that appellant is the holder-payee of a dishonored check. All of the allegations necessary to state a prima facie case on a dishonored check there appear. The first count states a good cause of action on a dishonored check for the same reasons as does the third.

[10] The sustaining of the demurrer without leave to amend was clearly error. The law of negotiable instruments is that the holder-payee of a dishonored check may sue upon it although not beneficially interested in the recovery. Such a cause of action has been here pleaded in both the first and third counts. Respondents may have a defense, but, if they have, such defense must be pleaded and proved. Respondents cannot prevail on the theory that the appellant does not have the capacity to sue. We do not decide that the complaint is not subject to the special demurrers. The trial court may pass upon those contentions and require or permit amendments if it so desires. But it was error to sustain the demurrers without leave to amend.

[11, 12] Appellant also appeals from the order dissolving an attachment secured by it. The trial court first denied such a motion. No appeal was taken from this order of denial, but subsequently respondent Bartolacelli filed a second motion. Consistently with sustaining the demurrer this second motion was granted. With the reversal of the judgment based upon the sustaining of the demurrer the order also must be reversed. The complaint states a cause of action, and it is a cause of action "upon a contract * * * for the direct payment of money," payable in this state and unsecured. § 537, Code of Civil Procedure. The merits of the controversy cannot be considered on such a motion. Asamen v. Thompson, 55 Cal.App.2d 657, 661, 131 P.2d 839. Therefore, an attachment will lie.

The judgment and order appealed from are reversed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

124 Cal.App.2d 747

SHENSON

v.

SHENSON et al.

Civ. 15596.

District Court of Appeal, First District, Division 2, California.

April 27, 1954.

Rehearing Denied May 27, 1954.

See 270 P.2d 896.

Action between co-owners of building for accounting of rents. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment in favor of plaintiff and cross-complainants against a defendant, and defendant appealed. The cross-complainants also appealed on ground that awards to them should be increased. The District Court of Appeal, Dooling, J., held that evidence sustained finding that, until expiration of lease, defendant personally, and as trustee for account and benefit of plaintiff and cross-complainants, credited to and for their account the sum of $200 per month as rent, and that defendant refused to pay to plaintiff and cross-complainants any of such rent so credited by him to them, but that the court erred in granting judgment, with respect to period of holding over after expiration of lease, based upon value of use and occupation at $500 per month or anything in excess of the $200 per month fixed in lease under which tenancy had its inception, and further, that the findings with respect to defendants' credits against rent due were not sufficiently detailed to support the judgment.

Judgment reversed.

1. Evidence ⚷215(5)

In action between co-owners of building for accounting of rents, income tax returns signed by defendant, in which returns a certain amount was entered as rent received, constituted admissions against interest by defendant.

2. Tenancy in Common ⚷37

In action between co-owners of building for accounting of rents, evidence sustained finding that, until expiration of lease, defendant personally, and as trustee for account and benefit of the others, credited to and for their account the sum of $200 per month as rent for property in question, and that defendant refused to pay to the others any of said rent so credited by him to them.

3. Tenancy in Common ⚷37

Where holding over after expiration of lease was with consent of all co-owners of building, tenancy continued at same rental as provided in lease, and one of such co-owners, in an action against him for accounting of rents, could be held liable to account for no more than the monthly rental as provided in lease, with respect to the period of holding over.

4. Landlord and Tenant ⚷114(3)

Generally, tenancy arising from tenant's holding over with consent of landlord is presumed to be on same terms as original lease, so far as they are applicable to the new tenancy.

5. Landlord and Tenant ⚷196

A tenant who remains in possession after expiration of his lease, with express or implied consent of lessor, may be liable for same amount of rent as that reserved in lease, but if tenant holds over without authority under such circumstances as to negative landlord's consent to the holding, tenant may be liable for reasonable value of use and occupation of premises.

6. Tenancy in Common ⚷37

In action between co-owners of building for accounting of rents, in which defendant sought credit against rental due his co-owners not only for all real property taxes paid on the property and that portion of payments on principal and interest properly attributable to original mortgage, but also for all moneys expended for repairs and improvements on property and for insurance, findings of trial court, which failed to cast any detailed account, that after giving defendant all proper credits the balances for which judgment was given were due the respective parties, were not sufficiently detailed to support judgment, there being nothing in the record to indicate the manner in which the account was calculated and the items which entered into it.

7. Appeal and Error 🔑1071(6)
Trial 🔑388(1), 389

Findings are required on all material issues raised by pleadings and evidence, unless they are waived, and if court renders judgment without making findings on all material issues, the case must be reversed.

8. Tenancy in Common 🔑30

In action between co-owners of building for accounting of rents, defendant was entitled to credit, against amount of rent found to be due his co-owners, for taxes on the realty actually paid and for proportion of mortgage payments properly attributable to original loan.

9. Tenancy in Common 🔑32

One co-tenant is entitled to credit from his co-tenants for expenditures necessarily made for protection of the common property.

Leo R. Friedman, San Francisco, for appellant Joseph Shenson.

Albert Picard, San Francisco, William R. Lowery, San Francisco, of counsel, for appellant Viola Shenson.

M. Mitchell Bourquin, John E. Lynch, San Francisco, for appellant Lillian Berman.

Jefferson E. Peyser, San Francisco, for appellant Lorraine Kaplan, as executrix, etc.

DOOLING, Justice.

This is an action for an accounting of rents of a certain building over a period of approximately fifteen years. Plaintiff Viola Shenson was awarded $9,007.25 against Joseph Shenson, cross-complainant Lillian Berman $3,589.52 and cross-complainant Lorraine Kaplan $3,349.52. Appeal was taken by defendant Joseph from the above judgment entered in favor of plaintiff and cross-complainants and from the order denying his motion for a new trial. Both cross-complainants also appealed from the judgment on the ground that the awards to them should be increased in amount.

All the parties involved were co-owners of an undivided interest in a certain piece of business property referred to as 1143 McAllister Street. Pursuant to a decree of partition the building was sold to a stranger on September 5, 1950. Plaintiff Viola acquired her one-fifth interest in the real property on October 10, 1935. Cross-complainant Lorraine Kaplan is executrix of the last will and testament of Samuel Baker, and his one-fifth interest in the property was acquired July 22, 1936. From July 21, 1944 until his death on May 12, 1945, Baker had a four-fifteenths undivided interest and this interest passed to his estate. Cross-complainant Lillian Berman had an undivided one-fifth interest in the same real property dating from February 4, 1936, and a four-fifteenths interest from July 21, 1944.

In 1946 the plaintiff Viola, as owner of an undivided one-fifth interest in the building, filed an action against Joseph and the other co-tenants for an accounting, alleging that Joseph had leased certain portions of the property and had retained the rents, income, etc., without accounting to his co-tenants.

Defendants Lorraine and Lillian filed answers and also cross-complained against the other co-tenants. Like the plaintiff they prayed for an accounting of all rents, issues, profits and moneys obtained by defendant Joseph from the property concerned.

After Viola had filed her complaint, Lillian brought an action for partition, which was so decreed by the court. The property was sold, and at the time of distribution of the profits, defendant Joseph filed a claim for reimbursement for payment of taxes. Thereafter it was stipulated that the partition action and suit for accounting filed by Viola be consolidated for purposes of trial.

A meat market whose owners and operators varied from time to time occupied the building during the entire period covered by this litigation. In 1933 the market was operated by Shensons Meat Market, a corporation. The defendant and Samuel Baker, whose executrix is one of cross-complainants, were among the owners. Also in 1933 Jesse Shenson, who at that time held legal title to the building, leased the building to Shensons Meat Market for ten years at $200 per month. Later in 1933 the market business was transferred to "Shenson Bros." a corporation, who assumed the lease. In 1937 the business along with the lease was transferred to "Shenson Bros." a partnership. In 1942 Lillian, one of the cross-complainants, succeeded to an interest in the partnership. In 1944 the two cross-complainants and defendant owned the entire interest in the meat market. In 1945 Baker died and in 1948 Lillian sold her interest in the market to Joseph who then became sole owner of the market.

Joseph took title to the real property from Jesse Shenson on October 10, 1935. At that time he admittedly held as trustee for the other co-owners. In 1935 Joseph deeded a one-fifth interest to Viola. In 1936 another co-owner deeded a one-fifth interest to Lillian, and Joseph deeded a one-fifth interest to Sam Baker. In 1944 Lillian, Joseph and Sam acquired an additional one-fifteenth interest from Louis Shenson, another co-owner. In 1950 the building was sold under decree in the suit for partition.

When the property was originally purchased there was a $10,000 mortgage on it. On July 22, 1936 and again on March 2, 1938, the mortgage was renewed in the sum of $15,000. The first mortgage of $15,000 was signed by Joseph and Frances Shenson only. The second mortgage of $15,000 was signed by Joseph and Frances Shenson and Sam and Eva Baker. $5000 of the money obtained from the renewal of the first mortgage was put into the business. $13,081.88 of the second renewal mortgage was used to pay off the bank. The remainder went into the business. $150 per month principal and interest was paid on the mortgages by the meat market business.

At the time that Joseph took title to the building in 1935 an account was set up on the books of the meat market headed "Joseph Shenson, Rent Account." Thereafter the sum of $200 per month was regularly credited on this account as rent, and the total payments made by the meat market business upon the several notes secured by mortgages on the real property and all real property taxes, which were also paid by the meat market business, were entered as charges against this account.

[1] During all of this time separate partnership income tax returns were made for the co-tenants of the real property, under the designation: "Eleven Forty Three McAllister Building". These returns were prepared by the same accountant who prepared the returns for the meat market business and were signed by Joseph Shenson. In these returns $2,400 was entered as rent received and deductions were taken for all payments on the notes secured by mortgages and for all payments of real property taxes. At the same time the income tax returns for the meat market business took credit for the rental payments as deductions. The earlier returns showed greater rental payments than $2,400 per year, because in those years the meat market business was also conducting other stores in other property rented from strangers to this litigation, but the later returns when the business was exclusively conducted on the real property here involved, show rent: $2,400. It is a fair inference that this same practice was followed regularly through the years. These income tax returns were likewise signed by Joseph Shenson. It may not be questioned that these income tax returns are to be treated as admissions against interest by Joseph Shenson. Balkema v. Deiches, 90 Cal.App.2d 427, 430, 202 P.2d 1068; Heck v. Heck, 63 Cal.App.2d 470, 147 P.2d 110.

The trial court found in Finding VI: "That * * * from the 10th day of October, 1935, to the 31st day of May, 1943, said defendant Joseph Shenson personally and as trustee for the account and benefit of plaintiff and said cross-complainants credited to and for their account the sum of two hundred (200) dollars per month as rent for said real property; that said defendant Joseph Shenson has refused to pay to said plaintiff or said cross-complainants any of said rent so credited by him to them."

[2] This finding carries only to May 31, 1943 (the date of the expiration of the lease for 10 years at $200 per month previously

mentioned). It finds ample support in the evidence of the books kept under Joseph's directions and the income tax returns signed and filed by him. There was some evidence that the $200 per month rent was only a bookkeeping entry, but against this evidence the trial court was entitled to weigh not only the books themselves but also the income tax returns signed by Joseph Shenson which charged to each co-tenant as income his share of the gross rental of $200 per month, less deductions; and the income tax returns of the business, also signed by Joseph, which deducted the rent as paid from the income received by the business during the taxable year.

From the expiration of the lease at $200 per month rental on May 31, 1943 the court found in Finding X: "That the reasonable rental value of said real property from and after May 31, 1943, to the date of the partition sale * * * was the sum of five hundred (500) dollars per month; that no part thereof has been paid or accounted for by said defendant Joseph Shenson to plaintiff or cross-complainants."

[3] That the holding over after the expiration of the lease was with the consent express or implied of all of the co-tenants cannot be disputed. Under these circumstances we are satisfied that the correct rule is that the tenancy continued at the same rental as provided in the lease, i. e., $200 per month. The rule is thus stated in Conner v. Garrett, 65 Cal.App. 661, 664, 224 P. 786, 787, quoting 16 R.C.L. 1161:

[4] "'As a general rule the tendency [tenancy] arising from the tenant's holding over with the consent of the landlord is presumed to be on the same terms as the original lease, so far as they are applicable to the new tenancy. Thus it is generally held that the terms of the original lease as regards the amount and time of payment of the rent apply.'"

The distinction is made in this regard between a tenant holding over with the consent of his landlord and a tenant holding over wrongfully without his landlord's consent. The tenant holding over wrongfully is liable for the reasonable value of the use and occupation; the tenant holding over with his landlord's consent is liable only for the rental fixed by the lease. Cowell v. Snyder, 15 Cal.App. 634, 115 P. 961.

[5] This is the generally accepted rule throughout this country. "A tenant who remains in possession after the expiration of his lease, with the express or implied consent of the lessor, may be liable for the same amount of rent as that reserved in the lease * * *. If the tenant holds over without authority under such circumstances as to negative the landlord's consent to the holding * * * the tenant may be liable for the reasonable value of the use and occupation of the premises * * *." 52 C.J.S., Landlord and Tenant, § 505, pp. 291–292. The California cases relied upon by respondents are consistent with this distinction. It follows that the court erred in any judgment based upon the value of the use and occupation at $500 per month or anything in excess of the $200 per month fixed in the lease under which the tenancy had its inception.

[6] This brings us naturally to one of the most serious criticisms of the findings. Appellant Joseph Shenson sought credit against the rental due the co-tenants not only for all real property taxes paid on the property and that portion of the payments on principal and interest properly attributable to the original $10,000 mortgage, but also for all moneys expended for repairs and improvements on the property and for insurance. The trial court failed to cast any detailed account only finding that after giving Joseph Shenson all proper credits the balances for which judgment was given were due the respective parties. Under the authority of Whann v. Doell, 192 Cal. 680, 221 P. 899 and Margolis v. Leonard & Holt, 94 Cal.App. 716, 271 P. 578, these findings are insufficient if the appellate court cannot find from the record the manner in which the account was calculated and the items which entered into it. Respondents are not even agreed among themselves on this matter. Respondent Viola Shenson asserts in her brief: "Appellant was not given credit for the payment of interest and principal on the $15,000 renewal mortgages of 1936 and 1937. In the first place Viola Shenson

never signed said mortgages nor was she a party to them * * *. Neither as lessee or as co-tenant did appellant have the right to mortgage the premises without the consent of the respondent." The other respondents assert with equal positiveness that the portion of the payments made on the renewal mortgages which is properly attributable to the original $10,000 indebtedness was taken into account by the court in striking the account. No one of the three has favored us with a computation showing the mathematical process by which whatever allowance was made for payments on the mortgages was arrived at by the court. We have taken the respective interests in the real property owned by each respondent and have attempted such calculations on our own account without being able to arrive at the amounts actually awarded by the judgment. From these circumstances we are satisfied that under the authorities above cited the findings are not sufficiently detailed to support the judgment.

[7] Neither Sears v. Rule, 27 Cal.2d 131, 163 P.2d 443, nor any other case cited by respondents departs from the rule of Whann v. Doell, supra. The rule of the Whann case is only a special application of the general rule reiterated in Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260, 267: "'Ever since the adoption of the Codes, it has been the rule that findings are required on all material issues raised by the pleadings *and evidence,* unless they are waived, and, if the court renders judgment without making findings on all material issues, the case must be reversed.'" (Emphasis ours.)

[8, 9] For these reasons the judgment must be reversed, but other issues are involved which will face the court on the going down of the remittitur. Appellant Joseph Shenson is entitled to credit for taxes on the real property actually paid and for the proportion of the mortgage payments properly attributable to the original $10,000 loan. One co-tenant is entitled to credit from his co-tenants for expenditures necessarily made for the protection of the common property. 13 Cal.Jur.2d, Cotenancy, sec. 41, p. 329. The taxes paid and the renewal mortgages to the extent of the $10,000 mortgage lien on the common property fall within this rule.

Whether the payments for repairs and insurance were for the preservation of the common property or were expenditures of the lessees for their own benefit is a question of fact. None of these expenditures was included in the partnership income tax returns made for the owners of the real property by Joseph Shenson. All of these expenditures were included as deductions in the income tax returns of Joseph Shenson for the business. This constitutes an admission against interest by Joseph which would support the trial court's finding that these items are not a proper charge against the co-tenants.

Appellant Joseph Shenson also argues that for the periods when Sam Baker and Lillian Berman were partners with him in the business his and their duty to pay rent would pro tanto cancel one another out since all were both tenants and co-owners of the property. This overlooks the fact that Sam Baker's and Lillian Berman's receipts from the business were reduced by the amount of the rental payments of $200 made to Joseph Shenson while they were partners and that they have therefore already paid out as tenants their share of, but have not received as co-owners any portion of, these rentals. The pleadings sufficiently charge that Joseph Shenson collected rents from the property for which he has not accounted and to the extent of the $200 per month the evidence is sufficient to establish these allegations.

The cross-complainants' appeals raise only the question that from the termination of the lease they are entitled to recover on the basis of $500 per month reasonable rental value. We have disposed of this question adversely to them.

Judgment reversed with costs to appellant Joseph Shenson.

NOURSE, P. J., and KAUFMAN, J., concur.

SULLIVAN v. KANTEL et al.

Civ. 19990.

District Court of Appeal, Second District,
Division 2, California.
April 26, 1954.
Rehearing Denied May 13, 1954.
Hearing Denied June 23, 1954.

Action to establish right of way and easement over defendants' lands and to recover damages for wrongful destruction of and interference with alleged right of way. The Superior Court, Los Angeles County, A. A. Scott, J., rendered judgment against first defendant, and in favor of second defendant, and plaintiff appealed. The District Court of Appeal, McComb, J., held, inter alia, that plaintiff had not sustained burden of proving a use, under claim of right, hostile and adverse to owner.

Judgment affirmed.

1. Easements 🔑8(1)

That previous owner of defendant's land, who at that time also owned land subsequently conveyed to plaintiff, used road over the portion subsequently conveyed to defendant, did not constitute user hostile to the true owner such as would be necessary to creation of easement in plaintiff's favor.

2. Evidence 🔑98

The party holding the affirmative of an issue must produce evidence to support it, and if such evidence is not produced, finding must be against such party.

3. Easements 🔑36(3)

In action to establish an easement over defendants' lands, plaintiff did not sustain burden of proving a use, under claim of right, hostile and adverse to the true owners.

4. Easements 🔑61(9½)

Where, in action for damages for wrongful destruction of and interference with an alleged right of way over defendants' lands, it was stipulated that first defendant had torn up road, and there was no evidence that second defendant either tore up road or directed that it be done, finding that second defendant was not responsible for the interference was proper.

5. Easements 🔑36(3)

In action to establish right of way and easement over another's land, evidence supported finding that alternative routes from highway to plaintiff's land were available.

6. Easements 🔑36(3)

In action to establish an easement over another's land, plaintiff's evidence failed to show that any person, other than the owner, used the road in question, and thus was insufficient to establish a prima facie case of implied grant of easement.

7. Easements 🔑61(9)

Where plaintiff, in action to establish a right of way and easement over defendants' lands and for damages for destruction and interference with alleged right of way, had failed to prove a cause of action against second defendant for failure to permit plaintiff to use road, evidence of damage resulting from such action was immaterial, and properly excluded.

8. Appeal and Error 🔑877(4)

Where plaintiff, who had sued to establish easement over defendants' land, won judgment against first defendant, but not against second defendant, and appealed only from the adverse judgment, question of whether trial court should have allowed costs against first defendant was not presented to reviewing court.

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A. Maxson Smith and Robert A. Keller, Los Angeles, for appellant.

John A. Griffin, Beverly Hills, for respondents.

McCOMB, Judge.

This action was instituted by plaintiff to establish his right to a right of way and easement over land owned by defendants Fred Kantel and Alice Kantel, and to recover damages for wrongful destruction of and interference with the alleged right of way by defendants.

Facts: Plaintiff owns a 60-piece of land located about a mile from Pine Canyon Road, which is the nearest public highway in the vicinity. A road runs from plaintiff's land over the lands owned by defendants to Pine Canyon Road. Shortly after defendants took possession of their land in the latter part of 1949, defendant Fred Kantel destroyed a portion of the road across defendant Alice Kantel's land, making it impossible for plaintiff to travel to and from his property over such road.

The major portion of the road runs from Pine Canyon Road over land owned by defendant Fred Kantel up to defendant Alice Kantel's land. The remainder of said road or right of way, which runs across defendant Alice Kantel's land, was built in 1924 by Mr. Munz, who at that time owned the entire parcel of 80 acres, of which defendant Alice Kantel now owns 20 acres and plaintiff 60 acres.

After trial before the court without a jury, judgment was entered in favor of defendant Alice Kantel against plaintiff and in favor of plaintiff against her codefendant. Costs were awarded only to defendant Alice Kantel.

These are the only questions necessary for us to determine:

First: *Did the trial court properly find that the following allegations in plaintiff's complaint were untrue?*

I

"For more than fifteen years immediately last past there has been an open, notorious, continuous and uninterrupted use of said road or right-of-way running from Pine Canyon Road across defendants' land to plaintiff's land, which use has been under claim of right, hostile to the true owner or owners and under claim of right adverse to said defendants, and their predecessors in interest, and by reason thereof plaintiff is entitled to an easement or prescriptive right-of-way as herein described in and over the defendants' land."

[1] *Yes.* Plaintiff failed to produce any evidence that any use of the road was under a claim of right, hostile and/or adverse to the true owners. The evidence discloses that the road was used by Mr. Arnold Munz from the time of its original construction until such time as he sold the property to the Rubles. Clearly such user was not hostile to the true owner.

The evidence showing the use of the road by the Rubles also failed to establish that the use of the road was hostile to the true owner. The evidence further disclosed that the road had been used by Mr. Munz, Newbergs and the plaintiff. There was no evidence to show that the use was notorious, continuous, uninterrupted or under claim of any right hostile to the true owner; or under claim of any right adverse to the true owner or owners.

[2] Where no evidence is introduced upon an issue, a finding thereon should be against the party who has the burden of proof. (Lori Ltd. v. Wolfe, 85 Cal.App.2d 54, 66[13], 192 P.2d 112; Wheeler v. Gregg, 90 Cal.App.2d 348, 370[21], 203 P.2d 37; Rancho Santa Margarita v. Vail, 11 Cal.2d 501, 543[15], 81 P.2d 533; Washington v. Washington, 91 Cal.App.2d 811, 813[2], 205 P.2d 736. See also cases cited, 21 West's Cal.Dig. (1951) Evid., 🔑98, p. 180.) In Washington v. Washington, supra, 91 Cal.App.2d at page 813, 205 P.2d at page 737, the rule is accurately stated thus: "* * * the party holding the affirmative of the issue must produce evidence to support it, and if such evidence is not produced the finding must be against such party. (Citing cases.)"

[3] Therefore the burden being upon plaintiff to produce evidence in support of the affirmative allegations of his complaint, which he failed to do, the trial court's finding is supported by the record.

II

[4] "Within forty-five days last past, defendants, and each of them, without the knowledge or consent of plaintiff, and without any right so to do, have plowed up, destroyed and rendered said road or right-of-way completely impassable for vehicles."

Yes. The record discloses that it was stipulated at the trial that the road was torn up by Fred Kantel, and there is a total failure of any evidence to disclose that defendant Alice Kantel, who is over 80 years of age, either tore up the road or directed that it be done. Hence the foregoing finding is supported by the record.

III

[5] "The aforesaid road or right-of-way across defendants' land is the only means of ingress to an egress from the plaintiff's land, and it is necessary for plaintiff to have access thereto in order that he may enjoy his property, care for the shrubbery and fruit trees thereon, complete the construction of a house thereon, and complete the construction of a domestic and irrigation water supply system which will in part reduce the extreme fire hazard to plaintiff's property, all of which is deteriorating because of lack of care."

Yes. The evidence of several witnesses disclosed that there were other roads leading to the property of plaintiff which had been used by parties on previous occasions. This evidence sustains the above questioned finding.

Since, regardless of whether there was evidence to sustain other findings questioned by plaintiff, the judgment predicated upon the above findings would necessarily have been in favor of defendant Alice Kantel, we refrain from discussing the other findings questioned by plaintiff.

[6] Second: *Did plaintiff's evidence create a prima facie case of an implied grant of an easement across defendant Alice Kantel's property?*

No. The record fails to disclose that any person used the road across said defendant's property other than the owners of the property. Hence there was obviously no implied grant of an easement of way to any person.

[7] Third: *Did the trial court err in refusing to admit evidence on the question of damage to plaintiff's land resulting from his being unable to use the road across defendant Alice Kantel's land?*

No. It is obvious that since plaintiff had failed to prove a cause of action against said defendant, any evidence as to damage on his property resulting from his inability to use a road across her property was immaterial.

[8] Fourth: *Did the trial court err in not awarding plaintiff costs against defendant Fred Kantel, against whom he obtained judgment?*

This question is not properly before us for the reason that plaintiff has not appealed from the judgment in which he is not awarded costs against defendant Fred Kantel. The only appeal is from the judgment in favor of defendant Alice Kantel.

Since no error appears in the record the judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

GEORGISON v. GEORGISON.*

Civ. 15818.

District Court of Appeal, First District, Division 2, California.

April 29, 1954.

Rehearing Denied May 28, 1954.

Hearing Granted June 25, 1954.

Proceedings on application for order that execution issue on judgment creditor's claim against decedent's estate and for leave to file a creditor's claim. The Superior Court in and for the County of Alameda, S. Victor Wagler, J., entered orders from which the executrix of decedent's estate appealed. The District Court of Appeal, Kaufman, J., held that record failed to show that diligence on part of judgment creditor which was required for authorization to present claim against a debtor's estate on basis of judgment rendered more than five years previously.

Orders reversed.

1. Judgment 🔑855(1)

A creditor, seeking to enforce a judgment more than five years after its entry, has burden of showing that he was not able to satisfy his claim within statutory period

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* Subsequent opinion 275 P.2d 3.

during which he was entitled to writ of execution as a matter of right. Code Civ. Proc. §§ 685, 686; Probate Code, § 732.

2. Executors and Administrators ⚷213

An order authorizing judgment creditor to enforce judgment, more than five years after its entry by presenting claim against the debtor's estate, may be made only if during the five years following entry of judgment, the creditor exercised due diligence in locating and levying on property owned by debtor or in following available information to point where a reasonable person would conclude that there was no property subject to levy within that time. Code Civ.Proc. §§ 685, 686; Probate Code, § 732.

3. Executors and Administrators ⚷221(4)

In proceedings on motion for order that execution issue and for leave to file a creditor's claim against estate of judgment debtor, directed by divorce decree to pay support for former wife and a child, which had not been paid for over five years, record warranted conclusion that movant had been guilty of such lack of diligence as to preclude granting of leave to file a creditor's claim. Code Civ.Proc. §§ 685, 686; Probate Code, § 732.

4. Divorce ⚷263, 311

Under provision of Code of Civil Procedure that upon death of judgment debtor execution may issue if judgment be for recovery of real or personal property, or the enforcement of a lien thereon, an execution was not authorized after the death of the judgment debtor for amounts due on a divorce judgment for support by debtor of his former wife and a child. Code Civ. Proc. §§ 685, 686; Probate Code, § 732.

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Crist, Stafford & Peters, John M. Brenner, Palo Alto, for appellant.

Forrest E. Macomber, Gordon J. Aulik, Stockton, for respondent.

KAUFMAN, Justice.

This is an appeal from an order granting respondent's motion for an order that execution issue and for leave to file a creditor's claim.

On January 26, 1924, respondent Minnie C. Lobrovich (then Minnie C. Georgison) obtained an interlocutory decree of divorce from George Georgison. The decree ordered him to pay to her the sum of $6 per week for her support and also the sum of $6 per week for the support of Clifford Gregory Georgison, their minor child. A final judgment of divorce was entered on February 2, 1925, which incorporated the same orders. George Georgison died in May of 1952. In November of 1952, over twenty-eight years after the interlocutory decree, respondent filed and served a notice of motion for order that execution issue and for leave to file creditor's claim. This notice, and the supporting affidavit, were served upon the attorney for Helen Georgison, widow of George Georgison, and executrix of the estate of George Georgison. A hearing was had on this motion on December 15, 1952, and the Court made its order granting the motion for an order for execution to issue and also for leave to file a creditor's claim.

Helen Georgison, as executrix of the estate of George Georgison, has taken this appeal from said order.

It is appellant's contention that during the years following the interlocutory decree, respondent did not exercise due diligence in locating and levying upon property owned by her former husband, or in following available information to the point where a reasonable person would conclude that there was no property subject to levy. For this reason, the motion for leave to file the creditor's claim should not have been granted, and the granting of the motion constituted an abuse of discretion.

Appellant also contends that it was error for the Court to order execution to issue.

Evidence at the hearing on the motion consisted of respondent's affidavit and oral testimony of respondent and appellant.

In her affidavit respondent stated that following the entry of the interlocutory decree she had Mr. Georgison arrested and confined in jail for about one week during February and March of 1924, but received no money. Respondent remarried in February of 1925. After being in jail, Mr.

Georgison went to Europe for a year, and after he returned to the United States she could not locate him again until 1939. During this time she made numerous attempts to locate him, but later learned that he had been using aliases. Apparently, her attempts to locate him consisted solely of making inquiries of friends and other people.

In regard to the allegation in the affidavit that Mr. Georgison had been using aliases, it developed at the hearing that respondent had no actual knowledge of this, but based her allegation on hearsay. The only names which it was proved that he used were Georgison and Mihaljevic. The name Mihaljevic was his original name—the name to which he was born—but he had changed it by the time he met the appellant.

In 1939 she located Mr. Georgison and he bought clothing for the boy valued at approximately $50. In addition, he paid her $15 per month from the summer of 1939 till August of 1941, when her son went in the Navy. She accepted this amount because she "figured it was better to take something than nothing at all."

Appellant married George Georgison in 1925. Respondent first met appellant in appellant's San Francisco home in 1940. At that time respondent learned that Mr. Georgison had four homes in San Francisco. Whether she then asked Mr. Freitas, the Stockton attorney, to investigate, or whether it was prior to this, in 1939, is not clear. It does appear from respondent's affidavit that she contacted Mr. Freitas in an attempt to enforce payment of the amounts due for child support, apparently as distinguished from the payments long since overdue for her own support. Also, it is clear that she did not see Mr. Freitas at any time after 1940.

Respondent testified that Mr. Freitas told her that he could find nothing in Mr. Georgison's name. This is, of course, hearsay testimony, and presumably it is not to be accepted as a statement of fact, for this testimony was admitted only to show what efforts she made to collect.

After 1940 or 1941, respondent stated that she called Mr. Georgison two or three times a year on the telephone, but each time he said he had nothing. When she found out that Mr. Georgison was sick, in December of 1950, she thought that she had better leave him alone.

Respondent knew that Mr. Georgison moved from San Francisco to Sunnyvale, and that he lived in a rather nice home surrounded by an apricot orchard. Her sister-in-law lived in Sunnyvale, quite close to the Georgisons, but she never asked her sister-in-law what Mr. Georgison did. She did assume, however, that he repaired houses, which was what he had done before.

Respondent did not see Mr. Georgison at any time after 1944.

Appellant testified that Mr. Georgison used the name of Mihaljevic as well as Georgison. She testified that in 1940 respondent visited at the Georgison home in San Francisco, having come to see what they owned. Mr. Georgison admittedly showed her the four houses he owned and told her they were his. This property was in joint tenancy, and two of the houses were in the name of Mihaljevic and two were in the name of Georgison.

Respondent made no attempt to levy upon this property.

In 1948 the Georgisons move to Sunnyvale, where they lived till his death. Respondent's sister-in-law lived within five or six blocks of them, and they visited her frequently. In Sunnyvale, Mr. Georgison owned the house they lived in and a three acre apricot orchard, and one or two other houses. This property was in joint tenancy and in the name of Mihaljevic. It was owned free and clear.

Appellant testified that so far as she knew respondent did nothing to enforce the judgment, except to ask for support. From 1937 on, respondent asked just enough for clothing and $15 per month, and Mr. Georgison paid that until the boy joined the Navy.

The question presented on this appeal is whether the trial court abused its discretion in granting the motion for leave to file a creditor's claim and whether it was error to make an order that execution issue.

It is clear from the record that respondent in 1940 was told by the decedent debtor that he owned real estate; he showed respondent four houses that he owned; two of these houses were in the name of Georgison his original married name; no execution was ever levied by respondent on decedent's real estate; respondent knew where he lived but she never at any time checked the records of the tax collector, county recorder, or county assessor to ascertain what property decedent owned.

It is our view that the record fails to show that diligence on the part of respondent that is required by section 685, Code of Civil Procedure and that the trial court abused its discretion in granting the motion for leave to file a creditor's claim.

[1] It is the law that a creditor, seeking to enforce a judgment more than five years after its entry, has the burden of showing he was not able to satisfy his claim within the statutory period during which he was entitled to a writ of execution as a matter of right. Butcher v. Brouwer, 21 Cal.2d 354, 358, 132 P.2d 205; Beccuti v. Colombo Baking Co., 21 Cal.2d 360, 132 P.2d 207.

[2] An order authorizing a judgment creditor to enforce a judgment, more than five years after its entry by presenting a claim against the debtor's estate, may be made only if during the five years following entry of judgment, the creditor exercised due diligence in locating and levying on property owned by the debtor or in following available information to the point where a reasonable person would conclude that there was no property subject to levy within that time. Lohman v. Lohman, 29 Cal.2d 144, 173 P.2d 657; Di Corpo v. Di Corpo, 33 Cal.2d 195, 200 P.2d 529.

[3] Here the record shows a complete lack of diligence on the part of respondent. Information imparted to her by the decedent debtor's own lips would have resulted in a levy and satisfaction of her claim had she acted on the said information given to her but on the contrary she sat idle and did nothing for twelve years from 1940, the date she acquired the information to 1952.

It is also argued that the order directing execution to issue is erroneous.

In addition to permitting respondent to file her claim against the estate, the Court also ordered that execution issue on the judgment. This latter order was definitely in error.

Probate Code section 732 provides in part: "When a judgment has been rendered against the testator or intestate, no execution shall issue thereon after his death, except as provided in the Code of Civil Procedure."

[4] Section 686 of the Code of Civil Procedure provides that upon the death of the judgment debtor execution may issue if the judgment be for the recovery of real or personal property, or the enforcement of a lien thereon. There is no provision for issuance of execution after death of the judgment debtor in circumstances such as are present in this case.

In Corporation of America v. Marks, 10 Cal.2d 218, 219, 73 P.2d 1215, 114 A.L.R. 1162, it was held that Probate Code section 732 requires a judgment against the decedent to be filed the same as other claims, and that the section also terminates the judgment creditor's right to execution levy and sale upon death of the judgment debtor, except where execution has been levied prior to death.

In view of this express law in California, there can be no question but that the order authorizing execution to issue must be reversed, with instructions to deny the motion for such order.

We conclude that the orders of the trial court herein do not find support either in the evidence in the record or in the law applicable thereto and accordingly both the order permitting the filing of the creditor's claim and the order authorizing issuance of execution after five years must be reversed.

Orders reversed.

NOURSE, P. J., and DOOLING, J., concur.

124 Cal.App.2d 713

PEOPLE v. WHALEN et al.

Cr. 5064.

District Court of Appeal, Second District, Division 1, California.

April 26, 1954.

Hearing Granted May 27, 1954.

Defendants were convicted of assault and attempted extortion. The Superior Court, Los Angeles County, Walter R. Evans, J., entered judgment, and defendants appealed therefrom, and from order denying motion for new trial. The District Court of Appeal, White, P. J., held, inter alia, that evidence sustained conviction.

Affirmed.

1. Criminal Law ⚿1144(13)

On appeal following conviction in criminal case, District Court of Appeal is required to view evidence in light most favorable to the People, and the existence of every fact which the jury could have reasonably deduced from the evidence must be assumed.

2. Assault and Battery ⚿91

Evidence sustained conviction for assault. Pen.Code, § 240.

3. Assault and Battery ⚿51

In statute defining an assault as an unlawful attempt, coupled with a present ability, to commit a "violent" injury on person of another, quoted word is not synonymous with "bodily harm", but includes any wrongful act committed by means of physical force against person of another, and the kind of physical force is immaterial. Pen.Code, § 240.

See publication Words and Phrases, for other judicial constructions and definitions of "Violent".

4. Criminal Law ⚿1159(3)

District Court of Appeal is not authorized to reweigh evidence and resolve conflicts therein in favor of accused.

5. Criminal Law ⚿741(1), 742(1)

Matter of credibility of witnesses and weight to be given their testimony are matters committed to the duly constituted arbiter of the facts.

6. Criminal Law ⚿1159(2)

Where there is present in the record evidence tending to support a verdict, reviewing court cannot disturb verdict upon ground that it is not sustained by evidence.

7. Criminal Law ⚿824(1)

In a criminal case, trial court has duty to give, sua sponte, instructions on general principles of law applicable to the case, but the rule does not apply to instructions which do not cover broad, general principles or where the necessity for an instruction is not developed through evidence introduced at trial, thus making it vital to a proper consideration of evidence by jury, or where omitted instruction would amount to but a mere refinement of other instructions given.

8. Criminal Law ⚿825(2)

In prosecution for assault and attempted extortion, court did not err in failing to specifically instruct, on its own motion, on difference between "preparation" and "attempt", where court's instructions, as given, contained all elements of offense charged, and where the evidence showed conclusively that defendant's conduct had gone beyond the preparatory stage, and established a commencement of the criminal act through uttered threats toward and actual assault upon the victim. Pen.Code, §§ 245, 524.

◆

Leonard Wilson, Los Angeles, for appellant Whalen.

Bentley M. Harris, Hollywood, and George R. Perkovich, Los Angeles, for appellant Solowitz.

Edmund G. Brown, Atty. Gen., Lester Ziffren, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, Jack Whalen, Sam Solowitz, Roger Matthews and Julian Kranzberg were accused in Count I of the offense of assault by means of force likely to produce great bodily injury, a felony, Penal Code, § 245, and in the second count defendants were charged with the crime of attempted extortion, Penal Code, § 524.

At the time of arraignment each defendant made a motion to dismiss pursuant to the provisions of section 995 of the Penal Code. As to defendants Solowitz and Kranzberg, the motion was granted only as to Count II, but as to the remaining defendants, was denied as to each count.

Following pleas of not guilty the cause proceeded to trial before a jury resulting in verdicts finding all defendants guilty of assault, a misdemeanor, a lessor but necessarily included offense in that charged in Count I of the information. As to defendants Whalen and Matthews, they were also found guilty of attempted extortion as charged in Count II. Defendants Whalen and Solowitz filed a motion for a new trial which was denied.

As to defendant Whalen, proceedings on Count II were suspended, and probation was granted for a period of five years on condition that he serve a term of 150 days in the county jail. As to Count I, defendant Whalen's application for probation was denied and he was sentenced to serve 30 days in the county jail, said sentence to run concurrently with the jail sentence imposed as a condition of probation on Count II.

In the case of defendant Solowitz, who was convicted only under Count I, the proceedings were suspended and he was granted probation for a period of three years, one of the conditions thereof being that he serve the first twenty days of such period in the county jail.

From the judgment of conviction and from the order denying their motions for a new trial, defendants Whalen and Solowitz alone prosecute this appeal.

[1] On appeal following a conviction in a criminal case we are required to view the evidence in the light most favorable to respondent, and the existence of every fact which the jury could have reasonably deduced from the evidence must be assumed. People v. Newland, 15 Cal.2d 678, 681, 682, 104 P.2d 778; People v. Reese, 65 Cal.App. 2d 329, 337, 150 P.2d 571. Bearing in mind this rule, we consider the following a fair epitome of the evidence forming the factual background of this prosecution.

At about five o'clock on the evening of October 9, 1952, John Anton, the complaining witness, was leaving the Hollywood Post Office when he heard someone call "John". On turning around he encountered defendants Whalen, Matthews and Solowitz, who approached him.

Anton was unacquainted with defendants Whalen and Solowitz, but had known defendant Matthews for approximately a year. The aforesaid three defendants walked directly up to Anton and Matthews took hold of Anton's left upper arm and grabbed his shirt, while Whalen held Anton's right arm, and they pushed him against one of the closed windows at the post office. Defendant Matthews demanded $15 for a bet that defendant Whalen had made with Matthews for Anton. The latter denied owing any money to defendants and denied knowledge as to anyone calling Matthews on Anton's behalf. Whalen then asked if Anton had any money in his pockets and when the latter responded that was none of Whalen's business, Whalen replied, "We are going to go into your pocket and get this $15.00." After he reiterated his ignorance as to the alleged call to Matthews or the $15 transaction, Anton warned defendants that he was going to call the police. Anton then shook himself loose and walked over to one of the clerk's windows at the post office. Prior thereto defendant Matthews, with his fist, hit Anton in the upper left arm.

Complaining witness obtained some change from the clerk at the post office and as he was proceeding to the telephone he was stopped by defendants Matthews and Whalen and the latter told Anton, "If you call the police, I will kill you. You will never get out of here." Anton requested that he be left alone otherwise he would call the police.

He then went to the telephone with Whalen and Matthews following him. He was about to call the operator to ask for the police department when Whalen again told him, "I am not kidding. If you call the police, you will never get out of here alive. There is a man standing at the door." Anton then noticed defendant Solowitz at the entrance to the building and Whalen advised that Solowitz "* * * is one of our men, and if you know what is good for you, you will not make any calls." Anton then responded that if he were left alone, he would not call the police.

Then Anton walked out of the building with defendants Whalen, Matthews and Solowitz following.

Outside the post office, Matthews repeated the demand for the $15 which Anton again insisted he did not owe. Whalen then told Anton that the former would give him one week to deliver the $15 to defendant Kranzberg at the Mark Twain Hotel. Again Whalen admonished Anton, "If you don't deliver it to him, (Kranzberg) I will catch you in an alley with no witnesses and I will give you such a going over you will remember me forever." When Anton replied he would go to the police if defendant did not desist from his threats, Whalen responded, "If you go to the police I will kill you." Thereupon Anton went to the Hollywood YMCA.

At approximately 7:00 p. m. that evening, Anton went to the Mark Twain Hotel to talk to defendant Kranzberg. As he entered the hotel, he saw Kranzberg behind the desk in the lobby of the hotel and saw defendant Solowitz, leaning against the telephone booth in the lobby. Anton told Kranzberg of the other defendants' request to have Anton deliver $15, but Kranzberg denied that Anton owed him any money.

When Anton asked why the defendants at the post office had threatened his life, Kranzberg remarked, "We had better take care of you right now." Thereupon Kranzberg made an inside telephone call and Whalen appeared. Whalen "pushed (Anton) at the desk" and hit him "* * * right in between the eyes." Anton staggered back against the telephone booth and against Solowitz when he felt a very sharp blow on the right side of his head. At this point, with Solowitz holding Anton's left arm and Kranzberg holding his right arm, Anton was held against the telephone booth and Whalen and Matthews continued for approximately one minute to hit and strike Anton with about ten blows mostly in his face, as well as kicking him on the left shin. Then Whalen advised, "Let's get him (Anton) outside and really finish him off." Kranzberg agreed to this suggestion, adding, "I don't want any evidence in the lobby."

At this point someone approached the entrance to the hotel and Anton heard people talking, whereupon Kranzberg told the other defendants, "You had better get out of here, and fast." Whalen again admonished Anton that if the latter reported anything "* * * about this to the police" Whalen would kill him.

Anton, with his right ear, mouth and nose bleeding, went to a washroom at the back of the desk to obtain a wet towel in an effort to stop the bleeding. As he came out of the washroom and returned to the scene, Kranzberg was observed wiping blood around the lobby but the other three defendants had departed.

As a result of the above mentioned encounter the complainant suffered a chipped front tooth, a bruise on his left shin, lumps on the right side of his head, a swollen nose, and his face was "badly beaten up". He also suffered pain in the left side of his chest, as well as from internal bleeding. For some three or four weeks after the assault the victim continued to expectorate and swallow blood. On October 10, 1952, two police officers took Anton to the receiving hospital, where, following examination, he was advised to consult his private physician. Thereafter, he was treated by his physician for the injuries above set forth.

Approximately a week prior to the preliminary examination, defendants Whalen and Matthews approached Anton in a restaurant. After asking him about his health, defendants inquired why he had not gone to defendants, who "* * * would have taken care of your doctor bill." Whalen, after expressing his dislike for the police, further admonished Anton, "Well, you know, if you know what is good for you, you're not going to testify against us next Wednesday." When Anton indicated he was going to testify, Whalen reiterated, "If you do, I will take care of you but good!" Defendant Matthews, at the same time, also advised Anton, "If you testify against (us) next week, we are going to get you really beat you up better than last time."

The complaining witness denied that he struck any of the defendants in the hotel, or on any other occasion. He admitted he had placed a $2 bet with defendants Matthews and Kranzberg several months prior to the date of the alleged assault.

Wm. W. Flannagan, a clerk at the Hollywood Post Office testified he saw the complainant at the post office about five o'clock on the afternoon of October 9, 1952; that he heard him say "Call the police". Shortly thereafter he saw Anton dialing the telephone at the post office with Whalen and Matthews within a few feet of him. He heard a brief discussion in which Anton stated he did not know defendants and inquired as to what they wanted. Flannagan then saw all parties leave the post office, including another person who was standing in the corner of the building during the incident. He did not see the parties prior to the telephone incident nor did he see any defendants touch Anton.

Police Officer Richard S. Williams testified to the injuries and appearance of Anton on October 10, 1952, and as to taking the latter to the receiving hospital.

Testifying in his own behalf, defendant Solowitz denied being present at the Hollywood Post Office on October 9, 1952, but admitted being present at the Mark Twain Hotel when the altercation therein took place. The witness testified that when the complainant entered the hotel he started an argument with defendant Kranzberg, the clerk behind the desk. That defendant Whalen came into the lobby and inquired as to the noise, whereupon, Anton replied that "* * * it is none * * * of * * * (Whalen's) business" and thereupon Anton swung at and struck Whalen in his face. Whalen, thereupon, swung back and hit Anton in the face. During this altercation, Solowitz stated, neither did he nor Matthews, who were conversing with each other at the time, nor Kranzberg participate in the incident at all.

Defendant Matthews testified as to the complaining witness requesting him to place a bet. That he replied he had no way to place the wager, but that defendant Whalen, who over heard the conversation, indicated he would place the bet. That Anton agreed to deliver the money at a stated time, whereupon, defendant Whalen said he would place the bet. The witness admitted being at the post office on October 9, with defendant Whalen, that they observed the complaining witness, that he, the witness, accosted Anton, inquired with reference to payment of the foregoing wager. That Anton said he would pay it in about a week. Defendant Matthews denied seeing defendant Solowitz at the post office and denied that either he or defendant Whalen made any threats against Anton. Defendant Matthews testified substantially the same as defendant Solowitz regarding the aforesaid occurrence at the Mark Twain Hotel.

Defendant Whalen testified in substance as did defendant Matthews concerning the happenings at the post office as well as to the incident at the hotel.

Appeal of Defendant Solowitz

This appellant was convicted only of the crime of assault, a misdemeanor, Penal Code, § 240. He maintains that the evidence is insufficient as a matter of law to establish his guilt of an assault. He asserts that the necessary elements of an unlawful attempt, coupled with present ability to commit a violent injury on the person of another, Penal Code, § 240, were not present.

[2, 3] Under the facts and circumstances shown in evidence this claim is untenable. The record discloses evidence that at the hotel while defendants Matthews and Whalen were assailing the complainant, appellant Solowitz was holding one of the latter's arms thereby aiding the assailants in their assault upon the complainant and preventing the latter from defending himself. The fact that appellant Solowitz merely restrained the victim with-

out striking him is of no consequence because in aiding and abetting the other assailants in an assault, appellant Solowitz became a principal in the commission of the crime, Penal Code, § 31. It is also in evidence that shortly before the complaining witness was assaulted as above described, appellant Whalen had struck the former, causing him to stagger back against appellant Solowitz, at which time the complainant felt a very sharp blow on his head. Under the circumstances disclosed by the record, the jury could reasonably have concluded that it was appellant Solowitz who struck this blow. Keeping in mind that the word "violent" as used in Section 240 of the Penal Code defining an assault, has been held not to be synonymous with "bodily harm", but to include any wrongful act committed by means of physical force against the person of another, and that the kind of physical force is immaterial, People v. Bumbaugh, 48 Cal.App.2d 791, 796, 120 P.2d 703, it is manifest, in view of the injuries suffered by the complainant, as well as the manner of the assault made upon him, that the jury was authorized to conclude that the assault was an unlawful attempt coupled with present ability to commit a violent injury upon the person of the complaining witness. As was said in People v. Bradbury, 151 Cal. 675, 676, 91 P. 497, "The term 'violence' as used here is synonymous with 'physical force,' and in relation to assaults the two terms are used interchangeably."

The case of People v. McCoy, Cal.App., 147 P.2d 54, strongly relied upon by appellant, is of little or no assistance to him, because a petition for hearing in the Supreme Court was granted, and upon its reconsideration of the case that court held that the evidence was amply sufficient to justify the verdict and the judgment of conviction was affirmed, People v. McCoy, 25 Cal.2d 177, 196, 153 P.2d 315.

[4–6] Appellant's contention that the testimony of the complainant was in conflict with that given by other witnesses is unavailing. Upon appeal we are not authorized to reweigh the evidence and resolve conflicts therein in favor of the accused. It is settled beyond controversy that the matter of credibility of witnesses and the weight to be given their testimony are matters committed to the duly constituted arbiter of the facts. And where there is present in the record evidence tending to support a verdict an appellate tribunal cannot disturb the verdict upon the ground that it is not sustained by the evidence.

Appeal of Defendant Whalen

It is not contended in the case of this appellant that the evidence is insufficient to sustain his conviction of simple assault (Count I) and attempted extortion (Count II). The "chief error" upon which he relies is that the trial court erred in failing to specifically instruct the jury on the difference between "mere participation" and "attempt". Although appellant at no time requested such an instruction, it is his claim that the court was required to give the same of its own motion.

[7] It is true that in a criminal case it is the duty of the trial court to give *sua sponte,* instructions on the general principles of law applicable to the case. Accordingly, it has been held that the court of its own motion must instruct the jury in criminal cases with respect to accomplices and their testimony, People v. Warren, 16 Cal.2d 103, 104 P.2d 1024; People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230, corroborative evidence in cases involving the obtaining of money by false pretenses People v. Curran, 24 Cal.App.2d 673, 75 P.2d 1090, testimony of expert witnesses, People v. Williamson, 134 Cal.App. 775, 26 P.2d 681, admission of confessions and the necessity of independent proof of the *corpus delicti,* People v. Frey, 165 Cal. 140, 131 P. 127; definitions of manslaughter in prosecutions for murder where the evidence may sustain a verdict of manslaughter, People v. Manzo, 9 Cal.2d 594, 72 P.2d 119, and presumption of innocence and burden of proof. People v. Matthai, 135 Cal. 442, 67 P. 694; People v. Soldavini, 45 Cal.App.2d 460, 114 P.2d 415. This rule does not apply however, to instructions which do not cover broad, general principles or where the necessity for an instruction is not developed

through the evidence introduced at the trial, thus making it vital to a proper consideration of the evidence by the jury. And the rule does not apply where the omitted instruction would amount to but a mere refinement of the other instructions given.

[8] In the instant case the court did instruct the jury on the definition of and the elements involved in the offense charged against appellant Whalen. After admonishing the jury in various instructions as to the crime of extortion, the court instructed on attempted extortion, and in the last paragraph thereof told the jury, "The difference between actual extortion and attempt to extort obviously lies in the results obtained; and if one uses a threat such as I have specified with the intent and for the purpose that I have specified, he is guilty of attempt to extort, although he fails to induce any fear in the mind of the other person or fails to obtain any money or property as a result of the attempt."

This instruction coupled with others given contained all the elements of the offense charged. If appellant Whalen desired a more elaborate exposition of the difference between preparation or intention and attempt he should have requested a special instruction on the subject.

Furthermore, an instruction on the difference between "preparation" and "attempt" was not warranted because the evidence herein showed conclusively that appellant's conduct had gone far beyond the preparatory stage, and established a commencement of the criminal act through uttered threats toward and actual assault upon the victim. Under the facts of this case it is manifest that the court was not required to give the suggested instruction, at least on its own motion.

Appellant Solowitz appeals from the judgment and the order denying his motion for a new trial on Count I. No judgment was pronounced, proceedings being suspended and conditional probation granted. But under the provisions of section 1237 of the Penal Code, as amended in 1951, an order granting probation "shall be deemed to be a final judgment within the meaning of this section".

As to defendant Solowitz, the order granting probation and the order denying his motion for a new trial, are and each is affirmed.

Defendant Whalen appeals from the judgment and from the order denying his motion for a new trial on Counts I and II.

As to Count I, a judgment was pronounced, but as to Count II, proceedings were suspended and conditional probation granted.

As to defendant Whalen, the judgment and the order denying his motion for a new trial as to Count I are, and each is affirmed. The order granting probation and the order denying defendant Whalen's motion for a new trial on Count II are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

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124 Cal.App.2d 683

PEOPLE v. KEMP.

Cr. 2515.

District Court of Appeal, Third District, California.

April 23, 1954.

An accused was convicted of grand theft. The Superior Court, Yolo County, McDonald, J., entered a judgment and accused appealed from the judgment and from order denying motion for new trial. The District Court of Appeal, Schottky, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. False Pretenses 🔑12

Where defendant allegedly falsely represented to used car lot manager he was relative of local business woman and was to assist in management, that defendant had $11,700 savings account, and presented altered bankbook showing such balance, and falsely claimed to be person named on exhibited social security card, and defendant gave dealer check in amount of purchase price of automobile for which defendant promised to pay cash on specified day, which dealer accepted as evidence of purchase, dealer was defrauded, justifying grand theft conviction, although dealer repossessed automobile and knew of defendant's lack of commercial account. Pen. Code, §§ 20, 476a, 484, 487.

2. False Pretenses ⚷15

Where defendant allegedly falsely represented to used car lot manager he was relative of local business woman and was to assist in management, that defendant had $11,700 savings account, and defendant presented altered bankbook showing such balance, and falsely claimed to be person named on exhibited social security card, and defendant gave dealer check in amount of purchase price of automobile for which defendant promised to pay cash on specified day, and possession of automobile was delivered to defendant, grand theft prosecution was proper, and civil suit was not only remedy available on theory check was promissory note. Pen.Code, §§ 20, 476a, 484, 487.

3. Criminal Law ⚷1159(2)

Question of felonious intent in grand theft prosecution is for jury from all circumstances, and unless determination lacks substantial support in evidence finding is conclusive upon appellate court.

4. Criminal Law ⚷1159(2)

In resolving whether evidence sustains conviction, appellate court will decide only whether upon face of evidence it can be held that sufficient facts could not have been found by jury to warrant its implied findings, and before they can be set aside it must be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support conclusion reached in court below.

5. False Pretenses ⚷49(1)

In grand theft prosecution of defendant who allegedly falsely represented to used car dealer he was relative of local business woman and was to assist in management, and that he had $11,700 savings account, and who allegedly presented altered bankbook showing such balance, and who gave dealer check in amount of purchase price of delivered automobile for which defendant promised to pay cash on specified day, which check dealer accepted as evidence of purchase, knowing defendant lacked commercial bank account, evidence sustained grand theft conviction. Pen.Code, §§ 20, 476a, 484, 487.

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Thomas E. Reynolds, Yolo County Public Defender, Davis, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and Frederick G. Girard, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Appellant was charged by information with the crime of grand theft, with six prior felony convictions. He refused to apply for appointment of counsel to defend him or to accept counsel appointed by the court, and acted as his own counsel at the trial. He pleaded "not guilty" to offense charged and admitted the prior felony convictions. Following a jury trial he was found guilty, and his motion for a new trial was denied. He then appealed from the judgment of conviction and from the order denying his motion for a new trial, and upon his application the court appointed the public defender of Yolo County to represent him upon the appeal.

Appellant's main contention is that the evidence is insufficient to support his conviction of grand theft. Before discussing this contention we shall summarize the evidence as shown by the record.

A Mr. Randolph, who was the manager of a used car lot in Woodland, California, was at his home in Woodland during the evening of October 3, 1953, when he received a telephone call from appellant who asked him to come down to the car lot, stating that he wanted to purchase one of the used cars. Randolph went to the lot and there met appellant who introduced himself as John M. Doyle and stated that he was in Woodland to assist his niece, a Mrs. Grace Bender, and her son, Stanley, in managing the operation of the Woodland Laundry. He also told Randolph that he had $11,700 in a savings account with the Bank of America, 12th and K branch, in Sacramento, and he showed Randolph a passbook to verify the amount, holding the passbook in such a manner, however, that the name of the depositor was concealed. The parties entered into a transaction whereby Randolph accepted a check for the purchase price of one of the automobiles and gave appellant possession of the car. Randolph testified to the transaction as follows:

> "* * * He then told me that this '51 Pontiac was the car he wanted to buy; he wanted to pay cash; he didn't want to finance the car; but he had no commercial account; this was a savings account. I told Mr. Doyle that I would gladly accept his check and refund it to him again on Monday [October 3d was a Saturday] when he released the amount of cash for the check. Which was agreeable with Mr. Doyle. I made out the check, and for the full amount of the purchase price of the automobile; and Mr. Doyle signed it. He showed me Social Security card to tie in with the name of John M. Doyle; and so the transaction was completed."

Appellant, acting as his own counsel, cross-examined Randolph. During this cross-examination he asked Randolph why the latter made out the check if he knew that it wasn't any good, to which Randolph replied:

> "I explained to you at the time. I had to have something to bind and protect myself on the sale of the automobile. You represented to me that you had eleven thousand seven hundred dollars in your savings account. You would make the check good on Monday. The check was no more than a piece of evidence for me to prove that you had purchased the automobile and intended to pay for it in full."

Appellant used the name "John M. Doyle" in signing the check, and the name "John M. Doyle" in signing the temporary operator's permit. He did not testify as a witness in his own defense.

Randolph repossessed the car later that evening, after talking with Stanley Bender and learning that the latter did not know "Mr. Doyle". Randolph found the car parked in front of the Woodlawn Laundry, with the motor running, and he took the car back to his place of business and left it there, taking the keys with him. He saw appellant walking down the street, but apparently made no effort to talk with him before taking the car. Randolph then went to the city police station, told his story, and was returning to his place of business, accompanied by officer Granucci, when they saw appellant on the street. Appellant ran when they appeared, and officer Granucci found him hiding under a car, placed him under arrest, and took him to the city jail. A savings passbook, account number 12127, showing a balance of $11,700 in the Bank of America, 12th and K Branch, in Sacramento, was found in appellant's possession, as were two social security cards bearing the name of John M. Doyle and George Williams, respectively. An assistant cashier of the bank, employed at the 12th and K branch, testified that the savings passbook had been issued to a John Amo who reported the loss of the book on October 1, 1953. He further testified that on that date the account had a balance of $110, and that the entries in the book had been raised and the street address of the depositor changed. The name "George Williams" had been written over the name of "John Amo" in the book, and the assistant cashier testified that there was no account at the 12th and K branch of the bank under the name of George Kemp (appellant's name) or George Williams or John M. Doyle.

Appellant was interrogated at the police station by detective sergeant Glavin who testified that appellant told him that he found the bank passbook in a bar in Sacramento, that he intended to take the car to Sacramento "and dump it," and that he had no money in the bank at all.

Appellant argues that to constitute a crime there must be a union of act and intent (citing Pen.Code, sec. 20), and the fact that he told Randolph that there were no commercial account funds to cover the check shows that there was no deception or intent to defraud, and therefore no crime. He cites People v. Wilkins, 67 Cal.App. 758, 228 P. 367, In re Griffin, 83 Cal.App. 779, 257 P. 458 and People v. Thompson, 114 Cal.App. 258, 299 P. 821, as authority for this contention. Each of these cases involved a violation of section 476a of the Penal Code relating to the issuing of checks with intent to defraud, the maker of the check knowing at the time that he did not have sufficient funds or credit at the drawee bank to cover the check. In the Wilkins and Griffin cases the payee was advised of the insufficiency of funds when the check was delivered, and the court held that there was no deception and it refused to find fraudulent intent from the mere fact that the drawer of the check failed to provide the funds necessary to cover the check. In the Thompson case there was a conflict in the evidence as to whether the payee was told, when he received the check, that there were insufficient funds in the bank to cover it, and the appellate court upheld the conviction on the ground that it was supported by substantial evidence. However, in the instant case appellant was not charged with or convicted of the offense set out in section 476a of the Penal Code, but was charged with grand theft as set out in section 484 of the Penal Code. Therefore, the cases cited by appellant are not in point because the conviction of appellant of the offense charged in the information is not based solely upon the issuance of the check.

Section 484 of the Penal Code, so far as applicable here, provides as follows:

> "Every person * * * who shall knowingly and designedly, by any false or fraudulent representation or pretense, defraud any other person of money, labor or real or personal property * * * is guilty of theft."

And section 487 of the code provides that:

> "Grand theft is theft committed in any of the following cases:
>
> * * * * * *
>
> "3. When the property taken is an automobile * * *."

The crime of grand theft "'sounding in false pretenses'" is said, in People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353, 355, to involve the following considerations: (1) whether there were representations of past events or existing facts as distinguished from a mere expression of opinion or promise of future action, though a promise, if unconditional and made without present intention of performance, will constitute actionable fraud; (2) whether the representations were made with intent to defraud the owner of his property; and (3) whether the owner was actually defrauded in that he parted with his property—both possession and title—in reliance upon the false representations. Applying this test to the facts of the instant case, it appears that each of these elements is present. Appellant did make representations of existing facts which were false. For example, he represented that he was the uncle of a local business woman and was in the community for the purpose of assisting her in the management of her business; he represented that he had a savings account balance of $11,700 in a specified bank and he presented an altered savings passbook showing such a balance, as evidence of the account; and he represented that he was the John M. Doyle whose name appeared on a social security card which he presented by way of identification. These misrepresentations will support an inference of intent to defraud, particularly in view of appellant's later admissions that he found the passbook in a bar in Sacramento, that he intended to take the car to Sacramento and dump it, and that he had no money in the bank at all. Randolph testified that he relied on appellant's representation regarding the savings account and other representations, but even if he had not so testified the jury could have inferred from the circumstances that the representations were the inducing factor. People v. Hong Quin Moon, 92 Cal. 41, 42, 27 P. 1096.

[1] There is no merit in appellant's contention that Randolph was not actually defrauded inasmuch as he repossessed the car later the same evening. For as was said in People v. Bryant, 119 Cal. 595, at page 597, 51 P. 960, at page 961:

> "* * * We cannot concur in this construction of the statute. If a person is induced to part with his property by reason of fraudulent pretenses and misrepresentations, he is thereby defrauded of the property so parted with, even though he may eventually make himself whole in some mode not then contemplated. It is not necessary to show that the property has been absolutely lost to him, in order to sustain the charge. He is defrauded of his property when he is induced to part with it by reason of the false and fraudulent pretenses and representations, and the offense is complete when, by means of such false pretenses, the fraud thereby intended is consummated by obtaining possession of the property sought."

And as this court said in In re Harper, 17 Cal.App.2d 446, at page 447, 62 P.2d at page 390:

> "* * * it appears that petitioner undertook to purchase a car from the complaining witness, gave him in payment thereof the check in question [allegedly fictitious or forged] and was prevented from actually driving the car away because owing to the lateness of the hour it was impossible to get a license from the proper authorities to operate the car. This shows more than mere preparation to commit the act. *Petitioner had done everything that he was called upon to do, as far as the complaining witness was concerned, to consummate the crime.*" (Italics added.)

See, also, People v. Talbott, 65 Cal.App.2d 654, 151 P.2d 317.

[2] There is likewise no merit in appellant's contention that the check was in effect a promissory note and therefore that the only proper proceeding was and is a civil suit. As stated in People v. Bryant, supra, 119 Cal.App. at page 597, 51 P. at page 961:

> "* * * The man who falsely pretends to be the owner of certain specified property, and by reason of such pretense fraudulently obtains the property of another, is guilty of obtaining that property by false pretenses, notwithstanding the defrauded party may recover the value of the property in a civil action against him."

Appellant concludes his brief with the following statement. "We respectfully submit that there being a lack of criminal intent to constitute the crime of Grand Theft, and as this factor prevails in any crime the prosecution could charge, the verdict of the jury should be reversed and the defendant released."

[3–5] The question of felonious intent is one to be determined by the jury from all the circumstances of the case, and unless the determination is without any substantial support in the evidence the finding of the jury is conclusive upon the appellate court. People v. Raines, 66 Cal.App.2d 960, 962, 153 P.2d 424. Further, in resolving the issue as to whether the evidence is sufficient to sustain the conviction, it is the settled rule that an appellate court " 'will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by' " the jury to warrant its implied findings, and before they " 'can be set aside * * * it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below.' " People v. Jones, 36 Cal.2d 373, 375, 224 P.2d 353, 354, quoting from People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

We are satisfied that the verdict of guilty in the instant case is supported by ample evidence.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

124 Cal.App.2d 697

GRIFFIN et al. v. LIMA et al.

Civ. 15834.

District Court of Appeal, First District,
Division 2, California.

April 26, 1954.

Action against employer and others for specific performance of an alleged oral collective bargaining agreement and for an injunction. The Superior Court, Santa Clara County, Byrl R. Salsman, J., issued a minute order overruling defendants' demurrer with leave to answer and granted a temporary injunction and defendants appealed. The District Court of Appeal, Kaufman, J., held, inter alia, that minute order granting a temporary injunction "as prayed for in complaint" was not an appealable order as reference to the prayer of the complaint asking for an injunction would create confusion and uncertainty.

Appeal dismissed.

1. Injunction 🔑148(1)

A preliminary injunction does not become operative until a bond is furnished as required by statute. Code Civ.Proc. § 529.

2. Injunction 🔑219

No one can be held in contempt for violating a temporary injunction requiring affirmative acts on part of defendants unless a bond has been required as provided by statute. Code Civ.Proc. § 529.

3. Injunction 🔑148(1)

Statute requiring that a judge when granting an injunction must require a written undertaking on part of applicant with sufficient sureties, is mandatory. Code Civ. Proc. § 529.

4. Injunction 🔑148(1)

Temporary injunction granted without requiring bond as provided under mandatory statute, was inoperative and of no effect. Code Civ.Proc. § 529.

5. Injunction 🔑157

If the terms of a preliminary injunction are uncertain it cannot be a valid injunction.

6. Injunction 🔑208

An injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing.

7. Labor Relations 🔑975

Where complaint asked that employer and others be restrained from not negotiating and not entering into a contract concerning terms and conditions of employment and where minute order granting injunction appeared to require that employer and others negotiate only but ordered that temporary injunction issue "as prayed for in complaint", preliminary injunction was void because too broad and uncertain.

8. Appeal and Error 🔑100(1)

Minute order granting temporary injunction requiring employer and others to negotiate with union was not an appealable order. Code Civ.Proc. § 529.

◆

James S. Duberg, Los Angeles, for appellants.

Tobriner & Lazarus, Albert Brundage, Robert Le Prohn, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal from a minute order granting a temporary injunction as prayed for in plaintiffs' complaint.

On November 19, 1952, respondent, Kenneth Griffin, individually, and in his representative capacity as Secretary-Treasurer of Teamsters' Automotive Workers' Union, Local No. 576, on behalf of himself and all other members of said local, filed a complaint for specific performance of an alleged collective bargaining agreement and for injunction. At the time the complaint was filed, an order was made for defendants to show cause why an injunction pendente lite should not issue. On January 6, 1953 a hearing was had on defendants' demurrer and the order to show cause, and the case was submitted after argument. On January 8, 1953, the trial judge issued a minute order overruling the demurrer with leave to answer and granting a temporary injunction.

Defendants and appellants herein are owners and/or operators of funeral homes in Santa Clara County. Defendant Employers' Council of Santa Clara County, an unincorporated association, was designated by the defendants herein, other than Jack Hale, as their agent to conduct negotiations with the aforesaid labor organization concerning the terms and conditions of employment of the employees of defendants, which designation remained unrevoked until sometime after May 28, 1951.

It is alleged that prior to May 17, 1951, said labor organization had on many occasions notified defendants that their employees had designated it as their representative for purposes of collective bargaining, and requested defendants to recognize said union as the collective bargaining representative of defendants' employees. It is then alleged that on or about May 17, 1951, defendants orally entered into a collective bargaining agreement with said Union whereby they agreed "that if in fact a majority of their employees had designated it as the collective bargaining representative and if satisfactory proofs of such fact were obtained in the form of an election conducted by the State of California Department of Industrial Relations Conciliation Service, the said defendants would recognize said Union as the exclusive collective bargaining agent for their employees and would negotiate with it concerning the terms and conditions of employment for the said employees and would enter into a contract covering the same." The election was then held, and it is alleged that the thirteen employees involved signified that they wished to be represented by Local 576, A. F. L., by a vote of 9 to 4.

After the election, defendants refused to bargain with the Union or enter into a contract. The complaint then alleges that defendants, unless restrained "will continue as hereinabove alleged and will refuse to perform the said oral agreement of May 17, 1951, to the irreparable damage of petitioners and the employees for whom this action is brought." Petitioners then ask for a (1) temporary injunction "restraining the actions herein complained of"; (2) after hearing, a permanent injunction; (3) after hearing, an order specifically enforcing the contract as set forth.

Appellants contend that the order granting the temporary injunction is void and inoperative because no bond was required from plaintiffs pursuant to Code of Civ. Proc., § 529. That section states that the judge "On granting an injunction * * * must require * * * a written undertaking on the part of the applicant, with sufficient sureties, * * *" and within 5 days after the service of the injunction the person enjoined may except to the sufficiency of the sureties.

[1, 2] It is very clear from the authorities that a preliminary injunction does not become operative until a bond is furnished, and that such a bond is expressly required. San Diego Water Co. v. Pacific Coast Steamship Co., 101 Cal. 216, 35 P. 651; Biasca v. Superior Court, 194 Cal. 366, 228 P. 861. It is also clear that no one can be held in contempt for violating an injunction such as that issued herein, which requires affirmative acts on the part of defendants without requiring the bond made mandatory by § 529, Code of Civ.Proc.

There is some authority to the effect that such an order is void. It is so stated in 14 Cal.Jur. 252, § 58, which apparently relies for that conclusion on Carter v. Mulrein, 82 Cal. 167, 22 P. 1086 and Maier v. Luce, 61 Cal.App. 552, 215 P. 399, 402. In the latter case a writ of probation was granted to stop a prosecution for contempt for violation of a temporary injunction which required no undertaking to be filed. That case reviewed several out of state cases, some of which held such an order to be void, others that it was inoperative. In the next to the last paragraph of the opinion it is stated that "No one may be punished for contempt because of his disobedience of a void order." In the last paragraph the court concluded that the weight of authority led it to conclude that the failure to require a bond rendered the temporary injunction inoperative.

[3] In 28 Am.Jur. 437, § 262, it is said that whether the matter is jurisdictional or not depends upon the terms of the statute. Where the statute is mandatory (as it is

here) the injunction may not be valid and operative until the bond is given. It is said that unless the statute requires the bond to be filed before or at the time of the issuance of the injunction, it may be filed thereafter or even after appeal where the circumstances justify it. The terms of the statute here involved demand that "On granting an injunction, the court or judge must require * * * a written undertaking on the part of the applicant * * *."

[4] In our opinion the temporary injunction here issued is inoperative and of no effect and the order granting the same cannot be sustained on this ground alone.

Appellants also contend the injunction is void because of uncertainty. With this contention we must agree. It is difficult to determine from the minute order just what acts the temporary injunction demands of defendants. That order recites that the Union having won the election, defendants should be required to negotiate, but then orders that the temporary injunction issue "as prayed for in the complaint." The final paragraph of the complaint asks that temporary injunction issue "restraining the actions herein complained of" which appear from the first part of that paragraph to be that defendants will "continue as hereinabove alleged and will refuse to perform the said oral agreement of May 17, 1951." That oral agreement, as alleged, embraced not only an agreement to negotiate but also to enter into a contract concerning the terms and conditions of employment for defendants' employees.

[5-7] If the terms of a preliminary injunction are uncertain it cannot be a valid injunction. In Wheeler v. Superior Court, 82 Cal.App. 202, 255 P. 275, cited with approval in People v. Gordon, 105 Cal.App.2d 711, 234 P.2d 287, it is pointed out that an injunction should contain sufficient information on its face to apprise the party upon whom it is served of what he is restrained from doing. In Wutchumna Water Co. v. Superior Court, 215 Cal. 734, 737, 12 P.2d 1033, it was held that although decrees in equity are almost invariably signed by the judge, if he is satisfied that relief upon application for preliminary injunction may be granted in the language of the prayer or motion, he is not required to sign a decision in writing, and the minute order is sufficient. In People v. Gordon, supra, it was held that the minute order neither by reference or otherwise contained detailed formulation of the acts prohibited. It was therefore not considered a final and appealable disposition of the application for a preliminary injunction. In the present case the minute order attempts by reference to formulate the injunction from the prayer of the complaint. The only reasonable reading of that prayer is that restraint is asked of all the actions of defendants therein complained of—namely, not negotiating and not entering into a contract concerning the terms and conditions of employment—which certainly goes far beyond the requirement that defendants negotiate, as would appear to be the intent of the court from all but the last sentence of the minute order.

If this is a reasonable interpretation of the temporary injunction, then it has in effect ordered specific performance as prayed for by respondents and has given everything that can be given by a permanent injunction, before answer is filed and in advance of the trial on the merits. It was said in Nyman v. Desert Club, 109 Cal.App.2d 63, 240 P.2d 37, that the purpose of a temporary injunction is to preserve the status quo until the merits of the action can be determined. And, see, Spelling, Injunctions and other Extraordinary Remedies (Second Ed.), pp. 31-34, § 21. In Bomberger v. McKelvey, 35 Cal.2d 607, 220 P.2d 729, it is said that unless a preliminary injunction is intended as a final adjudication of the controversy, it does not amount to a decision on the ultimate rights in controversy. In that case, as here, where a demurrer was sustained with leave to amend, it was held that the order denying the injunction was not intended as a final disposition of the rights of the parties.

Appellants also contend that the complaint does not state facts sufficient to constitute a cause of action for specific performance and that the oral contract sought to be enforced is too uncertain. These contentions we need not decide at this time in view of our holding that the temporary injunction is inoperative and of no effect because no undertaking was filed and our further holding that the injunction is too uncertain and broad in its scope and grants relief that is only proper after a trial on the merits.

Whether or not respondents on the final hearing can amend their pleadings or supply proof sufficient to show that they are entitled to relief by way of specific performance or permanent injunction is not decided herein. It is only determined that at this stage of the case, before the answer is filed or the final hearing held, it would be an abuse of discretion to in effect make a final determination of the rights of the parties prior to trial. If the injunction is not to be interpreted as such an adjudication, then it is so uncertain as to be invalid. See People v. Gordon, supra. Furthermore, as noted at the outset, it is also inoperative and of no effect because issued without an undertaking.

Respondents upon oral argument contended for the first time that the minute order appealed from herein is not an appealable order. They did not raise this issue in their brief. However, we must agree that there is merit in this contention. The minute order entered on January 8, 1953, recited that "the Court is of the opinion that the parties to this action did in fact agree to negotiate with each other in the event the Union won the election; and the Union having admittedly won the election, the defendants should now be required to negotiate. A temporary injunction will therefore issue as prayed for in the complaint." The final paragraph of the complaint alleges "That defendants, unless restrained by order of this Court, will continue as hereinabove alleged and will refuse to perform the said oral agreement of May 17, 1951, to the irreparable damage of petitioners and the employees for whom this action is brought * * *.

"Wherefore, petitioners demand judgment as follows:

"(1) That the Court issue an order to show cause why temporary injunction should not be issued restraining the actions herein complained of.

"(2) That after hearing had herein the Court issue a permanent injunction permanently restraining the actions herein complained of.

"(3) That the Court after hearing herein issue its order specifically enforcing the contract heretofore made between the parties hereto, as set forth in the first cause of action hereof."

[8] It is apparent that the relief demanded by paragraphs (1), (2), and (3) are the same. Paragraphs (1) and (2) ask that defendants be ordered to cease from refusing to perform the oral agreement of May 17, 1951, and (3) asks that defendants be ordered to perform the agreement of May 17, 1951. However, it seems obvious from a reading of the minute order that it has only been determined that defendants should be required to negotiate. But if we interpret this minute order as contemplating the incorporation by reference of the prayer of the complaint much greater relief will be given respondents than an injunction ordering them to negotiate. Undoubtedly, the court here had intended to issue a formal order granting a temporary injunction. The question as to whether a minute order granting a preliminary injunction is an appealable order was discussed at length in People v. Gordon, supra, reviewing the California authorities in detail. That case determined that an order for a preliminary injunction can be validly made by minute order if said order by reference "provides all required details of formulation but that otherwise a formal written order is essential." If we attempt to incorporate the prayer of the complaint by reference herein, only confusion and uncertainty are created.

There is an additional reason why we feel certain that a formal order granting a temporary injunction was required. Section 529, Code of Civil Procedure requires that "On granting an injunction, the court or judge must require, * * * a written undertaking on the part of the applicant, with sufficient sureties, * * *." There can be no valid preliminary injunction acquiring affirmative acts without such an undertaking. 14 Cal.Jur. 252, § 58; Carter v. Mulrein, supra; Maier v. Luce, supra; San Diego Water Co. v. Pacific Coast Steamship Co., supra; Biasca v. Superior Court, 194 Cal. 366, 228 P. 861.

In Re Estate of Mills, 111 Cal.App.2d 83, 243 P.2d 889, it was said that "It is settled that under Rule 2(b)(2) [Rules on Appeal] even though there is no direction in the minute order for the preparation of a written order if the minute order omits any essential portion of a valid order, such as findings when necessary, the minute order is not the appealable order. Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 346–347, 182 P.2d 182; People v. Gordon, 105 Cal.App.2d 711, 717, 234 P.2d 287; In re Estate of Dow, 91 Cal.App.2d 420, 423, 205 P.2d 698; Hirschberg v. Oser, 82 Cal. App.2d 282, 286, 186 P.2d 53."

The appeal from the minute order granting a temporary injunction is therefore dismissed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 797

SNOOK v. NETHERBY.

Civ. 15788.

District Court of Appeal, First District, Division 1, California.

April 28, 1954.

Hearing Denied June 23, 1954.

Action by would be purchaser against would be vendor for reformation of contract for sale of realty and for breach of such contract by conveyance of the realty to third persons. The Superior Court, County of Alameda, Gregory P. Maushart, J., entered judgment ordering reformation and awarding damages to purchaser, and vendor appealed. The District Court of Appeal, McMurray, J. pro tem., held that, where actual knowledge in vendor of agreement between agent and purchaser concerning time for performance did not exist as basis for judgment sounding in bad faith, and only damages shown by record were for bad faith breach of contract, purchaser could not recover for such breach.

Judgment reversed.

1. Brokers 🔑94

Where real estate agent, with whom vendor had listed property, conveyed to prospective purchaser vendor's offer to sell, notice of terms to which purchaser agreed with agent was imputable to vendor. Civ.Code, §§ 2332, 3306.

2. Brokers 🔑94
Reformation of Instruments 🔑11

Purchaser was entitled to assume that vendor's agent would inform vendor of terms to which purchaser agreed, and, therefore, reformation of contract for sale of realty to conform with such terms was proper. Civ.Code, § 2332.

3. Vendor and Purchaser 🔑350

In action by would be purchaser against would be vendor for reformation of contract for sale of realty and breach of such contract by conveyance of the realty to third persons, evidence was not sufficient to establish vendor's actual knowledge, upon which to base a judgment sounding in bad faith, of fact that, in accepting vendor's offer, purchaser and agent agreed that purchaser should have thirty days from date of acceptance in which to perform contract.

4. Contracts 🔑312(1)

Breach of contract may be based upon imputed knowledge, but a breach in bad faith cannot be since term "bad faith" necessarily requires actual rather than imputed knowledge.

5. Vendor and Purchaser 🔑343(1)

Where, in action by would be purchaser against would be vendor for reformation of contract for sale of realty and for breach of such contract by conveyance of the realty to third persons, actual knowledge in vendor of agreement between agent and purchaser concerning time for performance did not exist as basis for judgment sounding in bad faith, and only damages shown by record were for bad faith breach of contract, purchaser could not recover for such breach. Civ.Code, § 3306.

Breed, Robinson & Stewart, Richard K. Dutton, Oakland, for appellant.

Chase & Irving, Oakland, for respondent.

McMURRAY, Justice pro tem.

Defendant appeals from a judgment ordering reformation of a contract for sale of real estate and awarding damages to plaintiff for a breach of such contract.

Appellant in 1950 listed certain property for sale with a number of real estate brokers, including the Metropolitan Realty Company which employed a Mr. Bryant as a salesman. On May 20, 1950, Mr. Bryant obtained a deposit receipt signed by respondent which offered to purchase the property for $55,000; recited the receipt of a deposit of $5,000; stated that: "The balance of said purchase price is to be paid within thirty days from date hereof * * *"; bore the date "May 20, 1950"; recited: "That the essence of this Agreement is time" and had the balance of this provision stricken—a provision that the broker might extend period of performance for thirty days and contained the following addition, inserted by Mr. Bryant on his own initiative: "Acceptance of this offer shall be made by 5:00 p. m. May 25, 1950."

Mr. Bryant presented this offer to appellant on about May 24, 1950. She refused to accept it and, on the face of the deposit receipt, she struck the $55,000 figure and wrote on the face thereof the figure of $62,000, changed the amount of broker's commission therein set forth from $2,750 to $3,100, and then signed the deposit receipt. Respondent refused to accept this counter-offer.

Thereafter, on May 27, 1950, Mr. Bryant obtained from appellant an authorization to sell the property for $58,500 which included a $1,500 broker's commission. On May 31, 1950, Mr. Bryant succeeded in getting respondent to agree to this last counter-offer. Instead of preparing a new deposit receipt, Mr. Bryant made the following alteration to the receipt dated May 20, 1950: He scratched out "Sixty Two Thousand" written thereon by appellant and wrote in the amount "Fifty eight Thousand five hundred." He scratched out the proviso that "Acceptance of this offer shall be made by 5:00 p. m. May 25, 1950," and inserted certain requirements relative to the assumption of existing loans on the property, and struck out provisions relative to real estate commission.

The same day Mr. Bryant took this much amended deposit receipt to appellant who initiated the changes. The date on this receipt still read: "May 20, 1950," and the recitation "The balance of said purchase price is to be paid within thirty days from date hereof * * *" still appeared unchanged.

At the time Mr. Bryant received respondent's agreement to this deposit receipt there was conversation to the effect that respondent was leaving on a three-week vacation (R.T. 135:15), but there was no explicit discussion of the time covered by the deposit receipt. There is no evidence that Mr. Bryant informed appellant that the time for performance by respondent was to be computed from May 31, 1950, the date of signing, rather than from May 20, 1950, the date appearing on the deposit receipt, nor that he told appellant that respondent understood the time would run from the later rather than the earlier date.

About June 10, 1950, Mr. Bryant testified that he first noticed that the agreement still bore the date of May 20, 1950, whereupon he phoned appellant seeking an extension to June 30, 1950. According to Mr. Bryant appellant gave an equivocal answer to this request. Thereafter on June 22, 1950, after several attempts by Mr. Bryant to get in touch with appellant, Mr. Bryant had his attorney write appellant a letter which stated relative to the requested extension: "* * * which extension you declined to give * * *" and then stated that the requested extension was unnecessary since the parties on executing the deposit receipt had, by mistake, neglected to change the date thereof from May 20th to May 31st. Appellant answered this on June 26, 1950, and denied that there had been any mistake in not changing the date and that appellant considered the deposit receipt breached by respondent's failure of timely performance. On June 27, 1950, respondent deposited the balance of the purchase price with the designated title company. This was after respondent had been advised by appellant that she considered the deal off.

Sometime after June 19, 1950, appellant listed the same property with several other agents and finally sold the property for a total price of $63,000 to another purchaser on about July 1, 1950. This price included $1,000 which was put in escrow pending certain construction done on the property which cost appellant $1,000, and a real estate commission of $2,000, leaving appellant a net price of $60,000.

The trial court held that Mr. Bryant as appellant's agent made statements to respondent relating to the date on which the 30-day period was to start running which justified information of the deposit receipt so as to provide that such period should run from May 31, 1950; that appellant's sale of the property to others was a breach of this contract, and that respondent was entitled to damages of $4,500 less a three per cent real estate agent's commission thereon, leaving a total judgment of $4,365 together with interest from the date of the breach. The findings state that appellant knew of the mistake relative to the date of the contract and wrongfully and in bad faith put it out of her power to perform the agreement by conveying it to third parties. This judgment adopts the measure of damages set forth in section 3306 of the Civil Code.

Appellant urges that no contract ever came into being as there was no real agreement as to date; that therefore the court erred in granting a reformation and, in substance, that Mr. Bryant, by making the representations to respondent, exceeded his authority and that therefore appellant was not bound by these representations.

Respondent contends that appellant is bound by the acts of her agent, Mr. Bryant, and that she "undoubtedly" understood that respondent had thirty days from May 31, 1950 to complete performance. Respondent also states that appellant at the time of acceptance of the final offer could have "clearly" provided that the thirty-day period should run from May 20, 1950.

The language of the deposit receipt seems as clear as possible. Respondent also urges that since appellant had not performed her obligations under the agreement she was in default under the provisions of section 1439 of the Civil Code. That section is inapposite here since it merely states that before one can enforce a contract he must perform his own obligations thereunder. This is not so in the instant case as appellant is not seeking to enforce any contract. Respondent also asserts that appellant did not complete this transaction because of a more lucrative sale. This assertion is without any support in the record. Respondent further urges that all uncertainties in the contract are to be resolved against appellant since her agent prepared the contract.

In a memorandum opinion filed by the trial judge it is stated that at the time respondent signed the deposit receipt the agent of appellant assured respondent that he would have thirty days after May 31, 1950 to complete the transaction, and that appellant was bound thereby.

[1,2] The court's statement is based upon the theory of imputed notice and is certainly a valid ground to reform the contract here. Restatement of Agency, § 272 states: "* * * the liability of a principal is affected by the knowledge of an agent concerning a matter * * * upon which it is his duty to give the principal information." Here the agent, Bryant, knew of respondent's understanding regarding the time of performance and failed to inform appellant, his principal, thereof at the time appellant approved and initiated the final written agreement. The fact that the agent did know of such facts at that time is a distinguishing feature which removes it from the rule of Clements v. Rankin, 83 Cal.App. 2d 779, 189 P.2d 725, cited by appellant, be-

cause at the time of appellant's acceptance here notice of the terms to which respondent agreed were imputable to her, whereas in the cited case the agent made his misrepresentations after the final offer. Respondent was entitled to assume that the agent would inform his principal of these terms, and under the rule set forth in the Civil Code, section 2332, the court properly ordered reformation.

The judgment and the damages awarded here are based upon the provisions of section 3306 of the Civil Code which provides: "The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; *but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land.*" (Italics added.) The record before this court is devoid of any indication of bad faith on the part of appellant.

Respondent states that appellant breached the contract because of a more lucrative offer. The only evidence as to this is to the effect that it was received "a few days" after June 19, 1950, and that escrow instructions relative to this offer were dated June 28, 1950. Appellant, by her letter of June 26, 1950, had expressed her intention to treat the contract herein as breached, and did not consummate the sale until July 1, 1950. None of this is evidence that appellant was motivated to breach this contract by a more lucrative offer.

Respondent states that the fact that appellant visited the escrow holder to see if money had been deposited shows her bad faith. It would more readily show that she wanted the money, a wish that shows in much of the record. Appellant consistently resisted extensions of time whenever approached.

[3] There is no showing of any sort that appellant was ever informed of the fact that respondent understood that any date other than May 20, 1950, was to be used as the commencement of the thirty-day period for performance, until the agent caused the letter of June 22, 1950, to be sent her. There is no showing of actual knowledge in appellant upon which to base a judgment sounding in bad faith.

[4] While breach of contract may be based upon imputed knowledge, it would be a contradiction in terms to base breach in bad faith upon imputed knowledge.

The term "bad faith" necessarily requires actual rather than imputed knowledge.

Section 275, Restatement of Agency, states: "* * * *except where knowledge as distinguished from reason to know is important,* the principal is affected by the knowledge which an agent has a duty to disclose to the principal * * * to the same extent as if the principal had the information." (Italics added.) And in the Comment (p. 613): "In many situations, in order for one to be responsible, it is necessary that the act should be done with knowledge in a subjective sense and it is not sufficient that one has means of information." This language appears to be controlling here. Certainly bad faith requires subjective knowledge. None is here shown.

[5] There was no damage other than damage for a bad faith breach shown anywhere in this record. The judgment, therefore, is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

124 Cal.App.2d 778

DYER et al. v. INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, LOCAL 542, et al.

Civ. 4848.

District Court of Appeal, Fourth District, California.

April 27, 1954.

Action to recover damages for and enjoin picketing of plaintiffs' place of business by defendant labor union and others for the purpose of compelling plaintiffs to enter into a union shop contract with such union. From an order of the Superior Court of San Diego County, L. N. Turrentine, J., for issuance of an amended preliminary injunction against picketing of plaintiff's place of business, inducement of plaintiff's prospective customers to refuse to permit plaintiffs to pack household furniture for shipment out of the state, or doing of any other act to injure plaintiff's business, defendants appealed. The District Court of Appeal, Mussell, J., held that the trial court was without jurisdiction to issue the preliminary injunction, as its object was to accomplish something within the National Labor Relations Board's exclusive jurisdiction under the National Labor Relations Act.

Order reversed with direction.

1. States ⚷4.1

Federal power constitutionally exerted for protection of public or private interests or both becomes supreme law of land and cannot be curtailed, circumvented or extended by state procedure merely because it will apply some doctrine of private right, as private right is superseded to extent that it conflicts with public right, and to extent that public interest requires official enforcement, private initiative is ordinarily excluded, unless Congress, in enacting legislation, saves alternative or supplemental state remedies by express terms or clear implication.

2. Labor Relations ⚷922

Under National Labor Relations Act, state court has no jurisdiction, at suit of private person, to enjoin labor union activities affecting interstate commerce when covered by such act. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 141 et seq.

3. Labor Relations ⚷510

Under National Labor Relations Act, only National Labor Relations Board can determine whether employer has engaged in unfair labor practice affecting interstate commerce and take proceedings to enforce its order. National Labor Relations Act, § 1 et seq. as amended, 29 U.S.C.A. § 141 et seq.

4. Labor Relations ⚷510

The National Labor Relations Act vests exclusive jurisdiction in National Labor Relations Board over unfair labor practices affecting interstate commerce and vests in courts generally jurisdiction only of actions for damages arising from such practices, and act deprives state superior courts of original equitable jurisdiction in such cases. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 141 et seq.

5. Labor Relations ⚷969

The state superior court was without jurisdiction to issue preliminary injunction against picketing of trucking company's places of business by labor union and others for purpose of compelling company to enter into union shop contract with union, as object of such injunction was to accomplish something within National Labor Relations Board's exclusive jurisdiction under federal statute. National Labor Relations Act, §§ 1 et seq., 8(a) (3), (b) (4) (B), as amended, 29 U.S.C.A. §§ 141 et seq., 158(a) (3), (b) (4) (B).

6. Labor Relations ⚷298

Peaceful picketing is a lawful form of concerted action by members of labor union.

7. Labor Relations ⚷326

The securing of closed union shop contract with employer is proper object of concerted action by employees.

8. Labor Relations ⚷836

Injunctive relief against picketing of employers' premises by labor union is available, where objects of such picketing or means used to achieve it are unlawful.

9. Labor Relations ⚷510

A state court is without power to grant injunctive relief against alleged unfair labor practices, where exclusive power to decide whether such practices have been engaged in and to determine action that should be taken to remove or avoid consequences thereof is committed to National Labor Relations Board by federal statute. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 141 et seq.

10. Labor Relations ⚷969

A state court, which is without authority to issue binding permanent injunction to accomplish object within National Labor Relations Board's exclusive jurisdiction under federal statute, has no jurisdiction to issue temporary writ to maintain status quo until Board has had time to act. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 141 et seq.

11. Labor Relations ⚷510, 536, 963

In suit to enjoin picketing of employers' premises by labor union and others for purpose of compelling employer to enter into union shop contract with union, courts need not and should not surmise how National Labor Relations Board might have decided parties' controversy, as power of primary decision lies with such Board, which has power to issue its own complaint and seek from federal District Court, pending final hearing, an injunction to prevent irreparable injury while case is being considered. National Labor Relations Act, § 1 et seq., as amended, 29 U.S.C.A. § 141 et seq.

◆

Walter Wencke, San Diego, for appellants.

Gray, Cary, Ames & Frye, San Diego, for respondents.

MUSSELL, Justice.

Plaintiffs are engaged in the business of packing, warehousing and transporting household furniture and other goods in San Diego county. They employ six drivers and packers and their business affects interstate commerce. It is alleged in the complaint, which is for damages and injunctive relief, that on or about June 23, 1953, the defendants presented to plaintiffs a certain purported agreement with defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 542, and demanded that they sign the same; that the said contract contained the following provisions:

> "Section 2: The Company and the Union agree that all employees covered by this Agreement shall become and remain members of the Union in Good standing as a condition of employment.
>
> "Section 2–a: Whenever Employer requires additional employees for work covered by this Agreement, Employer shall first call upon the Union. If the Union is unable to supply Union members acceptable to Employer, he may hire non-union men with the provision that all non-union men must make application for membership in the Union within ten (10) days from the date of his employment, and must complete his application within thirty one (31) days from date of employment, and if found by the Union to be a qualified person, the Union agrees to accept such employee as a member of the Union.
>
> "Section 2–b: Upon notice by the Union that any employee is not in good standing, the Employer shall have a maximum of five (5) days to replace such employee. Such replacements shall be employed in accordance with the provision of this Agreement applying to New Employees."

That said defendant had not been certified by the National Labor Relations Board as a representative of any employee of plaintiffs; that said defendant had not been designated and is not the collective bargaining agent for the employees of plaintiffs; that plaintiffs cannot execute said contract or any other contract containing a clause requiring a union shop unless and until plaintiffs' employees select and designate said defendant labor organization as their collective bargaining agent because it would interfere with the collective bargaining rights secured to the employees by the National Labor Relations Act, 29 U.S.C.A. §

151 et seq.; that defendant nevertheless has placed and now maintains pickets around plaintiffs' place of business; that by the placing of the picket line about said place of business, defendant intended to compel plaintiffs to enter into said agreement and did not intend to induce plaintiffs' employees to join defendant's labor organization; that by the use of said pickets, and by other means, including threats to engage in a secondary boycott in violation of the National Labor Relations Act, and in order to compel plaintiffs to execute said agreement, defendant has induced a number of persons to cease doing business with plaintiffs and defendant refuses to permit plaintiffs to pack and ship household furniture out of the State of California; and that it has induced persons and firms to refuse to make deliveries to plaintiffs to their damage in the sum of $2,000.

Defendant, in its answer, admitted presenting the contract set forth in the complaint to plaintiffs and alleged that it was so presented at the request of plaintiffs; denied that defendant demanded that plaintiffs sign said contract; admitted that defendant was not certified by the National Labor Relations Board as the bargaining representative of the employees of plaintiffs; alleged that defendant has forwarded to the National Labor Relations Board an "unfair labor practice charge" against the plaintiffs; that the "union-shop" clause is not one on which defendant summarily insists and alleged that defendant was then and now is willing to delete said clause from any contract which may be negotiated between the parties; that a solitary picket was placed before the business of plaintiffs; that certain literature was distributed during the course of the picketing, which said literature set forth the advantages of membership in defendant union and invited plaintiffs' employees to join it; that the purpose of said picketing and distribution of literature was to induce the employees of plaintiffs to join said defendant union.

Plaintiffs filed affidavits to the effect that prior to the picketing they informed defendant that they would not sign a contract covering their employees unless a majority wanted the union to represent them; that plaintiffs arranged a meeting between the men and the union; that a considerable portion of plaintiffs' business consists of packing and shipping household goods of Navy personnel; that after the commencement of the picketing, plaintiffs were informed by a Navy representative that the Navy could no longer issue requisitions on interstate shipments to be packed by plaintiffs because the defendant union would picket vans of interstate carriers; that the Navy canceled requisitions upon said ground; that drivers approaching plaintiffs' place of business were spoken to by pickets or union representatives and thereupon diverted loads consigned to plaintiffs to other warehouses; that the picketing was for the purpose of injuring plaintiffs' business and generally consisted of one or more men, including officers of the defendant union, carrying signs and one or more men sitting in an automobile.

It is stated in the affidavit of the business representative of defendant union that two of the employees of plaintiffs were members of the teamsters' union on "withdrawal cards"; that affiant is informed and believes that said employees desisted from applying for active membership in the teamsters' union because of pressure by plaintiffs; that affiant presented the contract alleged in plaintiffs' complaint to plaintiffs and informed them that the two said "withdrawal card" members had expressed the desire that they be represented by the teamsters union in their dealings with plaintiffs' company; that affiant is informed and believes that one Jack Eastman, another "withdrawal card" member of the union, was prevented by employer pressure asserted by plaintiffs from reapplying for active membership in the teamsters union; that plaintiff Clyde O. Dyer, Jr., informed affiant that he would sign the union contract "If his people wanted it"; that affiant was informed by said Dyer that two of his people desired representation but that four did not; that affiant informed Dyer that he could not stipulate to a consent election at the time because of unfair labor practices of the employer; that affiant informed plaintiffs that he would cause a solitary picket to be placed in front of each of the premises of the Dyer Van and Storage Company to distribute literature to the employees and that from July 7, 1953, through July 23, 1953, the teamsters union did in fact maintain a solitary picket in front of each of the said premises, which picket distributed certain literature attached to said affidavit.

Plaintiffs' application for a preliminary injunction was heard on the pleadings and on these affidavits. The trial court then issued the order and amended preliminary injunction from which defendant appeals. The order in so far as material here is:

> "* * * whereas it appears to the court that the defendants have picketed the plaintiffs' place of business in order to compel the plaintiffs to execute the contract heretofore demanded by defendant which contains a union shop provision although the defendants, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 542, have not been properly designated as collective bargaining representatives of plaintiffs' employees or an appropriate unit thereof, and requires them to hire new employees through the union;
>
> "Now, Therefore, It Is Ordered that the defendants, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local 542, be, and you, and each of you, said defendants and your officers, agents, employees, members, and all others acting on your behalf, are hereby restrained and enjoined pending the determination of this action, from engaging in or conducting any picketing of plaintiffs' place of business, inducing prospective customers of the plaintiffs to refuse to permit the plaintiffs to pack household furniture to be shipped out of the State of California on other truck lines or doing any other act to injure or intended to or tending to injure the plaintiffs' business."

Appellant contends that the trial court had no jurisdiction to issue said order and preliminary injunction. We are in accord with this contention.

Plaintiffs allege in their complaint that they could not sign the union-shop contract until the defendant union was the certified collective bargaining agent of their employees; that signing such a contract would be an interference with the collective bargaining rights secured to such employees by the National Labor Relations Act. Section 158, 29 U.S.C.A., provides, among other things, that it is an unfair labor practice for an employer to encourage membership in a labor organization by discriminating in hire terms on conditions of employment, Section 158(a) (3), and for a labor organization to force or require an employer to recognize or bargain with a labor organization as a representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of the title. Section 158(b) (4) (B).

In Standard Grocer Co. v. Local No. 406 of American Federation of Labor, 321 Mich. 276, 32 N.W.2d 519, 529, 530, it was held that where picketing was carried on for an unlawful purpose, namely to coerce plaintiff into signing a contract with defendant union and to force plaintiff to coerce its employees into joining defendants' union, an injunction was proper, even though such picketing was peaceful; that the picketing was partially unlawful because an employer subject to the act may not encourage or discourage membership in any labor organization, and may contract only with the representative of the majority. It was further held therein that " 'The determination of the purpose or object sought to be accomplished by picketing is one of fact.' "

[1] In the recent case of Garner v. Teamsters, Chauffeurs and Helpers, etc., 346 U.S. 485, 74 S.Ct. 161, 163, petitioners were engaged in the trucking business and had twenty-four employees four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike, was in progress, and at no time had petitioners objected to their employees joining the union. Respondents,

however, placed rotating pickets, two at a time, at petitioner's loading platform. None were employees of petitioner. They carried signs reading "'Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions.'" Picketing was orderly and peaceful but drivers of other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as ninety-five per cent. The courts below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union and concluded, after reviewing the National Labor Management Relations Act, 29 U.S.C.A., § 141 et seq. that such provisions for a comprehensive remedy precluded any state action by way of a different or additional remedy for the correction of the identical grievance. The Supreme Court said:

> "Congress has taken in hand this particular type of controversy where it affects interstate commerce. In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief. * * *
>
> "We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes the supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.
>
> "On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

[2, 3] In Gerry of California v. Superior Court, 32 Cal.2d 119, 194 P.2d 689, 692, it was held that under the National Labor Relations Act as amended in 1947, the State court has no jurisdiction, at the suit of a private person to enjoin union activities affecting interstate commerce when covered by the federal act. It was there said, quoting from Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 264, 60 S.Ct. 561, 84 L.Ed. 738:

> "'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to

> remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized."

It was further said:

> "The provisions of the 1947 Act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. * * * The employer as well as the union is now required by the 1947 Act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause of action for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 Act. There is nothing in the act as so amended which indicates that these unions may not thus be subject to the appropriate procedure thereby provided."

[4] In In re DeSilva, 33 Cal.2d 76, 199 P.2d 6, 8, an employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Act, 1947, since there had been no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board under the terms of the federal act. In commenting on the Gerry case, supra, the court said:

> "This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of action for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

[5] In the instant case the finding of the trial court was that defendant picketed plaintiffs' place of business in order to compel them to execute the contract containing union-shop provisions when the union had not been properly designated as the collective bargaining representative of plaintiffs' employees and the injunction was based on that factual situation, which is similar to that presented in Garner v. Teamsters, etc., supra. It clearly appears that the trial court was without jurisdiction to issue the preliminary injunction as its object is to accomplish that which is within the exclusive jurisdiction of the National Labor Relations Board under the terms of the federal act.

[6, 7] The picketing carried on by defendant in the instant action was admittedly peaceful and as was said in Shafer v. Registered Pharmacists Union, 16 Cal.2d 379, 382, 106 P.2d 403, 405:

> "It is established in this state that peaceful picketing is a lawful form of concerted action by the members of a labor union (Lisse v. Local Union [No. 31], 2 Cal.2d 312, 41 P.2d 314; In re Lyons, 27 Cal.App.2d 293, 81 P.2d 190), and it was long ago held by this court that the securing of a closed shop contract with an employer is as proper an object of concerted action by employees, as is the attainment of higher wages, shorter hours of labor or better working conditions. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann. Cas. 1165."

[8, 9] We are not here confronted with a situation in which the state is attempting to exercise its police power, in which case the exercise of that power by the state could stand consistently with the operation of the federal act, a situation which was commented upon by the court in Gerry of

California v. Superior Court, supra, 32 Cal.2d at page 125, 194 P.2d at page 693. It is settled law that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful, Northwestern Pac. R. R. Co. v. Lumber & Sawmill Workers Union, etc., 31 Cal.2d 441, 445, 189 P.2d 277, but where, as here, the exclusive power to decide whether unfair labor practices had been engaged in and to determine the action that should be taken to remove or avoid the consequences thereof is committed to the National Labor Relations Board, the trial court is without power to grant injunctive relief. Gerry of California v. Superior Courts, supra, 32 Cal.2d at page 124, 194 P.2d at pages 692, 693.

[10, 11] It is argued by respondents that even if the state court might not have authority to issue a binding permanent injunction, it has jurisdiction to issue a temporary writ which will fulfill the function of maintaining the status quo until the National Labor Relations Board has had time to act. We find no merit in this argument. As was held in Garner v. Teamsters, etc., supra, it is not necessary or appropriate for the courts to surmise how the National Labor Relations Board might have decided the controversy; that the power of primary decision lies with the board and that it is vested with power to issue its own complaint and pending final hearing, to seek from the United States District Courts an injunction to prevent irreparable injury while the case is being considered. No California statute affording temporary state injunctive relief under the circumstances here presented has been called to our attention, and the procedure set forth in the Labor Relations Act provides for injunctive relief only in the United States District Courts.

The order for the issuance of the amended preliminary injunction is reversed and the trial court is directed to dissolve the injunction.

BARNARD, P. J., and GRIFFIN, J., concur.

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124 Cal.App.2d 704

SAMPSON v. SAPOZNIK et al.

Civ. 19596.

District Court of Appeal, Second District, Division 1, California.

April 26, 1954.

Rehearing Denied May 18, 1954.

Hearing Denied June 23, 1954.

Action by buyer against sellers, brought on theory that sale of shares of stock in corporation was in violation of Corporate Securities Act, in that no authorization had been granted for issuance or sale of such stock, and no application for such permission had been filed. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Doran, J., held, inter alia, that evidence sustained finding that the sale and memorandum of agreement executed in connection therewith were illegal and void.

Judgment affirmed.

See also 117 Cal.App.2d 607, 256 P.2d 346; 269 P.2d 209.

1. Appeal and Error 🔑931(1), 989

On appeal from judgment on trial court's findings of fact, every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of prevailing party, and prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded.

2. Licenses 🔑39.24

In action by buyer against sellers, brought on theory that sale of shares of stock in corporation was in violation of Corporate Securities Act, in that no authorization had been granted for issuance or sale of such stock, and no application for such permission had been filed, evidence sustained finding that the sale and memorandum of agreement executed in connection therewith were illegal and void. Corporations Code, §§ 25000 et seq., 25009.

3. Licenses 🔑18½(11)

Agreements and documents which evidenced intention to buy and sell corporate stocks were not "securities", within Corporate Securities Act provisions relative to permits to issue and sell such stock, but the shares of stock, admittedly the subject matter of the transaction, were "securities", within meaning of such provisions. Corporations Code, §§ 25000 et seq., 25009.

See publication Words and Phrases, for other judicial constructions and definitions of "Securities".

4. Licenses ⚷39.6

In action by buyer against sellers, brought on theory that sale of shares of stock in corporation was in violation of Corporate Securities Act, in that no authorization had been granted for issuance or sale of such stock, and no application for such permission had been filed, fact that the stock was to be issued and delivered at a future date was no defense. Corporations Code, §§ 25000 et seq., 25009.

5. Licenses ⚷39.24

In action by buyer against sellers, brought on theory that sale of shares of stock in corporation was in violation of Corporate Securities Act, in that no authorization had been granted for issuance or sale of such stock, and that no application for such permission had been filed, evidence sustained finding that the transaction was not within the statutory exemption in favor of sale of securities when made by or on behalf of a seller not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account. Corporations Code, §§ 25000 et seq., 25009, 25152.

6. Licenses ⚷39.17

Buyer of corporate securities, for the issuance and sale of which no permit had been issued, was not in pari delicto with sellers thereof, in view of evidence that seller's attorney had informed buyer's attorney that application for permit had been filed and that a deputy corporation commissioner had said that everything was in order. Corporations Code, §§ 25000 et seq., 25009.

7. Licenses ⚷39.17

The purchaser of a security is not in pari delicto with the issuer even though he may have knowledge of the fact that no permit for issuance and sale of such security has been issued. Corporations Code, §§ 25000 et seq., 25009.

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Pacht, Tannenbaum & Ross, Isaac Pacht, Clore Warne, Los Angeles, Maxwell E. Greenberg, Beverly Hills, for appellants.

Dryer, Burris & Lagerlof, Joseph J. Burris, H. Melvin Swift, Jr., Los Angeles, for respondent.

DORAN, Justice.

The present appeal is from a judgment awarding plaintiff $19,500, with interest, against the defendants Sapoznik, Ticktin, and Landfield, from which judgment the first two named defendants are appealing. The amended complaint contains five causes of action including rescission for fraud and for breach of contract, damages for money advanced under a void contract, declaratory relief, and for money had and received.

From the findings and conclusions, it appears that the judgment was based on plaintiff's Third Cause of Action, namely "That the sale to plaintiff of the 1,000 shares of common stock of the Scarfanet Co., a California corporation, was in violation of the * * * Corporate Securities Act", in that no authorization had been granted for the issuance or sale of such stock, and that no application for such permission had been filed. The trial court concluded that "the sale and Memorandum of Agreement executed in connection therewith are illegal and void".

The record discloses that on October 6, 1950, a written memorandum of agreement, dated September 30, 1950, was signed by plaintiff Sampson and defendant Theodore J. Ticktin, who was president of the Scarfanet Company, reciting that Ticktin "is entitled to receive 1,000 shares of the common stock of the Scarfanet Co., * * * pursuant to an application of the said corporation for a permit to issue such stock to the second party, which permit has been filed or is about to be filed". Sampson therein agrees to pay "the sum of $10,000.00 in payment and as the consideration for 1,000 shares of common stock of the Scarfanet Co., * * *; said stock being all of the outstanding and issued stock of the said corporation". Sampson likewise agrees to pay $500, "for an assignment of the indebtedness in the amount of $1,958.27 of the corporation to the second party (Ticktin) for monies advanced by the second party to the corporation".

In addition to the above agreement, Sampson was given an assignment of license "to manufacture a certain combination scarf and hairnet under the name of Scarfanet", signed by Theodore Ticktin, Joseph Landfield and Benjamin Sapoznik. Also dated the same day, September 30, 1950, is a memorandum of agreement "to indemnify and hold harmless the Scarfanet Co." in reference to certain contract liabilities, which recites that Sampson "has this day purchased all of the right, title and interest in and to 1,000 shares of the common stock of the Scarfanet Co. * * * being all of the issued and outstanding stock of said company to be issued pursuant to the Application for Permit to issue stock dated September 30, 1950".

A letter of the same date, was signed by Ticktin, Landfield and Sapoznik, in which "The undersigned hereby agree that in the event that the Commissioner of Corporations * * * refuses to grant his permit for the contemplated issuance of 1,000 shares of common stock * * * the undersigned officers, directors and creditors of Scarfanet Co. * * * will cause said corporation to sell and transfer all of its property and assets to Benedict H. Sampson for the sum of $19,500.00", etc. Ticktin, Landfield and Sapoznik on the same day executed a power of attorney, authorizing Sampson "To execute an assignment to himself or his nominee of any certificate representing shares of stock issued to me by the Scarfanet Co. * * * pursuant to an Application for Permit to Issue Stock dated September 30, 1950, filed or to be filed".

It is contended by the appellants that the material findings of fact "are misleading and unsupported by the Record on Appeal", and that such findings are ambiguous, inconsistent, uncertain and indefinite. Appellants' basic argument is that the transaction in question between Sampson as purchaser, and Sapoznik, Ticktin and Landfield (the only officers and directors of Scarfanet Co.), was not within the purview of the Corporate Securities Act.

This argument is predicated on the assumption that "The essence of the transaction" was that "Defendants were selling a going business to plaintiff for an agreed price. The business had been incorporated, but no stock had been issued * * *. The corporation was therefore only a shell * * *". The facts, says appellants' brief, "were tortured and twisted into a corporate sale of stock, and plaintiff recovered damages, sounding in tort, for the sale to him of 'void stock' ". According to appellants, "Sampson did *not* buy $1,000 shares of common stock of the Scarfanet Co., as found in Finding IV. He knew, at all times during the negotiations, that no such stock was in existence. The form of the transaction contemplated * * * was a future transfer of stock to-be-issued".

[1, 2] A review of the findings and conclusions of the trial court, and of the evidence disclosed by the record, fails to show any material ambiguities, uncertainties or inconsistencies which would in any manner tend to invalidate the judgment rendered. Appellants' brief singles out certain items of evidence by reason of which the trial court is alleged to have arrived at a wrong conclusion. But this position ignores the well-established rule that "Every favorable inference and presumption which may fairly be deduced from the evidence should be resolved in favor of the prevailing party. The prevailing party's evidence must ordinarily be accepted as true, and evidence which is contradictory must be disregarded". Scott v. Nevis, 120 Cal.App.2d 619, 621, 261 P.2d 797, 798. The present record undoubtedly discloses substantial evidence in support of the findings and judgment.

As stated in the respondent's brief, "The contract documents themselves are the clearest evidence that the transaction between plaintiff and defendants involved a sale of corporate securities". The terminology used in the initial agreement between Sampson and Ticktin is that Sampson agreed to pay "the sum of $10,000.00 in payment and as consideration for 1,000 shares of common stock of the Scarfanet

Co.". Indeed, the word "stock" is used repeatedly in all of the documents connected with the transaction. The sellers were all of the officers and directors of the corporation, and as found by the trial court, "each and every defendant, in all the transactions with plaintiff, was acting in behalf of Scarfanet Co., * * * and on behalf of all other defendants". The facts were not "tortured and twisted into a corporate sale of stock", as claimed by appellants.

[3, 4] Section 25009 of the Corporations Code defines the term "Sale", as including "every disposition, or attempt to dispose, of a security or interest in a security for value". More specifically, it includes "An offer to sell; an attempt to sell; a solicitation of a sale; an option of sale; a contract of sale". Of course, the agreements and documents signed by the parties were not "securities"; such writings merely evidence the intention to buy and sell the stock of Scarfanet Co. That the 1,000 shares of common stock, admittedly the subject matter of the transaction, was a "security" within the meaning of the Corporate Securities Act, cannot be doubted. And, as said in People v. Oliver, 102 Cal. App. 29, 282 P. 813, 817, "Because the stock in a corporation was to be issued and delivered at a future date is no defense to this action".

[5] Appellants' claim that the present transaction did not involve the corporation itself, said to be a mere "shell"; that it was a personal transaction by individuals disposing of a "going business"; that if "securities" were involved, it was within the exemption covered by Section 25152 of the Corporations Code which states that "the Corporate Securities Law does not apply to the sale of securities when (a) made by or on behalf of a vendor not the issuer or underwriter thereof who, being a bona fide owner of the securities, disposes of his own property for his own account," is not persuasive.

The trial court's finding that such was not the case is amply supported by the evidence which, among other things, discloses that the appellants were all of the officers and directors of Scarfanet Co., and that Sampson paid all of the money for the purchase of the 1,000 shares mentioned in the documents, into the treasury of the corporation. Indeed, appellants' brief refers to the fact the funds were "funneled through the corporate bank account", and thereafter reached the hands of the appellants by way of corporation checks.

In this respect the case is not unlike that of Randall v. Beber, 107 Cal.App.2d 692, 699, 237 P.2d 994, 998 where the reviewing court says: "These facts demonstrate that a sale of 200 shares of the capital stock of the corporation was made to the plaintiffs when they subscribed for them and paid the purchase price to the corporation * * * prior to the issuance of a state permit therefor. * * * The acts of the president and vice-president, each a director, of the corporation, in planning the sales and in furthering this sale, and the receipt of the purchase price for and its deposit in bank in the name of the corporation, would support a finding that the corporation made this sale. * * * The statute imposes penalties upon a corporation making such a sale, and upon each person who knowingly authorizes, directs, or aids in the sale. * * * From the imposition of these penalties in such a statute, a legislative intent to void the proscribed 'sale' is inferred".

[6, 7] It is further contended that if the transaction was illegal, then Sampson was *in pari delicto* with the appellants by reason of Sampson's knowledge that no permit had been issued, and consequently is entitled to no relief. However, as pointed out in respondent's brief, it has been held in Austin v. Hallmark Oil Co., 21 Cal. 2d 718, 134 P.2d 777, 783, and elsewhere, that "the purchaser of a security is not *in pari delicto* with the issuer even though he may have knowledge of the fact that no permit has been issued". And, in the instant case, there is evidence that the appellants' attorney had informed Sampson's then attorney on October 6, 1950, that application for a permit had been filed and that a deputy Corporation Commissioner had said that everything was in order. There is no merit in this contention.

Neither in the cases cited in appellants' brief, nor in the evidence disclosed by the record, is any valid reason for reversal presented. The basic nature of the transaction seems to have been correctly interpreted by the trial court as one within the purview of the statute. The damages awarded were not excessive.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

124 Cal.App.2d 709

SAMPSON v. SAPOZNIK et al.

Civ. 19772.

District Court of Appeal, Second District, Division 1, California.

April 26, 1954.

Hearing Denied June 23, 1954.

Action by buyer against sellers, involving sale of corporate stock. The Superior Court, Los Angeles County, Alfred L. Bartlett, J., entered order correcting, nunc pro tunc, a judgment previously ordered in favor of plaintiff, and defendants appealed from such order. The District Court of Appeal, Doran, J., held that where court inadvertently signed first draft of proposed judgment, which court had considered unsatisfactory, instead of second draft, and record indicated that court never had in mind signing any judgment but the second draft, the order appealed from merely corrected a clerical or inadvertent error, and its entry was not an abuse of discretion.

Order affirmed.

1. Appeal and Error 🔑931(1)

All presumptions and intendments are in favor of supporting the judgment or order appealed from.

2. Judgment 🔑306

Where court inadvertently signed first draft of proposed judgment, which court considered unsatisfactory, instead of second draft, and court acted upon motion for new trial before judgment was corrected, court's action upon such motion did not amount to a judicial approval of the judgment signed, and did not deprive court of power to correct the clerical or inadvertent mistake in signing wrong draft of proposed judgment.

3. Judgment 🔑294

In reference to remedial procedure for correction of judgments or orders, a liberal interpretation is to be adopted.

4. Judgment 🔑326

Where court inadvertently signed first draft of proposed judgment, which court had considered unsatisfactory, instead of second draft, and record indicated that court never had in mind signing any judgment but second draft, court, by granting motion to correct judgment nunc pro tunc, merely corrected a clerical or inadvertent error, and in so doing did not abuse discretion.

Pacht, Tannenbaum & Ross, Isaac Pacht, Clofe Warne, Los Angeles, Maxwell E. Greenberg, Beverly Hills, for appellants.

Dryer, Burris & Lagerlof, Joseph J. Burris, H. Melvin Swift, Jr., Los Angeles, for respondents.

DORAN, Justice.

The present appeal involves only the power of the trial court to correct *nunc pro tunc* a judgment previously ordered in favor of the respondent. There is also an appeal from the judgment rendered, 269 P.2d 205, this day affirmed in a separate opinion.

Upon conclusion of the trial and the entering of a minute order in respondent's favor, respondent's attorneys were ordered to prepare findings which, with a proposed judgment, were transmitted to the clerk of the trial court on April 10, 1952. The proposed findings included matter relating to causes of action other than the Third Cause of Action upon which the judgment was rendered, and consequently were not satisfactory. The proposed judgment, in addition to ordering a money judgment in favor of plaintiff, "Further ordered, adjudged and decreed that said defendants are entitled to the assets of Scarfanet Co. * * * which remain in the possession of the plaintiff, consisting of office equipment and the balance of merchandise inventory". The corporation was not a party to the litigation.

The trial judge then instructed counsel to prepare other findings and judgment, to which appellants filed objections, and the matter was thereafter discussed in chambers. A third set of findings was then presented which was duly signed by the trial court. No third draft of the judgment had been made, and in place of signing the second proposed judgment, the trial judge signed the first draft of judgment. The first and second proposed judgments were alike except that the second draft omitted the paragraph quoted above relating to assets of the Scarfanet Co. According to an affidavit of respondent's attorney, this second judgment draft was orally approved by the trial judge at the conference in chambers.

After entry of judgment, motions for new trial were made by the appellants, which motions were denied on August 25, 1952. Thereafter, and on November 12, 1952, the respondent filed a notice of motion to correct the judgment *nunc pro tunc* by striking the paragraph referred to above. The motion to correct the judgment was based upon the following grounds:

> "1. Mistake of plaintiff and his legal representatives.
>
> "2. Inadvertence of plaintiff and his legal representatives.
>
> "3. Excusable neglect of plaintiff and his legal representatives.
>
> "4. Correction of a clerical mistake.
>
> "5. The above referred to portion of the judgment is void.
>
> "6. Inadvertence of the court.
>
> "7. Mistake of the court.
>
> "8. Inherent power of the court to correct the judgment to make it conform to the judicial decision actually made."

This motion was argued by respective counsel before Judge Bartlett who had signed the judgment, "and by the Court granted on all the grounds stated in the motion". The present appeal is from this order.

It is appellants' contention that "The inclusion of the second paragraph (later stricken) in the judgment was judicial error, because the trial court exercised its judicial discretion, approving the judgment with the stricken paragraph in it, after the alleged inadvertence or clerical error". In this connection appellants state that "A trial court cannot modify or annul an earlier decree simply because upon a re-examination of the same matters at the time of making a second order, it has reached a different conclusion".

Respondent's position is that "The error in signing the wrong judgment was clerical, not judicial". It is understandable, says the respondent's brief, "that a Judge, with three sets of proposed findings of fact and conclusions of law before him, might sign the wrong judgment by mistake. The Minute Order correcting the Judgment *nunc pro tunc* was granted on all grounds stated in the motion. It must be presumed, then, that Judge Bartlett recognized and corrected a clerical mistake, that he recognized and corrected an error due to inadvertence of the Court, and that he invoked his inherent power to correct the Judgment so as to make it conform to the judicial decision actually made".

[1] As stated in 2 Cal.Jur. 852, "It is well settled that all presumptions and intendments are in favor of supporting the judgment or order appealed from". That this rule applies to such a case as the present cannot be doubted. In Meyer v. Porath, 113 Cal.App.2d 808, 248 P.2d 984, 986, involving an appeal from an order amending *nunc pro tunc* findings of fact, conclusions of law, and judgment, the reviewing court said: "A finding, express or implied (in this case express) that a clerical error exists in the judgment in question is, if supported by substantial evi-

dence, a conclusive finding which binds an appellate court on review".

Such is the situation in the instant case. The record, leaves no reason to doubt that Judge Bartlett disapproved of the first proposed judgment and intended to sign the second draft. And, as said by respondent, "although the (first) Judgment was actually signed by the Court, it did not conform to the findings and conclusions which concluded with the words 'Let Judgment be entered accordingly'. Judge Bartlett, having this state of facts called to his attention at the motion to correct judgment *nunc pro tunc*, performed only his duty in making the judgment express his actual decision".

[2] Appellants offer, as a further argument, that since the trial court acted upon a motion for new trial prior to correction of the judgment, such action amounts to a judicial approval of the judgment signed, and that thereafter the court was without power to correct the clerical or inadvertent mistake in signing the wrong draft of proposed judgment. It is significant that appellants have cited no case which either directly or by implication so holds. The authorities presented relate largely to fundamental rules about which there is no dispute, or to situations factually different from those here involved. The argument is untenable.

[3] A survey of the cases dealing with the correction of judgments and orders indicates that in reference to this remedial procedure, a liberal interpretation is to be adopted. This rule has been recently reaffirmed in Hover v. MacKenzie, 122 Cal. App.2d 852, 266 P.2d 60, 62. Although the Hover case relates to the vacation of a default judgment, the underlying principle approving a liberal interpretation of Section 473 of the Code of Civil Procedure is directly applicable to the present situation. And as there stated, "Even in a case where the showing under section 473 * * * is not strong, * * * such doubt should be resolved in favor of the application". The opinion further says: "Such orders are rarely reversed, and never unless it clearly appears that there has been a plain abuse of discretion".

[4] There is nothing in the present record to indicate that the trial judge, after signing one judgment "changed his mind", and decided to render a different judgment. On the contrary, there is every indication that Judge Bartlett never had in mind signing any judgment but the second draft, and by granting the motion merely corrected a clerical or inadvertent error. In so doing there was no abuse of discretion, and no reversible error.

The order is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

124 Cal.App.2d 790

PEOPLE ex rel. KLEVESAHL
v.
CITY OF SAN BRUNO et al.

KLEVESAHL et al.
v.
CITY OF SAN BRUNO et al.
Civ. 15735.

District Court of Appeal, First District, Division 1, California.

April 28, 1954.

Hearing Denied June 23, 1954.

Consolidated actions on a petition for writ of review to test validity of resolution ordering annexation election and quo warranto to test the validity of the annexation, tried under stipulation that final judgment in quo warranto proceedings should be deemed to be final judgment in the review proceeding. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment upholding the annexation, and the plaintiff-relator and the petitioners appealed. The District Court of Appeal, Peters, P. J., held that fact that annexation election purported to refer to all lands in specific area and city annexation ordinance excluded a small uninhabited portion of that area previously annexed by another municipality, did not invalidate the annexation proceedings since the voters could not have been misled by the technical error, and it could not have affected the results of the election.

Judgment affirmed.

1. Municipal Corporations 🔑33(1, 2)

Statute relating to annexation of areas by a municipality contemplates that the area to be annexed must be fully and fairly described in the proceedings, and that a city council, after an election, has no legal right to change in any material degree, by the final annexation ordinance, the boundaries of area to be annexed by excluding land described in the preliminary proceedings, or by including land not there described. Government Code, §§ 35100 et seq., 35102, 35111, 35116, 35124, 35135.

2. Municipal Corporations 🔑29(1)

Statute relating to annexation of an area by a municipality should not be so technically construed as to compel absolute and literal compliance with every word contained therein. Government Code, §§ 35100 et seq., 35102, 35111, 35116, 35124, 35135.

3. Municipal Corporations 🔑33(2)

Fact that annexation election purported to refer to all lands in specific area and city annexation ordinance excluded a small uninhabited portion of that area previously annexed by another municipality did not invalidate the annexation proceedings especially when propositions submitted at annexation election referred to only unincorporated territory in such area. Government Code, §§ 35100 et seq., 35102, 35111, 35116, 35124, 35135.

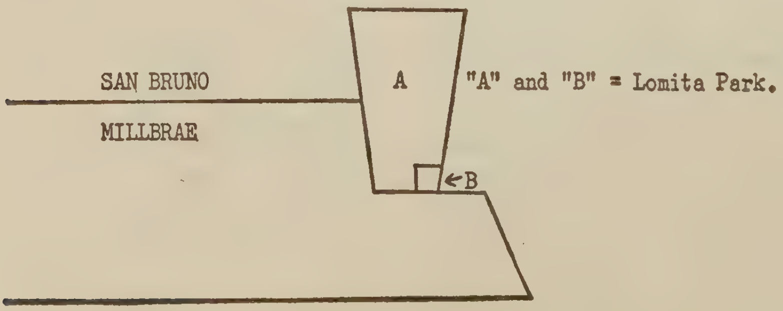
Edmund G. Brown, Atty. Gen., R. Lee Chamberlain, Deputy Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for appellants.

R. A. Rapsey, City Atty. of the City of San Bruno (Paul De Mare, San Bruno, of counsel), for respondents.

PETERS, Presiding Justice.

San Bruno purportedly annexed an area known as Lomita Park Territory. Two proceedings were instituted in the trial court to test the validity of that annexation. One was a petition for a writ of review to test the validity of the resolution of the City Council of San Bruno ordering a special election relative to annexing Lomita Park, an inhabited area, and to review the legality of San Bruno's ordinance approving the annexation. The second action was in *quo warranto* to test the validity of the annexation. Both proceedings present the same legal issues. They were consolidated in the court below, and the parties stipulated that the final judgment in the *quo warranto* proceeding should be deemed to be the final judgment in the review proceeding. From a judgment validating the annexation this appeal is taken.

The basic facts are not in dispute and are set forth in a stipulation of the parties. The following diagram, roughly adapted from the map attached to the stipulation, will serve to explain the controversy:



Prior to November, 1949, all of Lomita Park, including areas "A" and "B," was unincorporated. On November 7, 1949, Millbrae, on petition of the Millbrae Elementary School District, started proceedings to annex area "B," which was uninhabited and owned by the school district. This area "B" contains approximately two acres and consists of a square city block. November 9, 1949, Millbrae filed the resolution in the form of a petition to the Board of Supervisors for annexation of the area. The Board approved the resolution, and ordered a hearing on December 6, 1949. Such hearing was held, notice was published, and on January 17, 1950, the Board of Supervisors adopted its resolution approving the annexation of area "B" to Millbrae.

In the meantime San Bruno had been active. On November 17, 1949 (the same day the Board approved the petition of Millbrae to annex area "B"), in apparent ignorance of the Millbrae annexation, notice of intention to circulate a petition for annexation to San Bruno of all of Lomita Park (areas "A" and "B") was published pursuant to the provisions of the Annexation Act of 1913. §§ 35100–35158 of the Government Code. On January 25, 1951, the City Council of San Bruno adopted a resolution indicating an intention to call a special election of the residents of Lomita Park to vote on the proposed annexation. A petition had been received by the Council signed by at least one-quarter of the qualified resident electors of Lomita Park requesting that such annexation election be held. On February 23, 1950, the City Council of San Bruno adopted a resolution calling for an annexation referendum. The election was held in Lomita Park on April 25, 1950, on the question "Shall the unincorporated territory of Lomita Park be annexed to the City of San Bruno?" The canvass of votes was delayed because of certain legal proceedings until November 8, 1950, when it was determined that the annexation had been approved by a vote of 281 to 234.

Millbrae reacted to the San Bruno election by filing an action to review the San Bruno proceedings and to postpone the canvass of the San Bruno election. On November 8, 1950, a judgment was entered in that action which established the boundaries of Millbrae as including the school district area marked "B." That decision is final and is not challenged on this appeal. Thereafter, the canvass of votes in San Bruno was had as above mentioned.

Subsequently, San Bruno by ordinance declared the results of the election and approved the annexation. The ordinance carefully excluded from such approval area "B," which it recognized as already part of Millbrae.

The present actions were instituted against San Bruno and the members of its city council by certain taxpayers and electors who live in the inhabited portion of Lomita Park (area "A") and who are opposed to that area being incorporated into San Bruno.

On these basic facts the trial court ruled that the annexation of area "A" to San Bruno was valid. This determination is challenged by appellants.

It is conceded that in the notice of intention to circulate a petition to annex Lomita Park to San Bruno, in the petition itself, in the resolution to call the annexation election and in the notice of election, Lomita Park was described as including both "A" and "B." But the annexation ordinance, passed after the election, only described area "A." The basic contention of appellants is that this rendered the annexation proceedings invalid.

Appellants first argue that since all the preliminary resolutions and ordinances up to the time of election described Lomita Park as including area "A" and the school district property, area "B," but all that was or could be annexed was area "A," that the voters were victims of a "deliberate attempt to mislead [them] * * * into believing that the School District Territory (B) would be included in the annexation * * *." This, according to appellants, invalidated the entire annexation proceeding.

The same result is arrived at by arguments based on appellants' interpretation of the relevant statutes. It is pointed out that the Annexation Act of 1913, §§ 35100–35158 of the Government Code, requires in each step of the proceedings, i. e., notice of intention to circulate petition to call annexation election, § 35111, the petition, § 35116, the resolution of intention to call the election, § 35116, and the notice of election, § 35124, that there be a description of the specific boundaries of the area proposed to be annexed. It is argued that these statutory requirements were inserted in the act to protect the voter, and that if the adoption ordinance describes one area ("A") while the preliminary proceedings describe another area ("A" and "B"), the proceedings are invalid for failure to follow the statutory requirements. It is argued that, since the electorate voted on the annexation of an entire area specifically described, the City Council was without jurisdiction to annex a smaller area. Reliance is placed on section 35135 of the Government Code which empowers the City Council after election to approve the annexation, it being contended that this means that the City Council may approve the annexation of only the specific area described in the preliminary proceedings. As stated by appellants: "The jurisdiction of the Council, * * * ends with its right *to complete the annexation by ordinance,* * * *. It is vested with no discretion to change the boundaries of the area to be annexed." These arguments are bolstered by the provisions of section 35102 of the Government Code which provides: "If any election authorized by this article is not called or held in the manner or within the time specified, all proceedings relating to the annexation are void."

[1, 2] There would seem to be but little doubt that the annexation statute contemplates that the area to be annexed must be fully and fairly described in the proceedings, and that a city council, after an election, has no legal right to change, in any material degree, by the final annexation ordinance, the boundaries of the area to be annexed, by excluding land described in the preliminary proceedings, or by including land not there described. But this does not mean that every minor and unimportant defect will invalidate the proceedings. The fundamental purpose of the regulatory provisions of the statute is to assure a fair election to the property owners in the area to be annexed, and to assure them that they will not be imposed upon or misled. Where the error is a minor one that could not possibly have affected the results of the election, and could not possibly have misled the voters, the rule of *de minimis* applies. The courts should not so technically construe such statutes as to compel absolute and literal compliance with every word contained therein, because to do so, in many cases, would result in defeating the will of the majority in situations where no one was or could be misled.

There seems to be no California case directly in point so interpreting this annexation statute. But the principle is a familiar one, and has been recognized in interpreting a comparable statute. In People ex rel. McGroarty v. City of Los Angeles, 9 Cal.App.2d 431, 50 P.2d 101, there was involved the statute permitting the consolidation of two cities, Stats. of 1913, p. 577, Chapter 311, and the court was called upon to evaluate various errors committed in the course of the election. The consolidation statute contained a provision almost identical with the one above quoted from the annexation statute, to the effect that if an election was not called or held in the manner specified, all proceedings were void. It was first held that "the courts will not intervene for technical or trivial reasons to set aside the will of the people as expressed at an election." 9 Cal.App.2d at page 436, 50 P.2d at page 103. Then the court referred to the "wholesome doctrine that election laws are to be liberally construed to the end that when an election has been held the expressed will of the electors * * * will not be vitiated by any court because of any error committed in the course of the election, so long as the error complained of is not one which was likely to change the result of an election or one actually affecting the result of such election." 9 Cal.App.2d at page 438, 50 P.2d at page 104. In referring to the penalty clause of the statute the court stated 9 Cal.App.2d at page 438, 50 P.2d at page 104, "It seems rather clear that this penalty [declaring all proceedings void] was never meant to apply to an inconsequential variance in the actual election." The court concluded, 9 Cal.App.2d at page 440, 50 P.2d at page 105: "In spite of the irregularities and slight deviations from normal stressed by appellant in this proceeding, we feel that the courts should, where possible, give effect to the expressed will of the people as indicated at an election at which the issues were clearly presented to the electorate and where there was no possibility of serious misunderstanding as to the points involved." The theory of this case is here applicable.

[3] What was the nature of the variance here? Could it possibly have affected the results of the election? Was anyone injured as a result of the variance? Did it affect the fairness of the election? In answering these questions the trial judge, the Hon. Murray Draper, in his minute order ordering judgment for respondents, stated: "This court fully recognizes the importance of a proper description of lands proposed to be annexed, so that the electors may be fully advised at the time of voting. Here, however, the proceedings for annexation of the school area to Millbrae were widely known [at the time of election]. Further, the land is uninhabited, it is not taxable, and its annexation to either city would have no effect upon the boundaries of the school district nor upon the right of children, wherever resident, to attend the school in which they were students before the annexation."

To this evaluation, with which we agree, can be added the following comments: Not only is there involved but one square block of a quite large area, and not only is that square block uninhabited and non-taxable, but, in addition, the evidence does not show the slightest bad faith on the part of San Bruno. Quite obviously, San Bruno was not aware of the commencement of the Millbrae annexation of the school district block when it commenced its proceedings to annex all of Lomita Park. Once it had been determined that that square block had been annexed to Millbrae, San Bruno moved to correct its error by deleting the square block from the ordinance approving the election. It is true that the election had then been held, but it not only appears, as pointed out by the trial judge, that at that time the fact that Millbrae claimed the school land was widely known because of the dispute between the parties, but the voters at that election were not told that they were voting to include the school land. The proposition submitted to them was "Shall the unincorporated territory of Lomita Park be annexed to the City of San Bruno?" At the time of that election, as was well known, the school land had been already annexed to Millbrae and was therefore not part of the "unincorporated territory of Lomita Park." Thus, the election was fair, the voters were not misled, the results of the election were not affected by the error, and no one was or could have been injured because of the variance.

Counsel cite cases from other states, some upholding annexations in spite of defects in procedure or description, and some refusing to uphold such annexations for such reasons, but such cases are of little help in the instant case. The importance or effect of a variance necessarily depends upon the facts of each case. Here it must be held that the misdescription was a mere technical error that did not in any way affect the election. This being so, it must be regarded as *de minimis,* and therefore disregarded.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

PEOPLE v. POND.*

Cr. 5070.

District Court of Appeal, Second District, Division 1, California.

April 26, 1954.

Hearing Granted May 26, 1954.

Defendant was convicted in the Superior Court of Los Angeles County, Charles W. Fricke, J., on four counts of grand theft, and his motion for new trial was denied, and he appealed. The District Court of Appeal, White, P. J., held, inter alia, that evidence sustained convictions.

Affirmed.

1. Criminal Law ⚷594(4), 867

Where indictment for grand theft contained ten counts, and count relating to witness who became ill during trial was dismissed, and testimony given by such witness was stricken from record on motion of district attorney, and no showing was made by defendant as to materiality of testimony of such witness on other counts and no effort was made to controvert claim that witness was unable because of illness to appear and testify further, denial of a continuance and refusal to declare a mistrial because of absence of such witness, was not an abuse of discretion. Pen.Code, § 487; Labor Code, §§ 402–408.

2. Criminal Law ⚷338(1)

In prosecution for grand theft, allegedly committed by defendant when he converted to his own use money held in trust by him in connection with real estate transactions, offered evidence that alleged transfer of certain property by defendant's associate placed it beyond reach of defendant and precluded him from raising money to meet certain obligations, related only to collateral issues, and was properly excluded. Pen.Code, § 487; Labor Code, §§ 402–408.

3. Criminal Law ⚷1166½(12)

In prosecution for grand theft, committed by defendant when he converted to his own use money held in trust by him in connection with real estate transactions, record disclosed no remarks by trial court which could be characterized as prejudicial to rights of defendant or as tending to improperly influence the jury in the rendition of its verdicts. Pen.Code, § 487; Labor Code, §§ 402–408.

4. Larceny ⚷65

Evidence sustained conviction of defendant on four counts of grand theft. Pen.Code, § 487; Labor Code, §§ 402–408.

◆

Cannon & Callister, David H. Cannon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Robert Wheeler, Deputy Dist. Atty., Los Angeles, for respondent.

WHITE, Presiding Justice.

In an indictment returned by the Grand Jury of Los Angeles County containing ten counts defendant was accused in each of the crime of grand theft.

Following denial of a motion made under section 995 of the Penal Code and defendant's demurrer to each count of the indictment, he entered a plea of not guilty to all counts, and the cause proceeded to trial before a jury, resulting in guilty verdicts as to Counts I, II, IX and X. Verdicts of not guilty were returned as to Counts V and VI. While as to Counts VII and VIII, the jury was unable to agree upon a verdict. As to the four counts upon which defendant was convicted, a motion for a new trial was made and denied. Proceedings were suspended and defendant was granted conditional probation. This appeal is from the judgment and the order denying defendant's motion for a new trial.

The record reveals that at the time of trial and for a number of years prior thereto, defendant was engaged on his own account and also as a real estate broker and agent of others, in buying and selling real estate in the Antelope Valley, in or near Lancaster, in the County of Los Angeles. In connection with his activities defendant had dealings with each of the persons named in the indictment.

During the past several years the entire Antelope Valley, and particularly in the vicinity of Lancaster, has experienced unusual growth and activity; land values have risen rapidly and in substantial amounts, and many chicken ranches have been established and operated. About the middle of the year 1948, defendant went to Lancaster and soon thereafter became engaged in the real estate business.

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* Opinion vacated 284 P.2d 793.

At the time he went to Lancaster, defendant was in very serious financial straits, occasioned by losses sustained in the theatrical agency business and the production of motion pictures. Numerous civil judgments in rather large amounts had been taken against Mr. Pond and were of record when he went to Lancaster, so in the buying and selling of real estate in and around Lancaster he took title to and made some conveyances in names other than his own. Among the names he used was Geoffrey A. Watterson. He also took property in the name of Helen Fay Blackburn, sometimes known as Helen Fay Dale, the person named in Counts III and IV of the indictment.

In November, 1949, Mrs. Blackburn came to work in defendant Pond's office in Lancaster as a real estate broker and she and Mr. Pond engaged in a number of real estate transactions some of them being conducted in her name. A number of pieces of property were placed of record in her name rather than in Mr. Pond's name. In some of these pieces of real estate Mrs. Blackburn had a joint venture interest with Mr. Pond and in still others she had no actual interest either by way of ownership or otherwise. Mr. Pond gave as his reason for placing title to property in names other than his own the fact that he did not want existing judgments to become liens against any of his property.

While engaged in the real estate business at Launcaster, defendant conducted an extensive advertising campaign in newspapers, by mail, road signs, billboards, etc.

In discussing the factual background surrounding this prosecution we shall deal only with the counts upon which defendant was convicted.

Count I involved dealings with G. M. Bradford and his wife. They had had some experience in raising chickens in the state of Ohio. Mr. Bradford first learned about defendant when he "read it in the advertisement in the papers", and then he "saw a man in Los Angeles". Thereafter, the Bradfords went to Lancaster and on April 24, 1951, met defendant in the latter's office where they went "to see about chicken farms and laying houses; in other words, we were just looking for the chicken business, seewhat we could find up there". After telling defendant of their experience in the operation of farms and chicken business in Ohio, they requested that he tell them about what he had advertised in the newspapers. Defendant then told them about the large profits in raising chickens, what the possibilities were in the chicken ranch and chicken raising business, and how they could make considerable money. Defendant inquired as to whether they wanted to buy a chicken ranch or what they proposed to do. He asked how much money Mr. Bradford had. The latter replied that he had $7,000 and desired to purchase a chicken ranch. Defendant responded that, "not less than $5500.00 would be acceptable on the contract that we were thinking of going into with him". Defendant then said, "Let's go out and look as some of these chicken houses. I don't think you have got quite enough money for them". Defendant then took the Bradfords out to look at some of the chicken houses and chicken farms, showing them two or three different ones. They did not see quite what they wanted. Then defendant said he would take them to his home ranch and that maybe they would like what they saw there. They then went to defendant's home ranch and he showed them a chicken house being constructed. He said he had 120 acres at the home ranch. Defendant wanted to know which, right then, Bradford wanted to take.

At defendant's home ranch there was the home and an apartment building to the left of it; there was a chicken house partially built, no roof on it, just the side walls up, and a lot of debris and dirt around the chicken house.

Defendant said he needed help on his ranch and would employ Mr. Bradford. Defendant said "he needed a man of my (Bradford's) ability to take care of his farm, * * * he had been looking for somebody like that for a long time and he was awfully glad that I would be able to do something like that—being the fact that I didn't have enough money to go into the chicken business, that is buy the chicken house and grounds * * *".

Defendant told Bradford: "Well, * * * you're just the type of a man I have been looking for for a long while * * * I need somebody on my ranch to take care of it * * *".

Defendant told them he would write up a contract, that in a short length of time they should get their $5,500 back and have good employment and big profit.

Defendant offered Bradford "the position of taking care of, on the contract, the contract you have in your hand there".

On April 21, 1951, Mr. Bradford first saw the proposed contract while in defendant's office. Among other terms, the contract provided that the Bradfords "agree to put up $5500.00 as a guarantee that they will properly supervise and operate the chicken house on the Morning Star Ranch at 60th and 'H' West, Lancaster"; it then provided for division of the income. Defendant and the Bradfords signed the contract. Mr. Bradford testified that the reason for advancing the $5,500 was "as a guarantee of our loyalty to stay with this work and see it through." Defendant said the $5,500 was "(t)o be held in good faith, that" (Bradford) "would stay with" (defendant) "until the contract was fulfilled". As to the chickens, defendant was to furnish everything, the Bradfords were to move in and get to work.

In connection with the conversation above related, Bradford gave defendant a check for $5,500. Defendant received cashier's checks totaling $3,000 and the balance in cash from the proceeds of this check. One of the cashier's checks in the sum of $500 bore the endorsement of defendant and one Ralph A. Mochel and was delivered in payment for a deed to some property by defendant. The other cashier's check in the sum of $2,500 was tendered to the Sipherd Service of Lancaster and deposited to their account.

On April 24, 1951 the Bradfords had some conversation with defendant "about the construction of this chicken house". Defendant asked when the Bradfords' rent was up in Long Beach; they told him; he said they should come up there then and it would be ready. Defendant "promised that it would be ready for (Bradford) to move into the house, the house would be furnished and the chicken house would be finished and ready to go into production of chickens on the 9th of May." They would take over the chicken ranch right at the time they came up.

The Bradfords received a letter from defendant dated April 28, 1951, advising them "we are progressing very nicely with the house and the chicken building and we will have your house so that you can move into it by May 9th."

The Bradfords returned to Lancaster on May 9, 1951. They drove into the home ranch and saw there was nothing they could notice had been done at all on the chicken house or on the house they were supposed to move into. "(T)he little house was just—the bare outside walls were up and they had the roof on it. No paint; no inside work done; no plumbing or anything was done up to that time. And the chicken house was just the house walls and some of the rafters up, the roof could be put on."

Upon the Bradfords return to Lancaster on May 9, 1951 they had a conversation with defendant. "(A)s near as I can recall, (defendant) stated that the house wasn't quite ready for us to get in and the chicken house wasn't ready, and he had an apartment there in his apartment building that we could have until the chicken house was ready for us, the other house was ready for us to move into."

Defendant turned over to the Bradfords one of the apartments alongside of his home to live in until the chicken house was completed. The Bradfords moved into the apartment, unpacked and stayed there.

The next morning Bradford talked with defendant. Bradford asked defendant "about the chicken house, when he thought it would be ready; and he said, well, his foreman was there and I believe his foreman was there at this time, and he had his men working on it, he said he would get it ready just as soon as they could; and in the meantime I says well, I said, at the time I'm going to have to go out and get a job. He says, 'Well,' and he says 'I will put you to work here on the farm here as my foreman, my ranch foreman;' and he hired me then."

Bradford went in the house, got on his working clothes and went to work for defendant.

Bradford "was to be the foreman of the ranch, doing the crops and planting crops and things, and doing the ranch work around the ranch." Bradford worked there about four months from May 10th. He had no other employment.

Bradford "painted the barn, started painting the barn and cleaning up the place. They had an old tractor there that we used and a trailer and just started in general to clean up the debris and dirt and everything that was around the place." Defendant paid Bradford $150 a month wages for four months.

After four months defendant discharged Bradford, saying he was disloyal to him, and had been talking to other people about defendant's business. Bradford had been doing so.

The Bradfords had stayed in the apartment about ten months when they left the Antelope Valley in February, 1952. Defendant had told Bradford he was letting him occupy the apartment after firing him in lieu of interest on Bradford's $5,500.

There were no chickens on the place at any time. During the time the Bradfords spent on defendant's home ranch the house was never completed.

On October 31, 1952 Bradford received from defendant a refund of the $5,500.

Generally, concerning the various checks that were placed in evidence including the checks involved in this count, defendant admitted on the witness stand that he did not maintain any bank accounts and that the checks received by him were cashed and the proceeds were "just used in my regular business".

Count II involved dealings with Jan Reinders who did not "speak plain English because I'm only five years in the United States". This complainant also met defendant through reading an advertisement in a Los Angeles newspaper. Mr. Reinders, accompanied by his wife, telephoned defendant at the latter's office during August, 1951, seeking information about the chicken business. Mr. Reinders advised defendant that he had "come up with not enough money to start in (his) own business; so then (defendant) started asking me if I was willing to go with him as partner; and in that case we talked farther and went to his ranch to see the chicken house and the little house what I supposed to occupy." Reinders saw defendant's "home and the apartment building on the premises, and the little house what I supposed to go into and to going up of the chicken house." The chicken house was not completed when Reinders was there in August, 1951.

Defendant asked Reinders if he "was willing to take full charge over there because he could not be on the ranch * * * and then I got to take full charge of the ranch. And when it was necessary to do some repair work in the apartments that are on his premises." Defendant asked Reinders if he "was able to give a thousand dollars as a security that I want to live off the farm and the chickens were in the house."

Reinders advanced $1,000 to defendant in connection with the transaction. The $1,000, "was for the purpose as security that I won't run off the farm when the chickens were there so that he gets stuck with the chickens and nobody there."

There was an agreement or contract drawn in connection with the conversation. The agreement defendant signed after the conversation just related.

The agreement in question is similar in all respects to and follows the pattern of the agreement set forth with regard to the evidentiary statement in Count I and need not here be narrated.

Mr. Reinders stayed on the ranch from November 15, 1951 until February 29, 1952. At the time he left he had not received back his $1,000. At no time did Reinders "receive a delivery of the chickens to take care of on" the ranch. He testified he believed defendant's statements and relied upon them in parting with his advancement of $1,000. In connection with this count, defendant admitted on the witness stand that he did not maintain any bank accounts and that various checks received by him were cashed and the proceeds "just used in my regular business".

Counts IX and X involved negotiations with Cecil R. Dean who approached defendant about February, 1951, with an offer of $125 an acre for some forty acres situated near defendant's office. Accepting a deposit of $50, defendant stated he would present Dean's offer to the owner of the property. A few weeks later defendant informed Dean that he was unable to negotiate a deal for the aforesaid property but had a parcel of better land in another location that he would like to show Mr. Dean. Thereupon, defendant took Dean with him and showed him some vacant property comprising eighty acres. After making some independent inquiries concerning the property in question, Dean returned to defendant who informed him that the property belonged to a widow, but when Dean offered to accompany defendant to interview the owner, he was informed by defendant that the latter could better transact the business alone. Mr. Dean expressed a desire to purchase the entire eighty acres but was informed by defendant that too much money would be required. Defendant then offered to purchase forty acres if Dean would buy the remaining forty acres, and together they would drill a joint well at the intersection of the two forty-acre parcels, and then subdivide the entire property. Defendant suggested a price of $200 per acre, but they settled upon $190. Defendant also offered to do all the detail work of selling the property as subdivision property at a commission of 10 per cent, rather than the much larger amount generally charged for vacant property. Dean agreed to take the 40 acres at $190 per acre. Dean gave defendant a $1,950 check.

The following day, March 22, 1951, Dean paid defendant another $2,000. Defendant admitted on the witness stand that he put this money in his business; that he did not set up a trust account for Dean, the purchaser of the property.

Dean's check for $2,750 dated March 22, 1952 was delivered to defendant. It was for $2,000 payment in full of the amount due at that time on the property, and $750 as Dean's half payment of the cost of drilling a well on the intersection of the two forty acre parcels.

Defendant said they needed a well on the property, to be located at the dividing line of the two "40's"; that the water from the well would be used to irrigate parts of each "40"; that the cost of it would be $1,500; that it would be half on defendant's property and half on Dean's; that they would split the cost. So Dean paid defendant the $750 portion of the $2,750 check as Dean's half of the cost of the well. Defendant said he would have the well started in at least two weeks. Defendant said he would buy from the widow who owned the other 40 acre parcel next to Dean's. A well was not drilled on the property.

Dean's next contact with defendant was around April 1, 1951. On that date Dean made a $1,500 payment to appellant. On that occasion, at defendant's office in Lancaster, Dean offered to erect a tract office on the property, from which they could have salesmen out selling property in smaller parcels; that is, the property being purchased was to be a subdivision. Defendant said he thought he could erect a tract house for approximately $1,500. Defendant showed Dean some concrete blocks in his office which he said would probably be the best material with which to build a tract house. They talked, too, of the use of the tract house after the property was subdivided; Dean might sell it to individuals or might retain it in his own name. So Dean paid the defendant $1,500 in the form of a $1,000 check and $500 in traveler's checks.

A tract house was never constructed on the property. Defendant admitted receiving $1,500 from Dean for the construction of the tract house.

During May, 1951, Dean again saw defendant and demanded title to the property. Defendant replied that he was unable to deliver such title. In response to Dean's request for the return of his money, defendant replied that he did not have the money but offered as security certain trust deeds which were later accepted by Mr. Dean. A subsequent demand for the money proved equally futile and when asked what he had done with it, defendant replied that he had used it to purchase lumber and building materials. On cross-examination defendant admitted receiving the various sums of money from Mr. Dean, including $750 for the purpose of drilling the aforesaid well. With reference to the $2,750 received from Dean on March 22, 1951, defendant testified that he put the money in his business and was unable to drill the well on the property. Defendant admitted he did not set up any form of a trust account within which to keep these payments made by the purchaser of the property. As to the $1,500 received by him for the purpose of erecting a tract house on the property, defendant testified that he did not build it.

Before proceeding to a discussion of the contentions advanced by appellant, reference should be made to certain provisions of the Labor and Penal Codes and some authorities pertinent thereto.

Section 405 of the Labor Code reads:

> "Any property put up by any employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. No contract between the employer and employee or applicant shall abrogate the provisions of this section. Any employer or prospective employer, or agent or officer thereof, who misappropriates any such property, mingles it with his own, or uses it for any other purpose than that herein set forth is guilty of theft and shall be punished in accordance with the provisions of the Penal Code relating to theft."

See, also, Labor Code, sections 402–404, 406–408.

Section 487 of the Penal Code provides:

> "Grand theft is theft committed in any of the following cases:
>
> "1. *When the money, labor or real or personal property taken is of a value exceeding two hundred dollars ($200);* provided, that when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars ($50) the same shall constitute grand theft. * * *" (Emphasis added.)

The constitutionality of section 405 of the Labor Code was sustained in People v. McEntyre, 32 Cal.App.2d Supp. 752, 754, 756, 84 P.2d 560 and cases cited therein.

[1] As his first ground of appeal it is urged by appellant that the trial court erred in denying his motion to declare a mistrial and for a continuance. Both motions were made at the conclusion of the prosecution's case in chief.

It appears that Fay Dale Blackburn was the person against whom the theft was alleged to have been committed in counts III and IV of the indictment. These counts were later dismissed upon motion of the district attorney.

Mrs. Blackburn was called as a prosecution witness, was examined in chief and in part only on cross-examination when the trial was adjourned for the day. When the trial was resumed the next morning, the trial judge announced that he had been informed, "* * * that Mrs. Blackburn will not be able to be present at the present time for further examination as a witness or cross-examination. We will have to proceed with some other witness." Appellant's counsel then requested that the matter go over until the following day, "* * * to see if Mrs. Blackburn cannot be produced to the end that we may cross-examine her * * *". The court then announced that there were other counts in which the witness Mrs. Blackburn was not involved and directed that the trial proceed on some other count. Appellant's motion for a one day continuance was denied and the trial proceeded through that and the succeeding two days when the prosecution rested. The trial was then recessed over the weekend when appellant's motion to declare a mistrial was argued and denied as was his motion for a further continuance. It is appellant's contention that the trial judge abused his discretion in denying the requested continuance to the end that the former might procure the attendance of Mrs. Blackburn for further cross-examination. We perceive no abuse of discretion in the action taken by the trial judge. In the first place, the district attorney moved to strike from the record all testimony given by Mrs. Blackburn and counts III and IV of the indictment which involved her were dismissed. The reason for the non-attendance of the witness was presented to the court by the statement of the district attorney that she was ill; by an affidavit, as well as by the observation of the judge himself when the witness was last upon the stand that "she was very distinctly emotionally upset and didn't appear to me to be well". From the time appellant was appraised of the illness of the witness and during the ensuing days of the trial, no showing was made to controvert the claim that the witness was unable to appear and testify further because of illness. Under the facts here present we cannot say that the court abused its discretion in denying a continuance or in refusing to declare a mistrial. There was no showing of materiality of the testimony sought to be elicited from the witness as to counts other than III and IV, and those counts were dismissed. The testimony given by Mrs. Blackburn related only to the last mentioned two counts. We are unable to find any substantial showing that, as contended by appellant, the ruling of the trial court "actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right".

[2] It is next contended by appellant that the trial court committed prejudicial error in sustaining objections to certain offers of proof made by appellant; that by sustaining such objections the latter "was prevented from making his defense". The offers of proof were made after objections had been sustained to questions asked of appellant while testifying. These questions sought to place before the jury the reason why appellant went to the Antelope Valley. It being the claim of appellant, as announced in the opening statement made by his counsel, that the former went to Antelope Valley for the purpose of raising money with which to pay off existing debts; that by reason of his business activities in the Antelope Valley, appellant had reduced his obligations "from something like $100,000.00 to about $47,000.00". Appellant also offered to prove that the alleged transfer of certain property by Mrs. Blackburn, out of her name, thereby placed it beyond appellant's "reach", and rendered him unable to raise money to meet certain obligations he had contracted to perform with the complainants named in the indictment. As to the aforesaid two counts concerning the Bradfords and the Reinders, we are unable to perceive the remotest connection between the proffered testimony concerning the property in the name of Mrs. Blackburn and any valid defense to the charges contained in the two counts just mentioned. Nor would the inability of appellant to "reach" the aforesaid property furnish any defense for the thefts alleged in counts IX and X wherein Cecil R. Dean was named as the victim. We are in accord with the reasoning of the trial judge that the offers of proof seemed only to raise collateral issues foreign to those tendered by the indictment. As the trial judge cogently remarked, "In other words, if I received money and I am to do a certain thing with it, but I embezzle it; the fact that the funds are tied up doesn't help me any. If money is obtained by trick and device or false pretenses, the fact that I can't make good the restitution wouldn't make any difference because restitution would be no defense."

The ruling of the trial court sustaining objections to the aforesaid offers of proof were correct.

It is urged by appellant that remarks made by the trial judge during the progress of the trial were prejudicial to his rights and tended to improperly influence the jury in its verdicts. In this regard, appellant's brief recites that, "There is no particular statement by the trial court that could be singled out as grounds for setting aside these verdicts, however, we do feel that the italicized parts of the court's remarks as shown must necessarily have influenced the jury against the defense when those remarks are coupled with the refusal of the court to receive evidence embraced in the offers of proof in support of that defense."

[3] At no time during the trial did appellant make any objection to the remarks of the court, nor did he request an admonition to the jury to disregard the same. The contention raised for the first time on appeal lacks substantiality. And, an examination of the record reveals no remarks by the trial court that could be characterized as prejudicial to the rights of appellant or tending to improperly influence the jury in the rendition of its verdicts.

Finally, appellant insists that the court erred in denying his motion to set aside the guilty verdicts and grant a new trial. He particularly challenges the verdicts rendered on Counts I and II as not supported by the evidence and as being contrary thereto.

[4] We find no merit in this contention. A consideration of the evidence hereinbefore narrated leads clearly and convincingly to the conclusion that appellant's guilt was established. As to Counts I and II he offered nothing in his defense other than that the victim received back his money some year and a half after the alleged theft thereof, and executed a "release". This constituted no legal defense.

Testifying in his own behalf, appellant admitted that he kept no bank accounts or separate trust funds, and that the monies received by him from the various complainants were not only mingled with his own but used in the course of his own business and obviously for purposes not contemplated by the terms of his representations made to the various victims, and his covenants and agreements with them.

Applying the provisions of the heretofore mentioned sections of the Labor and Penal codes to the testimony adduced at the trial, the conclusion of appellant's guilt is inescapable. The motion for a new trial was properly denied.

Appellant appeals from the "judgment" as well as from the order denying his motion for a new trial. In the instant case the proceedings were suspended, defendant was granted conditional probation and no judgment was pronounced. However, under the provisions of section 1237 of the Penal Code, as amended in 1951, an order granting probation "shall be deemed to be a final judgment within the meaning of this section".

For the foregoing reasons the order granting probation and the order denying defendant's motion for a new trial are, and each is affirmed.

DORAN and DRAPEAU, JJ., concur.

124 Cal.App.2d 757

SOHN
v.
CALIFORNIA PACIFIC TITLE INS. CO. et al.

Civ. 15754.

District Court of Appeal, First District, Division 2, California.

April 27, 1954.

Rehearing Denied May 27, 1954.

Hearing Denied June 23, 1954.

Action by assignee of grantor of first and second deeds of trust against trustee under first deed of trust, in which action plaintiff claimed, inter alia, that trustee's payment of full amount due and owing to trust beneficiary, after exercise by trustee of power of sale, was improper for reason that beneficiary, upon grantor's default in payment of certain installments, failed to exercise its option to accelerate the payment of entire amount then unpaid. The Superior Court, City & County of

San Francisco, Herbert C. Kaufman, J., entered judgment adverse to plaintiff, and he appealed. The District Court of Appeal, Gibson, J. pro tem., held that evidence sustained finding that the beneficiary duly declared the entire principal and interest to be immediately due and payable.

Judgment affirmed.

1. Mortgages ⚷376

In action by assignee of grantor of deed of trust against trustee thereunder whose payment, plaintiff claimed, of full amount due and owing to trust beneficiary, after exercise by trustee of power of sale, was improper for reason that beneficiary, upon grantor's default in paying certain installments, failed to exercise its option to accelerate payment of entire amount then unpaid, evidence sustained finding that beneficiary duly declared the entire principal and interest to be immediately due and payable. Civ.Code, § 2924.

2. Mortgages ⚷376

In action by assignee of grantor of deed of trust against trustee thereunder, whose payment, plaintiff claimed, of $141,626.69 to beneficiary under deed of trust, after exercise by trustee of power of sale, was improper, evidence sustained finding that the sum so paid was due beneficiary at time of sale.

3. Mortgages ⚷376

In action involving issue as to proper disposition of proceeds of sale of real property following exercise of power of sale by trustee under deed of trust, evidence sustained finding that the fees, costs and attorneys fees in connection with the sale in question were reasonable in amount, and had been incurred, and justified direction that some of surplus proceeds be applied to payment of such fees and costs.

4. Stipulations ⚷14(12)

Where grantor of first and second deeds of trust entered into stipulation with beneficiaries of second deed of trust to effect that judgment should be entered in favor of such beneficiaries, and that it might be satisfied out of proceeds of sale of personal property and out of monies then under attachment in hands of trustee of first deed of trust, and such stipulation was acted upon by sheriff in making levy and disbursing funds thereunder, and was acted upon by trustee of first deed of trust in paying monies to sheriff, grantor's agreement became an executed contract, and grantor was bound thereby. Civ. Code, § 3515.

5. Corporations ⚷509(3)

Where, pursuant to stipulation entered into by grantor of first and second deeds of trust with beneficiaries of second deed of trust, to effect that judgment should be entered in favor of such beneficiaries, and that it might be satisfied out of monies then under attachment in hands of trustee of first deed of trust, service of writ of attachment, addressed to such trustee, was made upon an officer of such trustee, at his office, at a time when such officer had control of the monies in question, the service was sufficient. Code Civ. Proc. § 542, subd. 6.

6. Stipulations ⚷14(12)

Where grantor of first and second deeds of trust and beneficiaries of second deed of trust stipulated that judgment should be entered in favor of such beneficiaries, and that it might be satisfied out of proceeds of sale of personal property and surplus monies then under attachment in hands of trustee of first deed of trust, such stipulation evidenced intention of parties that both sources of funds were to be available for application on judgment in favor of beneficiaries of second trust deed.

7. Stipulations ⚷14(12)

Where grantor of deeds of trust, by stipulation for judgment in favor of beneficiaries of second deed of trust, especially agreed that such beneficiaries were to be paid out of proceeds of sale of personalty and surplus monies then in hands of trustee of first trust deed as result of trustee's exercise of power of sale, thus precluding such beneficiaries from seeking satisfaction of their judgment out of any other assets, grantor could not subsequently contend that such surplus monies should have been paid to satisfy federal government's claim against grantor for delinquent income taxes.

8. Mortgages ⚷376

Where trustee of first deed of trust exercised power of sale, thus eliminating second trust deed as a junior encumbrance, and first trust deed directed trustee to pay surplus to person or persons legally entitled thereto, the junior lien represented by second trust deed attached to the surplus proceeds so that beneficiaries of second trust deed became the persons legally entitled thereto, as provided in first deed of trust.

9. Mortgages ⚷376

The equitable principle which transfers creditors' claim from foreclosed property to sale proceeds does not apply where creditors' lien on property is unaffected by the sale, and in such case creditors' right to look to real estate for security continues.

10. Internal Revenue ⚷1724

A federal tax lien upon real property is not eliminated by a sale pursuant to exercise of power of sale under a prior deed of trust.

11. Mortgages ⚷336

Creditors who had lien on real property under their second deed of trust lost such lien as result of exercise of power of sale contained in first deed of trust.

12. Stipulations ⚷14(12)

Where grantor of deeds of trust stipulated with beneficiaries of second deed of trust that judgment should be entered in favor of such beneficiaries, and that it might be satisfied out of monies under attachment in hands of trustee of first deed of trust as result of exercise of power of sale, and unsatisfied portion of such judgment exceeded the balance remaining in hands of trustee after necessary payments were made, the owner of the judgment, and not the grantor, was entitled to such balance.

13. Judgment ⚷481

Party who consented to entry of judgment, which judgment subsequently became final, could not thereafter collaterally attack such judgment.

14. Mortgages ⚷376

Where amount claimed to be due beneficiary of first deed of trust after trustee's exercise of power of sale included amount paid out as a premium on policy with cash surrender value, and purchaser cancelled such policy and received return premium, inclusion of amount of premium in beneficiary's claim was an overcharge, but in view of fact that purchaser would have been entitled, in any event, to the return premium as part of surplus from sale of realty to which purchaser was entitled by reason of unsatisfied judgment, its inclusion in claim was immaterial.

15. Appeal and Error ⚷1071(6)

Party could not complain of court's failure to specifically find in respect to a matter, where a more specific finding thereon would have had to be adverse to such party.

◆

Henry J. Kleefisch, Reed M. Clarke, San Francisco, for appellant.

Landels & Weigel, Knight, Boland & Riordan, San Francisco, for respondent California Pacific Title Ins. Co.

Harold L. Levin, San Francisco, for respondent Casa Hamilton Corp.

GIBSON, Justice pro tem.

This action arose out of a dispute as to the proper disposition of the proceeds of a sale of real property following the exercise of a power of sale by a trustee under a deed of trust.

The following facts appear to be fully established by the evidence:

On August 29, 1947, Charles Tesseyman was the owner of certain real property located in Stockton, San Joaquin County, California, known as the Hotel Wolf, and on that date he borrowed $150,000 from the American National Insurance Company, hereinafter referred to as Beneficiary, and executed and delivered to it his promissory note in that amount. Contemporaneously, Tesseyman executed and delivered to Beneficiary, as security for the payment of the promissory note, his deed of trust in which he is named as trustor, the California Pacific Title Insurance Company, hereinafter referred to as Title Company, is named as trustee, and the insurance company aforesaid is named as beneficiary, which covered and described the Hotel Wolf property. On April 13, 1950, Mr. Tesseyman was in default in the payment of installments of principal and interest under the promissory note amounting to $12,163.50, and on that date Beneficiary caused to be filed a notice of default, in the office of the County Recorder of the County of San Joaquin pursuant to the provisions of Civil Code Section 2924. On October 18, 1950, exercising the power of sale conferred by the deed of trust, Title Company sold the Hotel Wolf property and received payment of $161,000 therefor. On that day, there was due to the Beneficiary under the terms of the promissory note and deed of trust the aggregate sum of $141,626.69, subject to an adjustment on the premium of a fire insurance policy hereafter to be mentioned. On October 26, 1950, this amount was paid by the Title Company to the Beneficiary, leaving a balance of $19,373.31 of the proceeds of the sale in the hands of the Title Company.

On June 15, 1950, several months prior to the sale, Mr. Tesseyman had executed a second deed of trust covering the Hotel Wolf property, in which Arthur Berberian, John Borasi, and William Dal Porto (hereinafter designated as the Berberian creditors) as trustees for creditors of Charles Tesseyman, are named as Beneficiaries. This second deed of trust was given to secure, among other things, the payment of a promissory note for $50,000 executed by Tesseyman in favor of the Berberian creditors, and was duly recorded on June 16, 1950. On October 18, 1950, the day on which the Hotel Wolf property was sold by Title Company under the first deed of trust, an action was filed by the Berberian creditors in San Joaquin County to recover the indebtedness evidenced by their said note. This action sought the recovery of $36,487.18, with interest.

Immediately following the sale under the first deed of trust, and on the same day of the receipt by Title Company of the $161,000 paid by the purchaser, a writ of attachment in the said Berberian action was served upon Title Company, which attached and garnished all of the right, title and interest of Charles Tesseyman in and to the proceeds of sale then in the hands of Title Company. On October 20, 1950, a stipulation was entered into and signed by the attorneys for plaintiff and Tesseyman and his attorneys, which, so far as applicable here, reads as follows:

> "It is hereby stipulated and agreed by and between plaintiffs and defendants in the above entitled and numbered action, by their respective attorneys, that plaintiff shall * * * recover from * * * defendant Charles Tesseyman, judgment for $36,487.18 * * * plus * * * costs and disbursements. No * * * writ of execution shall be issued except for the sole * * * purpose of levying upon and selling * * * all personal property and chattels exclusive of any monies, excepting monies which are presently under attachment and in the hands of the California Pacific Title Insurance Co., or its agents, belonging to * * * defendant and which have been levied upon * * * and * * * now are in the custody and possession of, the Sheriff of the County of San Joaquin * * * under * * * a writ of attachment issued out of this court in said action and said judgment, and any assignment * * * of said judgment or of any interest therein shall be subject to this provision and restriction, the plaintiffs hereby expressly waiving their right to any other * * * writ of execution based upon said judgment, and said judgment shall be fully satisfied * * * out of the personal property and chattels hereinbefore mentioned * * * belonging to the defendant, and by any sale thereof under execution irrespective of the amount for which said personal property and chattels may be bid in for or purchased at said sale * * *"

Pursuant to such stipulation, on November 6, 1950, a judgment was entered in the Berberian action against Tesseyman for

$37,171.68. On the same day, a writ of execution was issued in that action which was levied upon the furniture and equipment in the Hotel Wolf and the proceeds of the sale of the realty in the hands of Title Company. In response to this levy, on November 20, 1950, Title Company paid the Sheriff of the County of San Joaquin, out of the proceeds of the sale then in its hands, the sum of $10,100, leaving a balance of the proceeds in its possession in the amount of $9,273.31. It should also here be said that the Sheriff sold the personal property in the hotel, at a sale under said writ of execution, for $10,000, which was paid or credited to the Berberian creditors.

The Berberian judgment was subsequently, for a valuable consideration, on the 16th day of November, 1950, assigned to the Casa Hamilton Corporation, the inter-pleaded cross-defendant here, and the latter has ever since been and now is the owner thereof.

On October 26, 1950, this action was commenced by C. A. Sohn, as the assignee of Tesseyman, alleging an indebtedness of Title Company to Tesseyman in the sum of $148,836.14. Some time thereafter Casa Hamilton Corporation was brought in as a necessary party and the issues were joined in the pleadings thus before the court.

At the trial, the court determined that the payment of $141,626.69 by Title Company to the Beneficiary was proper; as was the payment by Title Company of the sum of $10,100 to the Sheriff of the County of San Joaquin, that there then remained in the hands of Title Company a balance of $9,273.31 which was, by the court, awarded as follows:

To Title Company, as the reasonable fee for services rendered by it in said sale, the sum of $1,461, together with the sum of $223.04, its costs and expenses; to Knight, Boland & Riordan, attorneys at law, $4,500 as their fee, together with $146.99 their costs; to Landels & Weigel, attorneys for Title Company, the sum of $1,000 as their fee; and to Casa Hamilton Corporation the balance of the proceeds of sale under its assigned judgment, after payment of the foregoing, in the sum of $1,942.28, less legal costs incurred in the action; and the costs herein of Title Company. Judgment was entered accordingly. All parties except Tesseyman seemed to be satisfied with said judgment, since he is the only one who has appealed. We are satisfied his appeal is without merit.

The court further found that while the nominal plaintiff and appellant is C. A. Sohn, Tesseyman's assignment to her of his interest in the proceeds of the sale was for collection only. This finding is fully substantiated, and since the name of Sohn does not appear in any of the proceedings leading to the commencement of this action, and since Tesseyman's name does frequently appear, in the interest of clarity only, we shall hereafter refer to Tesseyman as being the appellant.

Appellant complains first that Title Company improperly paid the $141,626.69 to the Beneficiary under the first deed of trust. He contends that said sum was not due at that time and that the sum of $12,163.50, the aggregate amount of unpaid installments, was the total amount then due. He admits Beneficiary had the right to require the immediate payment of the whole sum of principal and interest upon such a default, and that proper statutory notice of default had been given, but he insists that the Beneficiary did not exercise its option to accelerate the payment of the entire amount then unpaid. He argues that the word "obligation" and the phrase "nature of the breach" as used in Section 2924 C.C. are synonymous; that unless the notice of default specifically states the contrary, a declaration that the "nature of the breach" is a failure to pay certain installments, is equivalent to a statement that the "obligation" to be satisfied by the sale is the amount of the unpaid installments, and that, therefore, in the instant case, by filing a notice of default in the form required by the statute, the Beneficiary declared only the sum of $12,163.50 to be due.

We are persuaded such interpretation of the statute is untenable. The cases cited by appellant do not sustain it. Indeed, the cases of Birkhofer v. Krumm, 27 Cal.App. 2d 513, 81 P.2d 609, and Williams v. Koenig, 219 Cal. 656, 659–660, 28 P.2d 351 so cited, hold to the contrary. The notice here given stated: "* * * hereby gives notice that a *breach of the obligation* for which such transfer in trust is security, has occurred, the nature of such breach being the failure to pay monthly installments of principal and interest in the amount of $1,351.50 each month, maturing August 1, 1949, and thereafter, to date hereof, and that the Beneficiary elects to sell, or cause to be sold, the trust property *to satisfy said obligation.*" (Emphasis added.)

[1] It is thus seen the notice sets forth "the nature of the breach", and declares the trust property will be sold to satisfy "the obligation for which the transfer in trust is security", as the statute requires. The *breach* is the failure to meet monthly payments; the *obligation* is the duty to repay the sum loaned, plus interest. The finding of the court that the Beneficiary duly declared the entire principal and interest to be immediately due and payable is supported by the evidence, and we are bound thereby. Consolidated Lumber Co. v. Fidelity etc. Co., 161 Cal. 397, 400, 119 P. 506. Furthermore, there can be no doubt that Tesseyman knew the beneficiary had declared the entire amount of the indebtedness due and payable. He was so informed by the attorney for the beneficiary on March 20, 1950.

[2] Appellant also asserts there is no evidence to support the finding that the sum of $141,626.69 was due the Beneficiary at the time of the sale. In this he is in error. William H. Smith, Secretary of the title company, testified that was the amount due.

[3] The claim is also advanced that the court erroneously directed some of the surplus proceeds to be applied to the payment of the fees and costs and attorneys' fees in connection with the sale of the property in this litigation for the reason, so it is claimed, the evidence is insufficient to show that they were paid. They were, however, found to be reasonable in amount, and were found to have been incurred. That is all that is necessary, and we cannot say the evidence compels a contrary conclusion. T. L. Reed Co. v. Kruse, 220 Cal. 181, 183, 29 P.2d 856; Mitau v. Roddan, 149 Cal. 1, 16, 84 P. 145, 6 L.R.A.,N.S., 275.

[4] Appellant next contends that Title Company had no authority to pay the sum of $10,100 of the surplus proceeds to the Sheriff of San Joaquin County. As we have seen, however, on November 6, 1950, the same day the execution was issued, there was filed in the Berberian action the stipulation for judgment above referred to. This stipulation provided substantially that a judgment should be entered therein for $36,487.18, plus costs, and the same might be satisfied out of personal property and chattels in the hotel and "monies which are presently under attachment in the hands of the California Pacific Title Insurance Co. or its agents." This stipulation was personally signed by Mr. Tesseyman. In conformity thereto the court entered judgment, providing among other things that "this judgment shall be satisfied out of * * * monies belonging to the said defendant and heretofore levied upon under and by virtue of the writ of attachment hereinbefore referred to, in the possession or control of California Pacific Title Insurance Company * * *" The execution was issued on this judgment. There was no attack made upon the judgment in any way and no objection was made to its correctness until long after the $10,100 was paid to the sheriff. This stipulation of Tesseyman that the judgment might be satisfied out of the monies held by the Title Company and sale of personal property was acted upon by the court in entering judgment, was acted upon by the Sheriff in making his levy and disbursing the funds thereunder, and was acted upon by Title Company in paying the monies to the Sheriff. We thus see that Tesseyman's agreement became an executed contract, and he is bound thereby. Civil Code Section 3515; Cathcart v. Gregory, 45 Cal.App.2d 179, 186–188, 113 P.2d 894.

[5] The contention is then made that the writ of attachment in the Berberian action was not properly served. However, the record shows that service of the writ,

addressed to Title Company, was made upon an officer of that company, at his office, at a time when such officer had control of the money. This was a sufficient service. Code Civ.Proc. § 542(6).

In addition to this, it is noted the said stipulation refers to "monies which are presently under attachment, etc." And in any event, plaintiffs specifically agreed at the trial that the *execution* was served on the trustee; and that was the writ under which the $10,100 was paid to the Sheriff.

[6] Another assertion of the appellant is that the Berberian judgment was fully satisfied before the levy of the execution on Title Company. This is on the theory that the judgment was required to be satisfied out of the hotel personal property exclusive of monies, that such property was sold on November 16, 1950, for $10,000 and that the application of this amount on the judgment discharged it. However, in taking this position, he entirely overlooks the portion of the stipulation written in ink therein after it had been typewritten, which provides that the money then in the hands of Title Company, etc., belonging to Tesseyman should also be subject to the writ of execution. We think it clear, the intention of the parties to the stipulation was, the Berberian judgment was to be satisfied, if at all, solely out of the proceeds from the sale of the hotel furnishings *and* the surplus money in the hands of the trustee to which Tesseyman was entitled, and that both sources of funds were to be available for application thereon.

[7] We now come to a consideration of appellant's argument that the United States of America, also one of Tesseyman's creditors, should have been paid this $10,100, instead of the Sheriff of San Joaquin County. But Tesseyman had *especially agreed*, as we have already seen in his stipulation, that the Berberian creditors were to be paid out of proceeds from sale of personalty and these proceeds, and they were precluded from seeking satisfaction of their judgment out of any other assets.

Having reaped the benefit of his stipulation, we are satisfied he is in no position to take a contrary stand at this time. He may have well concluded, upon reflection, that he would have been better off if he had had this money applied on his delinquent income taxes, but he has already agreed otherwise, and said agreement has been executed. The title company was under no legal obligation to pay the United States Government its claim; it was merely the agent of Tesseyman and the Beneficiary. Ainsa v. Mercantile Trust Co., 174 Cal. 504, 510, 163 P. 898; Pacific S. & L. Co. v. North American etc. Co., 37 Cal.App.2d 307, 310, 99 P.2d 355.

The title company was bound to follow the provisions of the contract (stipulation), the deed of trust, and rules of law applicable thereto. Conlin v. Coyne, 19 Cal.App.2d 78, 85, 64 P.2d 1123; Scott v. Security Title Ins. & Guar. Co., 9 Cal.2d 606, 611, 72 P.2d 143, 117 A.L.R. 1049.

[8] There is nothing in the deed of trust, agreement, or any rule of law with which we are familiar, and appellant has pointed to none, which required the title company to pay these delinquent taxes. The provision in the deed of trust which directs the Title Company to pay this surplus "to the person or persons legally entitled thereto" can give him no aid or comfort even in the absence of the stipulation aforesaid. There was here a junior encumbrance, which was eliminated by the exercise of the power of sale, consequently the junior lien attached to the surplus proceeds so that the Berberian creditors (the Sheriff with his writ of attachment) became the "persons legally entitled thereto" as provided in said deed of trust. 18 Cal.Jur. 638, 639, 641; Markey v. Langley, 92 U.S. 142, 152, 23 L.Ed. 701, 705.

[9, 10] However, the equitable principle which transfers the creditors' claim from the foreclosed property to the sale proceeds does not apply where the creditors' lien on the property is unaffected by the sale, and in such case the creditors' right to look to the real estate for security continues. (3 Jones on Mortgages, Section 2483.) And a Federal tax lien upon real property is not eliminated by a sale pursuant to the exercise of a power of sale under a prior deed of trust. Bank of America Nat. T.

& S. Ass'n v. United States, D.C., 84 F. Supp. 387; Metropolitan Life Ins. Co. v. United States, 6 Cir., 107 F.2d 311.

[11] Of course, the Berberian creditors, who had a lien on the real property under their second deed of trust lost this lien on such real property as a result of the sale. Cook v. Huntley, 44 Cal.App.2d 635, 112 P.2d 889.

We see, therefore, the duty of Title Company was to pay from this surplus the Berberian creditors whose lien had been eliminated from the realty, and not the Government, whose lien on the property continued. This it did, thus performing its legal obligation in this respect, *and acting strictly in accordance with Tesseyman's agreement.* In addition to the foregoing, the evidence shows that Casa Hamilton Corporation has subsequently obtained from the United States Government releases of this tax lien on both the real and personal property here involved, by paying the Government the aggregate sum of $5,050.

[12] We now pick up the point urged by appellant, that this $1,942.28 should not have been awarded to Casa Hamilton Corporation, but should have been ordered to be paid to him. We can find no justification for the contention. The property was sold for $161,000. There was paid to the Beneficiary $141,626.69, which left a balance of $19,373.31 in the trustee's hands. There was paid out on execution the sum of $10,100, and awarded to the Title Company's fees and expenses $1,684.04, to Knight, Boland & Riordan, attorneys' fees, $4,646.99, to Landels & Wiegel, attorneys, $1,000, making a total for fees and expenses, the sum of $7,331.03, which, added to the $10,100, equals $17,431.03. Subtracting this sum from the $19,373.31, we have a balance of $1,942.28 left with the trustee for final distribution. In order to determine to whom this should be paid, let us now go back and see what the status of the Berberian judgment is.

It was originally entered in the sum of $37,171.68. There was paid thereon $10,000, plus $10,100, or $20,100, which leaves an unsatisfied balance of $17,071.68. The $1,942.28 is a part of the surplus funds levied on by the Sheriff, and since the unsatisfied portion of the judgment exceeds this sum, and Casa Hamilton Corporation is the owner of the judgment, it is entitled to this balance.

[13] Since some attack seems to be made upon the San Joaquin judgment, we perhaps should here say that that judgment is the one Tesseyman consented to, has long ago become final, and may not here be collaterally attacked. Nielsen v. Emerson, 119 Cal.App. 214, 217–218, 6 P.2d 281; Palace Hotel Co. v. Crist, 6 Cal.App.2d 690, 694, 45 P.2d 415.

[14] In the sum of $141,626.69 claimed to be due to Beneficiary there was included the sum of $1,964.80 paid out as a premium on fire insurance. Appellant contends that this is an overcharge and with this we agree. At the time of the sale of this realty to Casa Hamilton the policy had a cash surrender value of $1,735.02. This policy was turned over to the purchaser, who later cancelled it and received the returned premium. Obviously, the purchaser ordinarily would not be entitled to the gift of this $1,735.02. However, under the circumstances, it makes no difference here, since if the policy had been cancelled and this sum had remained in the hands of the trustee it would have been a part of the surplus from the sale of the realty, and since the unsatisfied judgment of Casa Hamilton, formerly the Berberian judgment, is much more than this sum, Casa Hamilton would be entitled to receive it anyway under the execution and did receive it.

[15] Finally, appellant complains that the findings do not dispose of the issues raised by the various pleadings. While the latter are somewhat voluminous, we think the material issues were found upon, and sustain the judgment. Regarding the court's claimed failure to specifically find in regard to the United States Government being entitled or not entitled to some of this money in satisfaction of Tesseyman's tax bill, we think the findings so adequately dispose of the matter, and a more specific finding thereon would have had to be ad-

verse to him. Therefore, he may not complain. Elliott v. Bertsch, 59 Cal.App.2d 543, 548, 139 P.2d 332; Vaughan v. Roberts, 45 Cal.App.2d 246, 248, 258, 113 P.2d 884; Dunn v. Stringer, 41 Cal.App.2d 638, 646, 107 P.2d 411.

We think the foregoing sufficiently disposes of the appeal. Appellant has written exhaustive briefs, which we have carefully read and considered. We find we are unable to uphold appellant's contentions sufficiently to reverse the judgment, and it is, therefore, affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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124 Cal.App.2d 735

WICE et al. v. SCHILLING et al.

Civ. 19594.

District Court of Appeal, Second District, Division 3, California.

April 26, 1954.

Action by purchasers against vendors for breach of contract and for damages for fraudulent representations, and against exterminator for damages for fraudulent representations. The Superior Court, Los Angeles County, J. A. Smith, J., rendered judgment against plaintiffs, and they appealed. The District Court of Appeal, Parker Wood, J., held that where exterminator, upon request by escrow officer, prepared a certificate, known to be false, stating that premises were free from infestation, exterminator was liable to purchasers who relied on the certificate to their detriment, even though the representation was not made directly to purchasers and even though exterminator was under no duty to issue a certificate.

Judgment affirmed in part and reversed in part.

1. Evidence 🔑77(5)

From fact that vendors failed to produce, in purchasers' action for breach of contract to deliver premises free from infestation and rot and for false representations, escrow officer who had knowledge of certain documents concerning state of infestation, court could infer that officer's testimony would have been unfavorable to vendors.

2. Fraud 🔑58(2, 4)

In purchasers' action against vendors for fraudulent representations and for breach of contract to deliver premises free from infestation and rot, evidence was sufficient to support findings that purchasers did not rely on any representations made by vendors and that vendors made no false representations.

3. Fraud 🔑21

Where exterminator, who had prepared report for previous owner prior to sale and who had done some work on premises, was called upon to furnish, to a person he did not know, a report of the work he had done, exterminator should have known that this report might be relied upon by such person or by other persons in dealings involving the premises.

4. Fraud 🔑58(2)

In purchasers' action against exterminator, who had prepared report upon which purchasers relied to their detriment, for damages for fraudulent representations, evidence supported finding that exterminator, at time he prepared certificate that premises were free from infestation, knew that such was not the case, and that certificate constituted a false representation.

5. Fraud 🔑30

Where exterminator, on request of escrow officer, prepared, for use by a named person he did not know, a certificate falsely representing certain premises to be free from infestation, exterminator was liable to purchaser who relied on the certificate to his detriment, even though the representation was not made directly to the purchaser and even though exterminator was under no duty to issue certificate.

6. Fraud ⚿29

A false representation made by one person with the intention that it shall come to the attention of another person and be acted upon by him, and which is acted upon by him to his injury, gives the person so acting the same right to relief as if the representation had been made to him directly.

7. Fraud ⚿17

Although one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated.

8. Fraud ⚿35

That a purchaser, who had required that termite clearance which vendors had accepted when they purchased premises be included in escrow, endorsed exterminator's report, which was placed in escrow in lieu of the original clearance, did not constitute an approval of false representations in the report nor a waiver of right to recover damages by reason of such representations.

9. Fraud ⚿52

In purchasers' action against exterminator, who had prepared report upon which purchasers relied to their detriment, for damages for fraudulent representations, deed, which was dated before alleged reliance on the representations but which had been sent only to escrow officer and delivered by him to recording officer, was properly excluded, where there was no evidence that purchasers had known thereof.

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Henry C. Rohr, Los Angeles, for appellants.

Harvey L. Silbert and Herbert Glaser, Los Angeles, for respondents Schilling and Greenberg.

Louis Ballenger and Edward B. Olsen, Glendale, for respondent Van Kolken.

PARKER WOOD, Justice.

On March 16, 1949 the plaintiffs and the defendants Schilling and Greenberg agreed to exchange real property. The property to be received by plaintiffs consisted of three apartment buildings at 312–318 East Palmer Street in Glendale. One of the conditions of the exchange, as shown by the escrow instructions, was that said defendants would place in escrow for delivery to plaintiffs "A termite clearance issued by a licensed termite control company." Defendant Van Kolken, a termite exterminator, was doing business as Termite and Structural Pest Control. The first cause of action herein is against defendants Schilling and Greenberg and their alleged agent, defendant Van Kolken, for damages for fraud by reason of their false representations to the effect that said apartment buildings were free and clear of termites. The second cause of action is against defendants Schilling and Greenberg for damages for breach of their contract to convey the property free from visible evidence of termite and dry rot infestation. In a nonjury trial, judgment was for defendants. Plaintiffs appeal.

When the escrow was opened (March 16, 1949) Mr. Schilling asked Mr. Wice if he would accept a "termite clearance" report which had been issued to the Schillings and the Greenbergs a few months previously. Mr. Wice replied that he would be willing to accept the clearance if it was issued within the past four or five months.

On September 4, 1948 Van Kolken issued a termite report on said Glendale property, upon the order of Mr. Cahoon who was then the owner of that property. That report consisted of 11 pages of typewriting and 3 charts—a total of 14 sheets of paper. As to each of the 3 buildings, there was a report regarding its condition, a chart indicating infested areas, a recommendation No. 1, and a recommendation No. 2. The recommendations were on separate sheets of paper. The report specified various parts of the buildings that were infested with subterranean and kaloterme termites, or infected with fungi. Statements in the report were to the effect that termites were infesting, in certain places, the subfloor and floor plates of the buildings, mudsills under two porches, a window casing, ceiling plates and joists, ribbon under roof rafters, rafters, and wood structure of rear porches of one building. Also there were statements therein to the effect that the wood structure in the lower part of a stucco arch was gone due to termites and fungi; that the dirt, in the dirt-filled front and rear cement porches, was against the stucco walls of the buildings, and there was evidence that those areas had been infested with termites; that stucco would have to be removed from a wall of one building, from ceiling to top of wall, to treat termites; and that stucco should be removed from the attic portion of a wall of another building to treat termites.

The recommendations known as No. 1 were as follows: the front and rear porches should be sealed off (where the dirt is against the walls) with a cement wall; remove as much stucco as necessary on walls above ceilings, and as much stucco as necessary at floor levels, and treat termites with arsenic insecticide; remove the infested stucco arch, and stucco the wall; treat all the specified infested areas of the buildings, and the infested ground areas under the buildings, with arsenic insecticide. Under that recommendation the total charge for the work would be $3,158.10. The recommendations known as No. 2 were as follows: treat all the specified infested areas of the buildings with arsenic insecticide; punch holes in stucco and drill holes in wood structure of one ceiling and one attic wall and treat with insecticide; drill holes in subfloor and floor plates and treat with insecticide; pull dirt from mudsill and remove form boards and treat those areas and soil around porches with insecticide. Under that recommendation the total charge for the work would be $795.85. Mr. Cahoon directed Van Kolken to do the work specified in the recommendations No. 2, and the work was completed about November 12, 1948.

Mr. Cahoon sold said property to the Pacific Western Realty Company and an escrow in that transaction was opened at a bank at Sixth Street and Western Avenue, Los Angeles. On November 15, 1948, while that escrow was pending and in accordance with instructions from Cahoon, Van Kolken sent to Cahoon his said termite report, above described consisting of 14 sheets of paper, which included his recommendations Nos. 1 and 2. He sent to that escrow at said time a document, dated November 15, 1948, which stated in part as follows: "To the best of our knowledge the above property [involved here] is now free from termites and fungi, we assume no responsibility for damage or infestation that cannot be reasonably detected without opening concealed areas or timbers. Termite and Structural Pest Control By R. F. Van Kolken."

While that escrow pertaining to the sale by Cahoon to Pacific was pending, Pacific sold the property to the Schillings and Greenbergs, and another escrow, regarding the last-mentioned transaction, was opened at the same bank on September 22, 1948. The escrow instructions in said last transaction stated in part: "Seller [Pacific] will deposit into escrow report of Termite and Structural Pest Control Company dated Sep't. 4, 1948 covering property described herein * * *. Said report has been read, examined by the buyer herein [Schillings and Greenbergs] and approved. No further approval necessary. You are authorized and instructed to pay to Termite and Structural Pest Control Company the sum of $794.95, when you are in receipt of a certificate or statement from the said Termite Company, that the work as outlined in various reports has been completed, from the monies which you hold in escrow #55-4673 [escrow in sale from Cahoon to Pacific]." Defendant Schilling testified that the "report" of September 4, 1948, referred to in his said escrow instructions as a report that he had read and approved, was a group of documents (8 sheets and 3 charts) known as "Exhibit 4" at the trial; and the documents comprising said Exhibit 4 were read by him when he approved them as the termite report. Said Exhibit 4 is a part of the report (of 14 sheets) which Van Kolken sent to Cahoon on November 15, 1948. The parts of said report of Van Kolken which are not in Exhibit 4 are the 3 sheets comprising the three recommendations No. 1, wherein he specified the repairs and treatment for which he would charge $3,158.10. In other words, the termite report in the escrow in the sale by Pacific to the Schillings and Greenbergs was not the whole report which Van Kolken sent to Cahoon in the sale by Cahoon to Pacific,—the recommendations No. 1 (3 sheets) were omitted.

At the bottom of the above-quoted document, dated November 15, 1948, which Van Kolken sent to the Cahoon-Pacific escrow and wherein he stated that to the best of his knowledge the property was free from termites, there appears the following endorsement: "Approved for payment JS. Approved for payt P W Rlty Co By T L G." The initials "JS." appearing thereon were written by defendant Joseph Schilling. Said sum of $795.85 (erroneously referred to as $794.85), which Van Kolken charged for the termite work under the second recommendation of his report, was paid to him on December 19, 1948 from the Cahoon-Pacific escrow.

The escrow in the sale from Pacific to the Schillings and Greenbergs was closed on January 17, 1949, and about two months thereafter the escrow in the present transaction was opened at the same bank which had been the escrow agent in the other two escrows. As above stated, Mr. Wice agreed to accept the "termite clearance" which had been issued to the Schillings and Greenbergs in their escrow with Pacific.

Van Kolken testified that about May 12, 1949 an employee in the escrow department of the bank (where the escrow was pending) called him by telephone and said that "they had copies of Mr. Cahoon's reports on file and that a Mr. Schilling would like to have an outline of the work that had been done there, with a copy of the clearance"; then Van Kolken said, "What do you mean, an outline of the work?"; the employee replied, "The work that you did on the property."; Van Kolken said, "If that is what you want I can get it. I don't know as I will have every thing on the report * * * all the work that had been done. It would take quite a bit of time."; The employee said, "I don't care just how you put it. Just so we get some kind of an outline."; the employee asked him to "make it to Mr. Schilling"; the employee gave him Schilling's address and told him to send it (outline) to the bank; Van Kolken made the document "with Mr. Schilling's name and address on it," and mailed it to the bank. The document was as follows:

"May 14, 1949

"Mr. J. Schilling
"2318 Canyon Dr.

Apartment Houses
"Re: Properties; 312–12G
312H–14–16H
318–18G

"Termite work (treating only) completed on the above property November 12, 1948 was as follows—

"Pulled dirt away from mudsills, removed form boards and treated areas with a sodium of arsenite solution, treated rear of porches 312B–C with a solution of arsenite (sodium), treated Kaloterme termites in attic and substructure with an arsenic insecticide.

* * * * * *

"Copy
"Clearance
"November 15, 1948

"To the best of our knowledge the above property is now free from termites and fungi, we assume no responsibility for damage or infestation that cannot be reasonably detected without opening concealed areas or timbers.

"Termite and Structural Pest Control
"By R. F. Van Kolken
"R. F. Van Kolken"

Mr. Wice testified that about May 16, 1949 the escrow officer showed said document to him, and he (Wice) wrote the following words in the lower left-hand corner of the document: "O.K. G. S. Wice," and he accepted the document as a termite clearance. It is not asserted that the Cahoon termite report was shown to Mr. Wice, or that the portion of the Cahoon termite report known as Exhibit 4, which was in the Pacific-Schilling and Greenberg escrow, was shown to him.

About February 15, 1950, Mr. Wice learned from Mr. Feeley, his manager at the apartments, that termite infestation was there. Mr. Feeley testified that in February, 1950, during his second month as manager, he found that the apartments were full of termites; the doorsills and window casings were "eaten up", and they were like an eggshell; in March, 1950, Van Kolken inspected the property; Van Kolken said that he found a lot of termites, and he had trusted his men but they did not do the job and he believed that the work would have to be done over.

About March 7, 1950, Mr. Wice sent a letter to Van Kolken stating that he wanted Van Kolken to inspect the property and satisfy himself that there "are plenty of termites" in the building, which Wice bought on the basis of the clearance report, and that he expected the property to be cleared of termites in accordance with the report. Thereafter, in a telephone conversation, Van Kolken said he would meet Wice at the property and talk about it. They met there, and at that time Mr. Feeley was present. Mr. Wice testified that Van Kolken said that they had slipped up in doing the work and termites were there, and he was willing to make the correction and eradicate the termites. At a later date, Wice, Van Kolken, and Mr. Bonner, an investigator for the Structural Pest Control Board, were at the property. Mr. Bonner testified that he inspected the property and found termites and termite pellets there; that Van Kolken said he believed that the man who had done the work in certain parts of the attic was dependable and therefore he had not checked his work, and that he (Van Kolken) was willing to go back and treat those parts. Van Kolken testified that he made the statements which Mr. Bonner said he had made; that he also told Mr. Bonner that while the work was being done some pellets had been overlooked because they were in a hard place to get to, and if it would be satisfactory he would remove the pellets which had been overlooked and while there he would treat some new infestation which he (Van Kolken) had found. Van Kolken, as a witness, denied that he had told Wice or Feeley that his men had not done the work right and that it would have to be done over.

The court found as follows: Van Kolken was at no time an agent of the Schillings or Greenbergs. On March 16, 1949 the Schillings and Greenbergs agreed to deposit in the escrow for the benefit of plaintiffs a termite clearance issued by a licensed termite control company. When George S. Wice, Barney Greenberg and Joseph Schilling were at the escrow office, Schilling said that the defendants sellers had a termite clearance which had been issued in an earlier escrow which clearance Schilling and Greenberg accepted when they purchased this property three months earlier. Plaintiffs agreed to accept this clearance or report if it had been made within the past five months. Thereafter an officer of the bank called Van Kolken by telephone and gave him Schilling's name. Van Kolken then mailed to the bank, on May 14, 1949, a document which evidenced a termite clearance for said property that had been issued on November 15, 1948. George S. Wice accepted this document as the termite clearance referred to in the agreement of March 16, 1949 by signing it "O.K. G. S. Wice." Prior to May 14, 1949 Van Kolken did not have any conversation with George S. Wice, or with any of his codefendants, nor was he ever paid anything by any of said parties. Defendants, or any of them, did not represent to the plaintiffs that the property was free and clear of any termites and fungi, and they did not advise the plaintiffs that the termite report they had received was complete or accurate. Plaintiffs did not rely upon any representations of the defendants, or any of them, concerning infestation or lack of infestation of said property by termites or fungi. The defendants and each of them did not make any false statements or representations in connection with the existence of termites on the premises. Plaintiffs did not rely upon any representation of the defendants in accepting the termite report endorsed "O.K. G. S. Wice". The defendants owned the property less than three months prior to March 16, 1949, and the defendants Schilling and Greenberg at no time had any knowledge that the premises were infested or infected with termites or fungi. As to Van Kolken, there was no privity of contract between him and the plaintiffs. Van Kolken had not been informed by the bank officer with reference to the reason for which his clearance was to be used.

[1, 2] As to the Schillings and Greenbergs, the court found, as above stated, that they did not represent to the plaintiffs that the property was free and clear of termites and fungi and did not advise them that the termite report they had received was complete or accurate; that none of them made any false representation in connection with the existence of termites on the premises. The agreement between Wice and Schilling (who attended to business for Greenberg) was that Wice would accept the "termite clearance" report which had been issued to the Schillings and Greenbergs. Said "clearance" and report were not shown to him. Those documents included the full report and recommendations that were made to Cahoon, except recommendation No. 1. The report was in another escrow file in the same bank, and presumably was available. There was no explanation at the trial as to the reason the report was not shown to Wice or that a copy thereof was not placed in the Wice escrow. There was no explanation as to the reason the escrow officer was not called by defendants to state the circumstances regarding the failure to exhibit that report, and to explain the reason an "outline of work done [6 lines of typewriting]," rather than a copy of the full report (14 sheets), was placed in the Wice escrow. Presumably the escrow officer was available as a witness. The court could have inferred from defendants' failure to present him as a witness that his testimony would have been unfavorable to defendants. Under the circumstances here, the court could have found that the full report was withheld and the "outline" was filed in lieu thereof as a part of a scheme to deceive plaintiffs as to the condition of the apartments and to obtain their approval of the so-called clearance. It would have been reasonable to conclude that if the report as to the condition of the apartments had been shown to Wice he would not have approved the statement of Van Kolken that to the best of his knowledge the property "is now free" of termites and fungi. Even though there was such unexplained and questionable conduct in connection with the escrow herein, it cannot be said that the evidence was not legally sufficient to support the findings in favor of the Schillings and Greenbergs.

[3, 4] As to Van Kolken, the court found, among other things, that the bank officer called him by telephone and gave him Schilling's name, and did not inform him concerning the use that was to be made of the clearance. There was no further finding as to the circumstances under which that telephone call was made or that name was given. There was no finding that Van Kolken did not know that said document which he addressed to Schilling and designated "Copy Clearance" was not to be relied upon by Schilling or someone in a pending escrow or transaction in which Schilling was a party. Van Kolken testified that he did not know Schilling; that when he (Van Kolken) was preparing the original termite report, Cahoon said that he was trading the apartments to a syndicate; later, when the bank officer stated that Schilling would like to have an outline of the work and a copy of the clearance, he (Van Kolken) took it for granted that Schilling was one of the syndicate. Van Kolken did not inquire regarding the identity of Schilling or the purpose for which the outline or the copy was to be used. It thus appears that Van Kolken knew or should have known that the document (Exhibit 1) which he sent to the bank might be relied upon by Schilling as a member of the syndicate, or by him as a seller after having purchased the apartments from Cahoon, or by him and other persons with whom he might be transacting business pertaining to the apartments. Said document which he sent to the bank was one sheet of paper containing two paragraphs of typewriting. The first paragraph was a purported outline of the work he had done in November, 1948, under recommendation No. 2 of the Cahoon report; and the second paragraph was a purported copy of the document dated November 15, 1948 (Exhibit D—referred to

by Van Kolken as a "clearance"), which he had sent to the bank in November in connection with the Cahoon-Pacific escrow, and in which he stated that to the best of his knowledge the property was free of termites and fungi. In November, 1948, when Van Kolken made and sent said document (Exhibit D) to the Cahoon-Pacific escrow, he knew that a large portion of the work which he had recommended should be done (recommendation No. 1 in the Cahoon report) had not been done. In recommendation No. 1 of the Cahoon report he specified work that should be done at a cost of $3,158.10. That work was not done, however, because Cahoon adopted recommendation No. 2 of the report. The work specified in recommendation No. 2 was done at a cost of $795.85. The difference between the amount of $3,158.10, which he proposed to charge for necessary work to be done under recommendation No. 1, and the amount of $795.85, which he charged for work done under recommendation No. 2, is $2,362.25. Said difference indicates the extensive amount of work which, according to the opinion of Van Kolken, should have been done in November, 1948. Inasmuch as Van Kolken knew that such a substantial amount of termite and fungus work had been omitted, it seems clear that he knowingly made a false certificate or representation in Exhibit D, wherein he said that to the best of his knowledge the property "is now free from termites and fungi." His recommendations, and his original and full report as to the condition of the buildings, show that said statement was not the best of his knowledge. Of course, he intended that Cahoon and the other party or parties to the Cahoon escrow should rely upon his said statement or certificate which he sent to that escrow. The document (Exhibit 1) which he sent to the bank six months later, dated May 14, 1949 and addressed to Schilling, contained a purported copy of the false statement he had sent to the Cahoon escrow. As above stated, it appears that under the circumstances here he knew or should have known that Schilling or other persons transacting business with Schilling might rely upon said statement. That part of Exhibit 1 was labeled by him as "Copy Clearance". Furthermore, the first paragraph of said Exhibit 1, consisting of 6 lines of typewriting, was only a purported outline of the work he had done—it did not purport to include any part of the report and recommendations, consisting of 14 sheets of paper, wherein he had reported as to the condition of the buildings and had recommended methods of correcting those conditions.

[5, 6] Respondent Van Kolken argues that there was no privity of contract between him and the plaintiffs; that since the contract regarding the termite and fungus report was between Cahoon and Van Kolken and since no representation was made by Van Kolken to Wice, there was no basis for an action for damages by plaintiffs Wice. The first cause of action herein was not for breach of contract but was a cause of action in tort for damages for fraud by reason of false representations. A false representation made by one person with the intention that it shall come to the attention of another person and be acted upon by him, and which is acted upon by him to his injury, gives to the person so acting the same right to relief as if the representation had been made to him directly. See Crystal Pier Amusement Co. v. Cannan, 219 Cal. 184, 188, 25 P.2d 839, 91 A.L.R. 1357; Strutzel v. Williams, 109 Cal.App.2d 512, 515, 240 P.2d 988. In the Crystal Pier case, supra, the defendants who were pier builders, agreed to build a pier for the Crystal Pier Amusement Company and to furnish creosoted piling of a certain quality. After the pier was constructed, the title thereto was transferred to the Crystal Pier Holding Company, which proceeded to carry out the original project of building certain structures on the pier, including a ballroom. Later the Holding Company discovered that the piling had not been creosoted but had been treated with an inferior substance. The action therein was by the Amusement Company and the Holding Company for damages for false representations, and the defendants contended that the representations upon which recovery was sought were made to the Amusement Company and not to the Holding Company;

that the Holding Company had no cause of action because no representations were made to it, or relied upon by it, in connection with the building of the ballroom. It was said therein, 219 Cal. at page 188, 25 P.2d at page 841, "In the instant case we may say that the representations were reasonably intended to be relied upon by such persons as were concerned with the construction of the pier *and its improvements*, for without the ballroom and other such structures, the pier would be useless; and when, as appears here, those persons (the two corporations) actually did through their officers [some of whom were officers in both companies] receive and rely upon the representations, there can be no valid objection to recovery by each." In the present case, it may be said that the representations in Exhibit 1 herein were intended to be relied upon by such persons as were transacting business with Schilling in connection with the apartments. The findings herein that Van Kolken was not an agent of the Schillings or Greenbergs, that Van Kolken did not have any conversation with Wice, and that there was no privity of contract between Van Kolken and plaintiffs, were not sufficient findings to support the judgment in favor of Van Kolken. The findings herein that Van Kolken did not represent to the plaintiffs that the property was free and clear of termites and fungi, that Van Kolken did not make any false representations in connection with the existence of termites on the premises, and that plaintiffs did not rely upon any representations of Van Kolken concerning infestation are not supported by the evidence.

[7] Although Van Kolken may not have been under a duty to submit a statement in response to the request of the escrow agent, he did undertake to comply therewith. As stated in Rogers v. Warden, 20 Cal.2d 286, at page 289, 125 P.2d 7, 9, "[A]lthough one may be under no duty to speak as to a matter, 'if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure.'"

[8] The endorsement, "O.K. G. S. Wice," on the so-called clearance did not constitute an approval of false representations, nor did it constitute a waiver of a right to recover damages by reason of such representations.

[9] At the oral argument on appeal, defendant Van Kolken made a motion for permission to file, as additional evidence, a photostatic copy of the grant deed whereby the Schillings and Greenbergs conveyed said property to plaintiff Marian Lois Wice. Van Kolken asserts that said copy of the deed is conclusive evidence that appellants were not induced to complete the transaction by reason of reliance on Exhibit 1 (the alleged clearance), since said copy will show that the deed was recorded on May 13, 1949, which was one day before Van Kolken mailed Exhibit 1 to the escrow agent and, of course, was before appellants could have seen the Exhibit. The deed was sent to the recorder by the escrow agent, and there is no evidence that plaintiffs or either of them actually knew it had been recorded or delivered to the recorder's office for recording prior to the time Mr. Wice saw Exhibit 1. The motion for permission to file the deed is denied.

The judgment is affirmed as to defendants Schilling and defendants Greenberg. Judgment is reversed as to defendant Van Kolken.

SHINN, P. J., concurs.

VALLÉE, J., did not participate.

124 Cal.App.2d 813

BARES v. CITY OF PORTOLA et al.

Civ. 8419.

District Court of Appeal, Third District, California.

April 28, 1954.

Hearing Denied June 23, 1954.

Action by general contractor against city and city council for amounts alleged to be due contractor for labor and materials allegedly furnished in excess of requirements of sewer system improvement contract. The Superior Court, Plumas County, Macmillan, J., sitting without jury, entered judgment denying contractor recovery, and contractor appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to sustain trial court's findings that items in question were not in excess of performance required under contract and that contractor, instead of relying upon plans, specifications, surveys, drawings, cuts or profiles prepared by city engineer, examined location of proposed work and assumed all responsibilities for errors and omissions in the plans, etc.

Judgment affirmed.

1. Appeal and Error 🔑931(1)

All reasonable inferences must be indulged in in support of trial court's findings.

2. Municipal Corporations 🔑374(4)

In action by general contractor against city and city council for amounts allegedly due contractor for labor and materials allegedly furnished in excess of requirement of sewer system improvement contract, evidence was sufficient to sustain trial court's findings that items in question were not in excess of performance required under contract and that contractor, instead of relying upon plans, specifications, surveys, drawings, cuts or profiles prepared by city engineer, examined location of proposed work and assumed all responsibilities for errors and omissions in the plans, etc.

3. Municipal Corporations 🔑360(2)

Even if changes in work to be done under sewer system improvement contract were ordered by city engineer, failure of contractor to obtain authorization for extra work or change from city council in accordance with contract would preclude contractor from obtaining compensation for any extra work or change.

Worthington, Park & Worthington, San Francisco, for appellant.

Winslow Christian, Portola City Atty., Loyalton, for respondents.

SCHOTTKY, Justice.

Appellant, a licensed general contractor doing business as Ted Bares Construction Company, was the successful bidder for the job of constructing certain sewerage system improvements for respondent City of Portola. Plans and specifications had been prepared and furnished to appellant and other prospective bidders when bids were solicited by respondent city. Upon the acceptance of appellant's bid, the parties entered into a written contract.

Appellant's bid, which was submitted to the city, contained the following provisions:

> "The undersigned [appellant] has examined the location of the proposed work and is familiar with the plans and specifications and the local conditions at the place where the work is to be done.
>
> * * * * * *
>
> "The undersigned understands that the quantities as set forth under the foregoing units are approximate only and are for the purpose of comparing bids and fixing the amount of bonds and agrees that these quantities may be increased or decreased, or the relative amounts of the various items varies without claim for damage or loss of anticipated profit, and that payment will only be made on the basis of the actual quantities of work performed."

The specifications, which are a part of the contract, provide in part as follows:

> "The City reserves the right to make alterations by addition to or omission from the contract, specifications or drawings, which change or modification shall in no way affect or make void the contract. The difference in cost of the work affected by such change will be added to or deducted from the amount of said contract price, as the case may be, by a fair and reasonable valuation, which shall be determined in one or more of the following ways:

* * * * * *

> "* * * *No extra work shall be performed or change be made except upon a written order from the Engineer pursuant to authorization by the City Council stating that the extra work or change is authorized, and no claim for an addition to the contract sum shall be valid unless so ordered."* (Italics added.)

The contract, itself, provides:

> "That said Contractor agrees to receive and accept as full compensation for furnishing all materials and for doing all the work embraced and contemplated in this agreement the prices as set forth in the proposal submitted to the City Council of the City of Portola on the ——— day of ———, 1949, and the true copy thereof hereto attached; also, for all loss or damage arising out of the nature of said work, or from the action of the elements or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work until the acceptance thereof by the Owner; and for all risks connected with the work, and for well and faithfully completing the work and the whole thereof, in the manner and according to the said plans and specifications and the requirements of the Engineer under them, to-wit: The prices as set forth in the Proposal for —* * *."

Appellant admitted that he was familiar with the provisions set forth above.

The contract was entered into on or about July 25, 1949, and appellant commenced the work on or about September 19, 1949, and continued to work on the job until July 15, 1950, when it was completed. Respondent city accepted the completed job on September 13, 1950.

It appears from the record that as the work progressed there were deviations from the plans, and certain difficulties were encountered because of the location of underground lines which were not correctly shown in the plans. Appellant testified to the following items as exceeding the performance required of him under the contract or as involving additional expense due to errors in the plans or specifications: (1) appellant was required by the city engineer to abandon, backfill and relocate a ditch when appellant, in excavating, struck a water line which was incorrectly shown in the plans (cost: $225); (2) in the area near the Western Pacific roundhouse, appellant was required by the city engineer to dig certain ditches deeper than was indicated in the plans (cost: $5,840); (3) appellant encountered unexpected difficulties in installing five manholes, owing to interference from other lines which were incorrectly shown in the plans (cost: $250); (4) in installing seven other manholes, appellant was required to excavate to greater depths than those shown in the plans (cost: $440); (5) appellant was required by the city engineer to backfill a ditch which exposed a city water line not shown in the plans, the backfilling being done to protect the line from freezing during the winter months and it being necessary to re-dig the ditch in the spring (cost: $400); (6) appellant was required by the city engineer to dig another ditch (along Main Street) deeper than was indicated in the plans (cost: $365); and (7) appellant was required by the specifications to order more pipe, not readily resalable, than was actually used on the job and paid for by respondent city (cost: $147.86). The amount shown as "cost" in connection with each of the above items was the actual cost or a reasonable charge, according to the uncontradicted testimony of appellant. The total of these amounts is $7,667.86.

A dispute having arisen as to the amount due appellant, appellant commenced an action against respondents City of Portola and City Council of City of Portola to recover the sum of $10,715.51 alleged to be due appellant for labor and materials furnished in performance of the contract. Appellant in his brief states that respondent city paid $3,047.66 of that amount, leaving a disputed balance of $7,667.85. This is the total of the amounts claimed for the seven items specified above, as set out in the third to the ninth causes of action, inclusive, in appellant's complaint. The first and second causes of action show different amounts, the first being a common count for materials furnished and services rendered, and the second being an action on the contract for the contract price, and both showing a total claim of $37,996.50 (apparently including the seven amounts), less a payment of $27,428.85, leaving a balance of $10,567.65, and the latter cause of action also admitting an additional tender by respondent city of $3,047.65 as final payment under the contract. It appears that the city did make progress payments totaling $27,428.85, and a final payment of $3,047.65, or total payments of $30,476.50. However, in view of appellant's statement we may assume that the only amounts now in dispute are those claimed for the seven items specified above.

The case was tried before the court, sitting without a jury, and the trial court found that the items in question, hereinbefore enumerated, were not in excess of the performance required of appellant under the contract, and found further that in making his bid appellant did not rely upon the plans, specifications, surveys, drawings, cuts or profiles prepared by the city engineer, but instead examined the location of the proposed work and assumed all responsibility for errors and omissions in the plans, etc. In accordance with said findings judgment was entered denying appellant any recovery, and this appeal is from said judgment.

Appellant outlines the issues upon this appeal as follows:

> "There are no factual issues to be decided by this Court because the evidence of the plaintiff stands undisputed. * * *
>
> "The only issues before the Appellate Court are of a legal character which may be summarized as follows:
>
> "I. May the trial court arbitrarily reject the uncontradicted testimony of one party where it is reasonable and is supported by documentary evidence and other facts?
>
> "II. Is the City liable for services performed by a contractor at the request of its engineer above the original contract amount?"

The record shows that during the course of the work the city engineer (Kennedy) and/or his assistant (Manlove) drove offset stakes and gave appellant written cut-sheets designating, from point to point, the depths to which the various ditches should be dug for the purpose of laying pipe. The specifications provide that all lines and grades will be given by the engineer. The cut-sheets are in evidence and hardly can be considered written orders covering a change in work. Appellant also had a scale map prepared which shows the excavations as indicated by the plans, and also as actually made by appellant. The evidence shows, and the court so found, that the work involved in appellant's first six claims (specified above) was performed by appellant, but the court also found that this was work required of appellant in his performance of the contract, that the city engineer was not negligent in the matter, that the $30,476.50 paid to appellant was payment in full under the contract, and that appellant was not entitled to any of the additional amounts claimed.

Appellant testified that it was customary in a job of this nature to make changes during the course of the job, and gave the following testimony on cross-examination:

> "[Mr. Keane]: Q. Now, at the time this extra work was ordered as you have testified, did you ever get any authority in writing from the engineer? A. We have the cut sheets.
>
> "Q. Aside from that? A. No, that is right.
>
> "Q. Did you ever get any authorization by the City Council? A. I have never had authorization from a city council, in this particular job, or any other job.
>
> * * * * * *
>
> "Q. According to the notice of completion filed by the City of Portola the job was accepted on the 13th day of September, 1950. And according to my correspondence the first intimation that the City had as to any protest as

to the amount due you was the 9th of November, 1950, in a letter dated on that date, from Worthington, Park, and Worthington. Now, if those dates are correct, and I understand counsel is stipulating they are, why is it you waited until after the job was completed before calling attention to the extra compensation? A. We expected the engineer to make the proper adjustments on his own.

"Q. But you knew the provisions of the contract setting up your remedies in the event you were doing work not called for by the contract, did you not? A. That is true.

"Mr. Worthington: There is no time specified, counsel.

"Mr. Keane: No, but it states that no extra work shall be performed or change be made except upon a written order from the engineer pursuant to authorization by the City Council.

"Q. Why did you not insist upon it at that time, that such authorization be given you? A. It took us a little time to prepare these maps and figures.

* * * * * *

"Mr. Keane: Q. The question was, why, before you did this extra work, that you believed was outside of the contract, did you not insist upon some sort of written authorization? A. We felt we had it in our cut sheets, that is all we have on many a job. You follow this and complete the job and then proper adjustments are made; that is the usual procedure. And where fairness is manifested by parties concerned, there is no difficulty.

"Mr. Keane: I move to strike that last as not responsive.

"The Court: The latter part may go out.

* * * * * *

"Mr. Keane: Q. During all this time that these changes were ordered did you realize then there must have been some error in the plans and specifications? A. I certainly did.

"Q. And at that time you did not ask to be relieved of your obligations under the contract? A. That isn't normal procedure.

"Q. You did not ask for relief? A. We did not.

"Q. Did you at any time ask to make a new contract with the City of Portola? A. That was not indicated in this case either.

"Q. You never did? A. We did not.

"Q. In other words, you chose to stand on this particular contract? A. We chose to rely on the fairness of the engineer involved."

On redirect examination appellant testified that if he had demanded written authorization every time the engineer handed him a cut-sheet covering a change in depth, the job would have had to be shut down, and this would have been contrary to normal procedure.

[1] Appellant attacks the court's finding that the items in question were not in excess of the performance required of him under the contract, and also the finding that in making his bid appellant did not rely upon the plans, specifications, surveys, drawings, cuts or profiles prepared by the city engineer, but instead examined the location of the proposed work and assumed all responsibility for errors and omissions in the plans, etc. Appellant argues that his uncontradicted testimony showed that he relied solely upon the plans and drawings in making his bid and that, therefore, the work for which additional compensation is claimed was not covered by the contract. However, the rule is well settled that all reasonable inferences must be indulged in in support of the findings, Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689, and in the instant case appellant's failure, during the progress of the work, to avail himself of the contract provisions for extra compensation, or even to suggest (until several weeks after the completed job had been accepted) that additional compensation was owing for the work in question, certainly supports an inference that he, himself, did not consider the work to be in excess of that required by the contract. His bid expressed his understanding that the quanti-

ties were only approximations, and his testimony shows that changes were customary in a job of this nature. And as this court said in Norgard v. Estate of Norgard, 54 Cal.App.2d 82, at page 89, 128 P.2d 566, at page 569:

> "The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for doing so. Davis v. Judson, 159 Cal. 121, 113 P. 147."

See, also, Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868. In Davis v. Judson, 159 Cal. 121, at page 128, 113 P. 147, at page 150, the court said:

> "It is insisted by appellants that this testimony of Wilson stood uncontradicted, and that the court had no right arbitrarily to reject it and find to the contrary.
>
> "While it is the general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted by the court as proof of the fact, this rule has its exceptions. The most positive testimony of a witness may be contradicted by inherent improbabilities as to its accuracy contained in the witness' own statement of the transaction, or there may be circumstances in evidence in connection with the matter, which satisfy the court of its falsity. The manner of the witness in testifying may impress the court with a doubt as to the accuracy of his statement, and influence it to disregard his positive testimony as to a particular fact, and, as it is within the province of the trial court to determine what credit and weight shall be given to the testimony of any witness, this court cannot control its finding or conclusion denying the testimony credence, unless it appears that there are no matters or circumstances which at all impair its accuracy."

Respondents in reply contend that the work performed by appellant was either covered by the contract, in which event it was to be paid for at the agreed contract price, or it was extra work, in which event any claim for extra compensation is barred by appellant's failure to obtain the written authorization required by the contract.

The court found that the work performed and materials furnished by appellant were covered by the contract and that plaintiff (appellant) "did agree to receive and accept the sum of $30,476.50 as full compensation for furnishing all materials and for doing all the work embraced and contemplated in said contract and for all loss or damage arising out of the nature of said work or from the action of the elements or from any unforeseen difficulties or obstructions which may arise or be encountered in the prosecution of the work until the acceptance thereof by the owner; and for all risks connected with the work, and for well and faithfully completing the work and the whole thereof, in the manner and according to the plans and specifications and the requirements of the engineer thereunder." The court further found that under the written agreement "it was provided that no extra work shall be performed or change be made except upon a written order from the engineer, pursuant to the authorization by the City Council stating that the extra work or change is authorized and no claim for an addition to the contract sum shall be valid unless so ordered. That at no time was there a written order made by Clyde C. Kennedy, the engineer, pursuant to authorization by the City Council of the City of Portola, stating that extra work or change be made and by such written order authorized."

[2, 3] We are satisfied that the record amply supports the findings and judgment. Even if appellant were correct in his contention that the so-called changes were ordered by the city engineer, it is clear that the specifications, which are a part of the contract, provided that "no extra work shall be performed or change be made except upon a written order from the Engineer pursuant to authorization by the City Council stating that the extra work or change is authorized, and no claim for an addition to the contract sum shall be valid unless so ordered." If appellant intended

to seek compensation for any extra work or change, he should have proceeded to get the necessary authorization in accordance with the provisions of the contract. The purpose of such provisions is clearly to permit the City Council to have control over the project and its cost, as otherwise a municipality which had voted a certain amount for a public improvement might find itself obligated to pay an amount greatly in excess of the contemplated cost of the improvement.

No other points raised require discussion.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SHENK and SCHAUER, JJ., dissenting.

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124 Cal.App.2d 802

PEOPLE v. ROLL.

Civ. 19784.

District Court of Appeal, Second District, Division 3, California.

April 28, 1954.

Petition for writ of mandate to compel district attorney to deliver to the state moneys seized by district attorney in his official capacity as money offered for distribution in violation of Penal Code provisions relating to lotteries. The Superior Court of Los Angeles County, Samuel R. Blake, J., rendered judgment denying the writ, and petitioner appealed. The District Court of Appeal, Parker Wood, J., held that prior to final adjudication of a forfeiture under Penal Code, § 325, district attorney was under no legal duty to deliver to state money seized as money offered for distribution in violation of lottery laws.

Judgment affirmed.

1. Lotteries 🔑19

Prior to final adjudication of a forfeiture, district attorney was under no legal duty to deliver to state money seized by him in his official capacity as money offered for distribution in violation of Penal Code provisions relating to lotteries and held by district attorney awaiting final adjudication of claim and delivery actions brought against him for return of the money. Government Code, § 26521; Pen.Code, § 325.

2. Lotteries 🔑19

Statute providing for forfeiture of money offered for distribution in violation of Penal Code provisions relating to lotteries contemplates that a forfeiture must be judicially determined and offer of money for distribution in violation of lottery laws does not operate as automatic forfeiture of such money. Pen.Code, § 325.

3. Lotteries 🔑19

Final judgment in claim and delivery action against district attorney that plaintiff was not entitled to recover any of money seized by district attorney in his official capacity as money offered for distribution in violation of Penal Code provisions relating to lotteries would be in practical effect the same as if a forfeiture of such money had been declared in an action against claimant. Pen.Code, § 325.

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Edmund G. Brown, Atty. Gen., Edward Sumner, Deputy Atty. Gen., for appellant.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Deputy County Counsel, for respondent.

Morris Lavine, Los Angeles, amicus curiae.

PARKER WOOD, Justice.

The People of the State of California, represented by the Attorney General, sought a writ of mandate to compel the District Attorney of Los Angeles County to deliver to the State of California the sum of $24,990.91 which the district attorney, in his official capacity, had seized as money that had been offered for distribution in violation of provisions of the Penal Code relating to lotteries. The writ was denied, and the People appeal from the judgment.

The question is whether the district attorney was under a duty enjoined by law to deliver the money to the State for deposit in the state treasury.

Section 325 of the Penal Code provides: "All moneys and property offered for sale or distribution in violation of any of the provisions of this chapter [pertaining to lotteries] are forfeited to the state, and may be recovered by information filed, or by any action brought by the attorney-general, or by any district attorney, in the name of the state. Upon the filing of the information or complaint, the clerk of the court, or if the suit be in a justice's court, the justice, must issue an attachment against the property mentioned in the complaint or information, which attachment has the same force and effect against such property, and is issued in the same manner as attachments issued from the district courts in civil cases."

Appellant argues to the effect that since section 325 of the Penal Code provides that moneys offered for distribution in violation of the lottery provisions of the Penal Code "are forfeited to the state," and since section 26521 of the Government Code [1] places a duty upon the district attorney to prosecute forfeiture actions, the moneys should have been delivered to the State.

Respondent argues to the effect that said section 325 does not provide for an automatic forfeiture to the State, and that until the right of the State to the possession of the moneys has been adjudicated in a proceeding provided for in said section 325, no duty devolves upon him to turn the money over to the State.

The money was seized by deputies and agents of the district attorney on February 3, 1949, at the "Club Algiers," and at that time one Reynolds, who was the manager of the club, was arrested upon charges of violating certain sections of the Penal Code regarding lotteries. The asserted violations occurred in the presence of the arresting officers. The money was seized as evidence in connection with the charges. Thereafter, the grand jury indicted Reynolds upon charges which included conspiracy to violate certain sections of the Penal Code regarding lotteries. On June 24, 1949, Reynolds was convicted of conspiracy to violate said sections as charged in the indictment.

On May 19, 1949, one Kersh, who was the owner of the club, filed a claim and delivery action against the district attorney wherein he sought recovery of $6,900 of the $24,990.91.

On December 17, 1951, the attorney general filed the petition herein for a writ of mandate compelling the district attorney to deliver the $24,990.91 to the State.

On January 31, 1952, Reynolds filed a claim and delivery action against the district attorney, alleging that he (Reynolds) was the owner and entitled to the possession of said $24,990.91.

Said three proceedings were consolidated for trial and were tried in July, 1952. The two claim and delivery actions were tried by a jury, and the mandate proceeding was determined by the judge after the verdicts of the jury were returned.

Kersh obtained judgment for the return of $6,900, and no appeal was taken therefrom. In the Reynolds' case, judgment was that Reynolds was not entitled to recover any of the money. Said judgment was affirmed on appeal. Reynolds v. Roll, 1954, 122 Cal.App.2d 826, 266 P.2d 222. (Reynolds' application for a stay of judgment to permit him to petition the Supreme Court of the United States for a writ of certiorari was granted by this court on April 20, 1954.) In the present proceeding, as above stated, the petition for a writ of mandate requiring the district attorney to deliver the money to the State, was denied.

[1] It thus appears that, at least until Reynolds was convicted on June 24, 1949, the district attorney held the money as evidence pending the trial of the criminal charges. It also appears that on May 19, 1949, prior to the time of the conviction, Kersh had sued the district attorney for the

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[1] Section 26521. "The district attorney shall defend all suits brought against the State in his county or against his county wherever brought, and prosecute all recognizances forfeited in the courts of record and all actions for the recovery of debts, fines, penalties, and forfeitures accruing to the State or his county."

return of part of the money, and that that action was pending when the present action was filed (December 17, 1951). About one and one-half months thereafter, Reynolds sued the district attorney for all the money. When the present action was decided by the trial judge in July, 1952 (as one of the cases consolidated for trial), the claims of Kersh and Reynolds were of course still pending, since the judgments in those cases were not final. The judgment in favor of Kersh for $6,900 of said amount became final sixty days after the entry thereof, since no appeal was taken. The judgment against Reynolds was affirmed on appeal in January, 1954, and of course during the pendency of the appeal that judgment was not final. In other words, it appears that the district attorney was holding the money either as evidence in the criminal case or to await a final adjudication of a claim or claims for the return of the money. In view of the various claims made for the return of the money, the district attorney was not in a position, prior to a final adjudication of those claims, to deliver the money to anyone without assuming the risk of being required eventually to return a part or all of said amount from his personal funds. At the time of filing the present action, or at the time of trial, the district attorney was not under a duty enjoined by law to deliver the money to the State.

[2] Although said section 325 of the Penal Code states that moneys offered for distribution in violation of sections relating to lotteries are forfeited to the State, that provision does not mean that such offer for distribution, ipso facto, operates as a forfeiture. Said section contemplates that a forfeiture must be judicially determined. The section provides that the moneys "are forfeited to the state, and may be recovered by information filed, or by any action brought * * * in the name of the state." In People v. Grant, 52 Cal.App.2d 794, at page 799, 127 P.2d 19, at page 22, it was said: "'If the statute which provides for the forfeiture authorizes the proper officer to seize the thing named, or if a right to sue for the violation of the statute is given to anyone, title does not vest *ipso facto* by the prohibited act being done, but relates only to the time of seizure or to adjudging of the forfeiture in a suit begun. * * *'" In People v. Grant, supra, it was also said in 52 Cal.App.2d at page 800, 127 P.2d at page 23: "A holding that section 325 of the Penal Code does not require the bringing of an action, or of a special proceeding of a civil nature, *for a forfeiture,* would be sheer fiat." In People v. Broad, 216 Cal. 1, at page 3, 12 P.2d 941, at page 942, which involved a forfeiture of an automobile, it was said: "Even where, as here, the statute declares that a forfeiture takes place at the time of the commission of the offense, such forfeiture is not fully and completely operative and effective, and the title of the state is not perfected until there has been a judicial determination."

[3] There was no adjudication of a forfeiture in any proceeding against Reynolds, but the judgment in the action which Reynolds brought for the return of the money was a determination that he was not entitled to possession of the money because his claim was based upon an illegal transaction and under such circumstances the court should not assist him. Since the result of the adjudication in the case commenced by Reynolds is in practical effect the same as if a forfeiture were declared in an action against him, it would seem that when and if that adjudication becomes final the district attorney should deliver to the State the remainder of the money after deducting the amount of the Kersh judgment. As above stated, there was no legal duty on the part of the district attorney, prior to or at the time of the trial herein, to deliver the money to the State.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

124 Cal.App.2d Supp. 904

PEOPLE v. COLE.

Cr. A. 18.

Appellate Department, Superior Court,
San Bernardino County,
California.
April 26, 1954.

Defendant was convicted in the Municipal Court of San Bernardino, Judicial District, of violation of provision of Vehicle Code relating to speeding, and he appealed. The Appellate Department of the Superior Court, Coughlin, P. J., held that whether a speed of between 75 and 80 miles an hour in a fifty-five miles per hour speed zone was, under the condition prevailing, greater than was reasonable or prudent or a speed endangering the safety of persons or property, within contemplation of the basic speed law which, if shown by defendant not to have been violated, prevents violation of speed limit from being prima facie unlawful, was a question of fact to be determined by the trial court in the light of the evidence and trial judge's judgment as to rate of speed which an ordinarily prudent person would drive under the circumstances prevailing.

Judgment affirmed.

Automobiles ⚿245(40)

Whether a speed of between 75 and 80 miles an hour in a fifty-five miles per hour speed zone was, under the condition prevailing, greater than was reasonable or prudent or a speed endangering the safety of persons or property, within contemplation of the basic speed law which, if shown by defendant not to have been violated, prevents violation of speed limit from being prima facie unlawful, was a question of fact to be determined by the trial court in the light of the evidence and trial judge's judgment as to rate of speed at which an ordinarily prudent person would drive under the circumstances prevailing. Vehicle Code, §§ 510, 511.

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Lowell E. Lathrop, Dist. Atty., Edward F. Taylor, Deputy Dist. Atty., Robert Bierschbach, Asst. Dist. Atty., San Bernardino, for plaintiff and respondent.

Sydney Charles Cole, in pro. per.

COUGHLIN, Presiding Judge.

This is an appeal from a judgment convicting the defendant of a violation of Section 511 of the California Vehicle Code. On December 2, 1953, at about 4:30 o'clock in the afternoon, the defendant was driving a 1953 Buick convertible in a southerly direction along U. S. Highway 66 when he was observed by a traffic officer near the Wrightwood cut-off. The highway in question is a paved, four lane, divided highway; two twelve foot lanes for north bound traffic and two twelve foot lanes for south bound traffic, with an eight foot shoulder on each side of the highway. From a standstill the traffic officer started in pursuit of the defendant. That portion of the highway from the Wrightwood cut-off southerly is down hill and curves to the right and to the left until it reaches an area known as the Blue Cut. Up to this point the officer had not overtaken the defendant although at times he attained a speed of ninety to ninety-five miles per hour. After leaving the Blue Cut the highway straightens out, and on this straight stretch the defendant was clocked by the officer at a speed between seventy-five and eighty miles per hour. This straight stretch of highway covers a distance of approximately three miles; crosses three hills, the crests of which obscure the driver's view of the highway; and is intersected by three side roads. There are several structures in the area of the Blue Cut and from that area to Devore, where the defendant was overtaken, there are two houses adjoining the south bound roadway. Two or three automobiles were passed by the defendant while driving from the area of the Blue Cut to Devore. The pavement was dry and the weather was clear. There were no pedestrians or workmen upon or along or automobiles entering the highway.

The officer making the arrest testified that at a speed of seventy miles per hour the average person would require two hundred ninety-seven feet in which to stop his vehicle. The defendant testified that he did not know in what distance he could stop his car driving at a speed of seventy-five miles an hour.

The alleged violation occurred in a fifty-five mile an hour speed zone as defined by Section 511 of the California Vehicle Code. That section further provides:

> "The speed of any vehicle upon a highway in excess of any of the limits specified in this section or established as authorized in this code is prima facie unlawful unless the defendant establishes by competent evidence that any said speed in excess of said limits did not constitute a violation of the basic rule declared in Section 510 hereof at the time, place and under the conditions then existing."

The basic rule declared in Section 510 of the California Vehicle Code provides that:

> "No person shall drive a vehicle upon a highway at a speed greater than is reasonable or prudent having due regard for the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property."

The defendant contends that the facts in this case established as a matter of law that the rate of speed at which he was driving was not in violation of the basic rule declared in Section 510, and that, therefore, he did not violate the provisions of Section 511 of the California Vehicle Code even though he was travelling between seventy-five and eighty miles an hour in a fifty-five mile speed zone.

The issue whether a speed is in excess of that prescribed by the basic speed law is analogous to the issue whether the acts of a person constitute negligence, and the rules applicable to a determination of the one should apply to a determination of the other. Ordinarily such determination is a question of fact and not of law. Even where the evidence is undisputed, the ultimate conclusion still is a question of fact in most cases.

In Wright v. Los Angeles Ry. Corp., 14 Cal.2d 168, 176, 93 P.2d 135, 138, the Court said:

> "* * * it is rarely that a set of circumstances is presented which enables a court to say, as a matter of law, that negligence has been shown. And it frequently has been declared by the appellate courts of this state that negligence is a question of fact for the jury even where there is no conflict in the evidence, if reasonable men might differ on the question whether the particular acts and circumstances shown to have been present in the case did in fact constitute negligence."

In Wahlgren v. Market Street Ry. Co., 132 Cal. 656, 663, 62 P. 308, 309, 64 P. 993, the Court said:

> "'The rule is that negligence is a question of fact for the jury, even when there is no conflict in the evidence, if different conclusions upon the subject can be rationally drawn from the evidence. This proposition has been frequently declared by this court. Fernandes v. Sacramento etc. R. R. Co., 52 Cal. 45; McKeever v. Market Street R. R. Co., 59 Cal. 294; Chidester v. Consolidated etc. Co., 59 Cal. 197; House v. Meyer, 100 Cal. 592, 35 P. 308. The rule is general, and appellant presents a very long list of cases in which the rule has been stated. The effect of all is the same. If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. McKune v. Santa Clara Co., 110 Cal. 480, 42 P. 980. Our ideas as to what would be proper care vary according to temperament, knowledge, and experience. A party should not be held to the peculiar notions of the judge as to what would be ordinary care. That only can be regarded as a standard or rule which would be recognized or enforced by all learned and conscientious judges, or could be formulated into a rule. In the nature of things, no such common standard can be reached in cases of

> negligence, where reasonable men can reach opposite conclusions upon the facts.' "

Whether a speed of between seventy-five and eighty miles an hour at the time, place, and under the conditions here considered was "reasonable or prudent" or "a speed which endangers the safety of persons or property" was a question of fact to be determined by the trial court in the light of the evidence and his judgment as to the rate of speed at which an ordinarily prudent person would drive under those circumstances.

In People v. Don Carlos, 47 Cal.App.2d Supp. 863, 865, 117 P.2d 748, 749, it was held that:

> "mere speed constitutes a violation of section 510, and the absence of an accident, actual or near, neither in law nor logic tends to prove that an excessive rate of speed was reasonable or prudent nor that it did not of itself endanger the safety of persons and property."

The judgment is affirmed.

MITCHELL and HILLIARD, JJ., concur.

124 Cal.App.2d Supp. 897

DUVAL
v.
ROWELL et ux.
C. A. 12.

Appellate Department, Superior Court,
San Bernardino County,
California.
April 26, 1954.

Action for damages to chickens allegedly resulting from a trespass. The Municipal Court of San Bernardino Judicial District, Edward P. Fogg, J., entered judgment for defendants and plaintiff appealed. The Superior Court, Appellate Department, Hilliard, J., held that an invitee, who went upon land of another and was confronted by two apparently suspicious and hostile dogs and elected to attract attention of occupants of house by sounding his automobile horn, which caused panic in flock of chickens, was not negligent in sounding his horn.

Judgment affirmed.

1. Trespass 🔑10

Every man by implication invites others to come to his house as they may have proper occasion either for business or courtesy or information, and in these cases custom must determine what the limit is of that implied invitation.

2. Negligence 🔑2

Where operator of a grocery store and tavern, who had the only telephone in a sparsely settled area and customarily transmitted telephone messages to neighbors gratuitously, went upon land to deliver message to owner who resided on land utilized by another as chicken ranch, store operator was an invitee and it was his duty to refrain from committing acts of negligence.

3. Negligence 🔑1

Negligence is relative to time, place and circumstances.

4. Negligence 🔑2

Before an invitee on land of another may be charged with violation of his duty of due care under circumstances, it is essential that invitee had full knowledge of facts which create the duty and in addition an appreciation of the natural and probable consequences of his conduct.

5. Animals 🔑44

Where an invitee upon land of another was confronted with two suspicious and hostile dogs and elected to attract attention of occupants of house by sounding his automobile horn, which alarmed a flock of chickens in the immediate vicinity, invitee was not negligent in sounding his automobile horn and was not liable for resulting death of chickens.

Herbert L. Ives, Barstow, by Lek von Kaesborg, San Bernardino, for plaintiff-appellant.

Harold King, San Bernardino, for defendants-respondents.

HILLIARD, Judge.

This is an appeal from judgment in favor of respondent in an action brought by appellant to recover damages resulting from an alleged trespass.

At the time of the unfortunate series of events which ultimately culminated in this litigation, the appellant was engaged in the business of raising chickens on a ranch near Newberry, California. In order to understand and appreciate the circumstances it is necessary to discuss the factual situation with brevity, but some attention to material details.

The property occupied by appellant was owned by one DeFlon, who has permitted appellant to utilize the premises as a residence and chicken ranch for some three years prior to this litigation. Obviously, Mr. DeFlon is an individual of rather philanthropic disposition since appellant states that he has made a down payment upon purchase price of the land, is "supposed to buy it", but does not know whether he will ever make any more payments thereon. This happy situation is apparently agreeable to Mr. DeFlon, who, with the permission of appellant, occasionally uses a small house on the property for living purposes.

Appellant contends he is not an expert on the subject of raising chickens, but admits that this has been his source of livelihood for at least twenty years, and, in fact, as long as he can remember.

On the date in question, December 21, 1952, appellant had approximately 9500 young chickens on the ranch, and was raising them for the market. These chickens were in pens or inclosures which were located near the house on the premises occupied by appellant and his wife.

Respondents own and operate a grocery store and tavern east of Daggett on Highway 66 and, with the exception of an inspection service approximately one mile from their place of business, enjoy the distinction of having the last telephone between that point and Daggett, which is some twelve miles distant. It was respondent's habit and custom to accept telephone messages at his store for his neighbors and to transmit such messages to them. As far as the record discloses, this was a service gratuitously performed as a courtesy and accommodation. In a sparsely settled desert country it is obvious that this neighborly gesture was a logical holdover from the best traditions of the West. Mr. DeFlon had requested respondent to accept and transmit any telephone messages for him, and advised respondent that he might be located at the ranch occupied by appellant.

On December 21, 1952, respondent received a telephone message for Mr. DeFlon and, faithful to his promise, drove to appellant's ranch about 6:00 P.M. that evening to inform Mr. DeFlon of the receipt of such message. Respondent's mode of travel was by Plymouth station wagon, and his route to appellant's ranch was along Highway 66 to the intersecting county road, thence along that road some distance to a gate marked "Keep Out", thence through the gate to appellant's place of residence. Upon stopping his vehicle in front of the house, respondent noted the immediate presence of two dogs who regarded him—or so he concluded—with some suspicion and hostility. Being convinced that the dogs neither wanted his presence nor appreciated his role of Good Samaritan, respondent determined that discretion was the better part of valor. In accord with this plan of action, or inaction, he declined to leave the safety of his vehicle, and summoned the occupants of the house by sounding his horn. This conduct, as the results are described by appellant, caused immediate consternation, panic and confusion upon the part of the chickens who, being unaccustomed to the ordinary perils of traffic and the technical rights of pedestrians, must have believed that Judgment Day had arrived, and in truth it had for 720 of the flock who were crushed and smothered against the wire netting in an effort to escape the unknown danger represented by the blast of the horn.

According to appellant's complaint the horn was blown "in a loud and unusual manner". Respondent testified that the horn was standard equipment upon the Plymouth station wagon and, so far as he was advised, capable only of the intensity and volume necessary to meet the exigencies of traffic upon the highway. The lower court availed itself of the opportunity to hear the horn sounded during the trial. Unfortunately, the comments of the trial judge on this subject are not before us.

Suffice it to say, the reaction of appellant's chickens to the sound of the horn was above and beyond the call of duty as delineated by the Vehicle Code. At the time of this disastrous occurrence appellant and his young son, Billy, were busily engaged in feeding the chickens. After the panic appellant immediately separated the living from the dead, and then determined that 720 chickens had come to an untimely end. According to the testimony the value of the chickens thus lost was $540 and appellant, so grieved, seeks to recover that amount from respondent.

It was the theory of appellant, as set forth in his complaint, that respondent was a trespasser upon the premises, being neither welcome nor expected, and that the damage suffered by appellant was a direct and natural consequence of such trespass. It might be observed at this point that appellant also named respondent's wife as a defendant in this action. The evidence discloses that she did not participate in any of the transactions, and her guilt must arise by reason of association. No tenable theory is advanced wherein she might be held liable, under the laws of this state, for such conduct on the part of her husband.

[1] A review of the decision of the lower court first involves a determination of the status of respondent at the time that he entered upon the premises occupied by appellant. If he was then a trespasser upon the premises, his liability, if any, would result from all injurious consequences flowing from his trespass, which were the natural and proximate result of his conduct. It would be a harsh rule which penalized respondent for his acts of neighborly courtesy and kindliness. While it is true that his invitation to come upon the land was not directly extended by appellant, nevertheless he was impliedly invited by the circumstances and habits of that particular vicinity. There is no evidence that respondent had visited this particular ranch for similar purposes at other times. His status, however, as the operator of the local store and tavern, coupled with his ownership of the only telephone in the neighborhood, entitled him to assume that he would be welcome at isolated ranches for either business or social purposes. " 'Every man, by implication invites others to come to his house as they may have proper occasion either of business or courtesy or information, etc. Custom must determine in these cases what the limit is of that implied invitation.' " Citation from Cooley on Torts, page 303, Cambou v. Marty, 98 Cal.App. 598, 277 P. 365.

[2-4] Having concluded that respondent was an invitee upon the premises, it follows that the duty imposed upon him was to refrain from acts of negligence. It is well recognized that negligence is relative to time, place and circumstances. If the conduct of respondent in sounding the horn of his vehicle was not that of the ordinary prudent person in like circumstances, and if the consequent panic confusion and loss of the chickens was a direct and proximate result thereof, then respondent is liable for the damages thus inflicted. Before respondent may be charged with violation of the duty, it is essential that he shall have full knowledge of the facts which create the duty and, in addition thereto, an appreciation of the natural and probable consequences of his conduct.

[5] In considering the conduct of respondent in electing to attract the attention of occupants of the house by means of the automobile horn, rather than gambling with the unknown propensities of the dogs ostensibly guarding the residence, the trial court found that respondent had acted with commendable caution and circumspection. While it might have been inferred that respondent had knowledge of the fact that there were chickens in the immediate vicinity who would be alarmed

by such strange and unusual noises, the trial court made no finding on that subject and we must assume that such finding, if it had been made, would be adverse to appellant. Respondent had, therefore, no full knowledge of the facts which might deter him, acting as an ordinary prudent person in like circumstances should, from sounding his horn.

We conclude that the evidence sustains the finding of the trial court that the conduct of respondent was not negligent.

Judgment is affirmed.

COUGHLIN, P. J., and MITCHELL, J., concur.

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124 Cal.App.2d Supp. 888

FRESNO COUNTY
v.
ROBERSON, MARTIN & CO. et al.
C. A. 15.

Appellate Department, Superior Court,
Fresno County, California.
April 8, 1954.

Action by county to recover the sum paid under a contract with defendants to examine the books, records and accounts of the County. The Municipal Court for Fresno Judicial District, Frederick E. Butler, Acting Municipal Court Judge sustained the demurrer of the defendants and the plaintiffs appealed. The Superior Court, Clement, J., held that the order, so far as it authorized a sum for the examination and investigation of the equipment needs of certain offices of the county of Fresno, was without jurisdiction, and void because of excess of statutory authority.

Reversed and remanded for further proceedings.

1. Judgment 🔑518

A "collateral attack" on a judgment, is an attempt to impeach the judgment by matters dehors the record, in an action other than that in which it was rendered, and is an attempt to avoid the effect of a judgment or order perhaps made in some other proceeding.

See publication Words and Phrases, for other judicial constructions and definitions of "Collateral Attack".

2. Judgment 🔑336

A "direct attack" on a judgment is one within the proceeding itself taken within the time and according to the plan provided by law, such as motions for a new trial appeal and motions to set aside the judgment in the manner provided by statute. Code Civ.Proc. § 473.

See publication Words and Phrases, for other judicial constructions and definitions of "Direct Attack".

3. Judgment 🔑392, 497(1)

In so far as judgments, which do not show invalidity on their faces are concerned, the main difference between the direct and collateral attack, is that in the former, the true facts may be shown, while in the latter, the court is confined to an inspection of a record, conclusively presumed to be correct.

4. Counties 🔑204(1)

When the law expressly confers upon a judge the power to order claims against county paid, such judge is then himself the auditor of the claim, and if the judge has authority to make the order, his action in absence of fraud is conclusive. Pen.Code, § 928.

5. Motions 🔑61

Where county grand jury approved a contract for examination of books at agreed compensation, and the court thereafter approved an agreement for an additional compensation, order was in the nature of a judicial order and could not be attacked in a collateral proceeding unless some defect appeared on its face which would show some character of validity. Pen.Code, § 928.

6. Grand Jury 🔑27

Under the statute relating to the duty of the grand jury to make an examination of the books and records of officers of the county, under the doctrine of ejusdem generis, the portion of the statute providing power to employ an expert relates back to and receives its identifying generia from the subject with which the sentence was started. Pen.Code, § 928.

7. Grand Jury ⚷33

The legislative history manifests the conclusion that the Legislature has regularly followed the practice of defining and limiting the powers of grand jury in relation to the employment of others.

8. Grand Jury ⚷27

Where the applicable statute, failed to show any authority for the grand jury to employ experts to examine and investigate the equipment needs of county offices, a judicial order for the examination and investigation of the equipment needs of certain offices of county of Fresno was void as without jurisdiction because of lack of statutory authority. Pen.Code, § 928.

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Robert M. Wash, and John E. Loomis, Fresno, for appellant.

Dearing, Jertberg & Avery, Fresno, for respondents.

CLEMENT, Judge.

Defendants herein demurred to plaintiff's complaint on the ground that it fails to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer without leave to amend and entered judgment for defendants. Plaintiff appeals.

In the complaint the following facts are alleged:

The 1952 Fresno County Grand Jury made a court approved contract on April 28, 1952 with defendants to examine books, records and accounts as authorized by Penal Code, § 928. The agreed compensation was not to exceed the sum of $10,000 "provided that in case it appeared reasonable and expedient to continue any audit or investigation past the limit of $10,000 the same might be done only on the approval of the Grand Jury and the Superior Court."

Thereafter without court approved agreement for additional compensation defendants rendered their claim for $1,516.07 in excess of the agreed maximum of $10,000 without court approved agreement. The complaint further alleges that defendants

> "entered upon an examination and investigation of *the equipment needs of certain offices of the County of Fresno* —and upon completion thereof rendered their claim and bill in the sum of $749.91 for such investigation and the expenses of travel in connection therewith * * *
>
> "That thereafter * * * and on the 26th day of January, 1953, Honorable Strother P. Walton, Judge of the Superior Court of the State of California, in and for the County of Fresno issued an order increasing the amount authorized in the said contract aforesaid from the $10,000 limit therein contained to $12,265.98, which said amount of increase included both the additional sum of $1,516.07 as and for an examination of the books, records and accounts herein referred to *and the sum of $749.91 for the special examination and investigation of the equipment needs hereinabove referred to* * * *
>
> "That on the 26th day of January, 1953 (the same day and presumably at the same time and as a part of the same official act) the Honorable Strother P. Walton, Judge of the Superior Court issued his written order directing the auditor of the County of Fresno to pay to said defendants the sum of $5,284.32, *which said sum included both the sum of $1,516.07 and the sum of $749.91 hereinabove referred to.*"

Thereafter pursuant to the written order of the Court said sums were paid by the auditor. The judgment prays for the return to the County of $2,269.98 unlawfully paid and $453.19 damages.

Unfortunately the order increasing the amount to be paid and the order directing payment were not set out in the complaint in haec verba, but it is a fair inference from the allegations of the complaint that the order for an increase and the order for payment constituted one official act and in legal contemplation but one order.

Appellant contends that the claims of the defendants, insofar as they exceeded the amount provided for in the original contract of employment as approved by the Superior Court are illegal and not proper County charges. It further contends that the mere fact that the moneys herein sued for were paid by the Treasurer under an order of the Court increasing the amount of Grand Jury contract, and an order directing that payments does not foreclose an action of this kind to recover the same. Appellant also contends that even if the order to pay referred to in the complaint is determined to be a "judicial order" of the Court, it may, nevertheless be attacked in an action of this nature.

Respondents contend that the order of the Court was a "judicial order" and that such an order may not be the subject of collateral attack unless the invalidity of the order appears on its face.

The sole point involved in this appeal and to be determined by this Court is whether or not the Judge of the Superior Court had jurisdiction to make the order of the 26th of January, 1953 pursuant to Section 928 of the Penal Code, which will be considered in detail later in this opinion.

[1] A collateral attack on a judgment is an attempt to impeach a judgment by matters dehors the record in an action other than that in which it was rendered. It is an attempt to avoid the effect of a judgment or order perhaps made in some other proceeding. Clark v. Deschamps, 109 Cal.App.2d 765, at page 769, 241 P.2d 681; Nielsen v. Emerson, 119 Cal.App. 214, 6 P.2d 281; Rico v. Nasser Bros. Realty Co., 58 Cal. App.2d 878, 137 P.2d 861.

[2] A direct attack is one within the proceeding itself, taken within the time and according to the plan provided by law; for example, motions for a new trial, appeal and motions to set aside the judgment in the manner provided by Code Civ.Proc. § 473. City of Los Angeles v. Glassell, 203 Cal. 44, at page 49, 262 P. 1084; Macbeth v. Macbeth, 219 Cal. 47, 25 P.2d 11.

[3] Insofar as judgments which do not show invalidity on their face are concerned, the main difference between the direct and collateral attack is that in the direct attack the true facts may be shown, while in the case of collateral attack we are confined to the inspection of a record conclusively presumed to be correct. City of Los Angeles v. Glassell, supra.

Before 1917 a Judge of the Superior Court had no auditing power respecting claims of this character, and could not compel, by direct order, that the Auditor draw warrants for payment of the same. Woody v. Peairs, 35 Cal.App. 553, 170 P. 660; White v. Mathews, 29 Cal.App. 634, 156 P. 372.

In 1917 there was, however, added to Section 928, as it then stood, the following language:

> "Any and all expenses incurred under this section, and also the per diem and mileage where allowed by law, of the grand jurors, shall be paid by the treasurer of the county out of the general fund of said county upon warrants drawn by the county auditor upon the written order of the judge of the superior court in said county."

[4] When the law expressly confers upon the judge or magistrate the power to order the claims paid, such judge or magistrate is then himself the auditor of the claim, and if the Judge has authority to make such order the action of the Judge, in the absence of fraud, is conclusive and stands in the same position as any other judicial judgment or order. Woody v. Peairs, supra; White v. Mathews, supra.

[5] We are satisfied that the order which is the subject of dispute in this action was in the nature of a judicial order, and that it cannot be attacked in the manner in which plaintiff here seeks to attack it, unless some defect appears on its face which would show some character of invalidity. It is, therefore, necessary to carefully examine the language of Section 928 to ascertain whether any such invalidity appears.

That portion of Section 928 of the Penal Code with which we are here specially concerned reads as follows:

> "*It shall be the duty of the grand jury annually to make a careful and complete examination of the books, records and accounts* of all the officers of the county, and of every city board of education within the county, and especially those pertaining to the revenue, and report as to the facts they have found, with such recommendations as they may deem proper and fit; *and if, in their judgment, the services of an expert are necessary, they shall have power to employ one,* at an agreed compensation, to be first approved by the court; and if, in their judgment, the services of assistants to such expert are required, they shall have power to employ such, at a compensation to be agreed upon and approved by the court.
>
> "It shall be the duty of every grand jury first impaneled in even numbered years to investigate and report upon the needs for increase or decrease in salaries of the county supervisors, the district attorney and the auditor, and it shall cause a copy of such report to be transmitted to each member of the Legislature representing the county in which it has been impaneled before the commencement of the regular session of the Legislature in odd numbered years. It shall also be the duty of every grand jury to *investigate and report upon the needs of all county officers in its county, including the abolition or creation of offices and the equipment for, or the method or system of performing the duties of,* the several offices and it shall cause a copy of such report to be transmitted to each member of the board of supervisors in its county." (Emphasis added.)

[6] Section 928 of the Penal Code is cast into 5 paragraphs and it will be seen that the first paragraph relates solely to the examination of books, records and accounts. It will be further noted that this first paragraph is all in one sentence, and that the portion relating to the employment of an expert is a part of that sentence. By the doctrine of ejusdem generis, the portion providing power to employ an expert indubitably relates back to and recieves its identifying generia from the subject with which the sentence is started.

It will be further noted that the thought content of paragraph two relates to the needs of county officers, including their equipment. This paragraph is complete in itself and contains no reference of any kind to the employment of an expert.

[7] An examination of the legislative history of Grand Juries in California compels a conclusion that the Legislature has regularly followed a practice of defining and delimiting the powers of the Grand Jury in relation to employment of others. Allen v. Payne, 1 Cal.2d 607, at page 608, 36 P.2d 614; Woody v. Peairs, supra.

We have examined the statutes of California carefully, and we have not found anything which we consider authority for the employment by the Grand Jury of an expert to examine and investigate the equipment needs of county officers.

In Allen v. Payne, 1 Cal.2d 607, 609, 36 P.2d 614 the Court in holding that Grand Juries have no inherent or implied powers to contract services in connection with their investigation held

> "This conclusion is reinforced by an examination of the legislative history of the grand jury in this state, in the light of established rules of statutory construction. That examination reveals a practice of defining and delimiting its powers in relation to employment, by express statutory grant. * * * It seems clear * * * that the Legislature has considered the employment of persons by grand jury a matter to be governed by statute."

[8] A reading of Section 928 of the Penal Code as hereinabove set out fails to show any authority whatever for the Grand Jury to employ experts to examine and investigate "the equipment needs of certain offices of the County of Fresno."

Whatever power the Judge had to make the order in the case before us derives from said Section 928. The power of the Judge to make the order depended on the power of the Grand Jury to incur the expenses covered by it.

So far as the order authorizing an increase in the amount in excess of $10,000 was for services authorized by Section 928 it is not subject to collateral attack, but as to the item of $749.91 for the examination and investigation of the equipment needs of certain offices of the County of Fresno it is void on its face as having been made without jurisdiction for the simple reason that there was no authority in Section 928 for the Grand Jury to contract for these services.

The Judgment appealed from is reversed and the cause remanded to the trial court for proceedings in accordance with the views expressed herein.

SHEPARD, P. J., and KELLAS, J., concur.

42 Cal.2d 752

HAUGER et ux. v. GATES et al.

Sac. 6326.

Supreme Court of California.
In Bank.
April 30, 1954.

Action to set aside extrajudicial sale of realty under deed of trust. The Superior Court, Sonoma County, Hilliard Comstock, J., entered order sustaining defendants' demurrer without leave to amend and from the resultant judgment, plaintiffs appealed. The Supreme Court, Spence, J., held that the complaint, alleging that demand of trustors against beneficiaries exceeded amount due under deed of trust and that sale was made to person who was not a purchaser in good faith or for value, stated cause of action.

Reversed.

Prior opinion, 260 P.2d 139.

1. Mortgages ⚷335

A trustor under deed of trust is entitled to offset money owing to him by beneficiary against amount secured by deed of trust.

2. Mortgages ⚷369(2)

Where there was not in fact any indebtedness due from trustor to beneficiary of deed of trust under note secured by the deed of trust, sale thereunder to purchaser who was not a purchaser in good faith or for value may be set aside. Code Civ.Proc. § 440.

3. Pleading ⚷214(1)

Allegations of complaint would be accepted as true for purposes of demurrer.

4. Mortgages ⚷369(2)

If grantor of realty and beneficiary of deed of trust failed to deliver personalty covered by contract with trustor, and value of such personalty exceeded unpaid installments owed by trustor, trustors were not in default and could set aside extrajudicial sale of realty to person who was not purchaser in good faith or for value. Code Civ.Proc. §§ 438, 440.

5. Set-Off and Counterclaim ⚷35(1)

Statute authorizing cross-demands does not require that they be liquidated. Code Civ.Proc. § 440.

6. Mortgages ⚷335, 415(3)

Statute authorizing cross-demands is equally applicable to foreclosure action under deed of trust or to attempted foreclosure by extrajudicial sale under deed of trust. Code Civ.Proc. §§ 438, 440.

7. Equity ⚷84

A court of equity will consider all surrounding circumstances where defense of laches is interposed.

8. Mortgages ⚷369(5)

Delay of 70 days after extrajudicial sale of realty under deed of trust, which sale was held four months after recording of notice of default in payment due under deed of trust, before bringing action to set aside the sale on ground that demand of trustors against beneficiaries exceeded amount due under deed of trust did not constitute such laches as would bar the action to set aside the sale to one who was not a purchaser in good faith or for value.

9. Mortgages ⚷369(7)

Complaint, seeking to set aside extrajudicial sale of realty under deed of trust because demand of trustors against beneficiaries exceeded amount due under deed of trust and because sale was made to person who was not a purchaser in good faith or for value, stated cause of action.

Joseph E. Isaacs, Alan H. Critcher, Donald M. Haet and Louis Garcia, San Francisco, for appellants.

Edward T. Koford and Bryce Swartfager, Santa Rosa, for respondents.

SPENCE, Justice.

Plaintiffs brought this action to set aside an extrajudicial sale made under a deed of trust. Defendants' demurrers to plaintiffs' second amended complaint were sustained without leave to amend. From the judgment accordingly entered for defendants, plaintiffs appeal. They maintain that the allegations of their second amended complaint were sufficient to state a cause of action for the setting aside of the sale, as such allegations showed that plaintiffs were entitled to a set-off or counterclaim in an amount exceeding the amount due on the note, and that therefore they were not in default on their obligation. Code Civ. Proc. § 440. We have concluded that their position is well taken.

As alleged, plaintiff Carson J. Hauger agreed to purchase from defendants Charles E. Gates and his wife for $16,000 certain real property in the county of Sonoma, together with the improvements thereon and certain specified ranch equipment. Pursuant to the agreement, defendants Gates executed and delivered to plaintiffs a deed to the realty; and plaintiffs executed and delivered a promissory note and second deed of trust as security for the unpaid portion of the purchase price. In the deed of trust plaintiffs were the first parties-trustors, defendant Sonoma County Abstract Bureau was second party-trustee, and defendants Gates were third parties-beneficiaries.

Plaintiffs failed to make certain payments under the deed of trust and defendants Gates failed to make the agreed delivery of certain personal property. Thereafter and on December 11, 1950, defendants Gates and the Sonoma County Abstract Bureau recorded a notice of breach and election to sell under the deed of trust. Plaintiffs claim that they were not then indebted to defendants Gates because the latter, in breach of their contract, had failed to deliver to plaintiffs the agreed personal property, valued at $987.50, which sum exceeded the amount of the installments then due under the promissory note and deed of trust; that plaintiffs repeatedly told defendants Gates that they would pay the overdue installments if the Gates would return the personal property but the latter refused. On April 12, 1951, the property was sold by the Sonoma County Abstract Bureau, the trustee under the deed of trust, to defendant Chalmers, who allegedly had full knowledge of the above-recited facts and was "not a purchaser in good faith or for value" but holds the property "in trust" for defendants Gates. The property was sold for $5,025 to defendant Chalmers, and the deed therefor was accordingly made and recorded. The Exchange Bank of Santa Rosa holds a first deed of trust on the property, calling for monthly payments of $65. Defendants have made certain of these payments to the Bank and in the event the sale is set aside, plaintiffs are willing to pay to defendants Gates and "all other defendants * * * who may be entitled thereto such sums as may in right, justice and equity be owing from * * * plaintiffs to defendants."

[1, 2] Plaintiffs' theory of relief rests upon the proposition that a trustor under a deed of trust is entitled to offset money owing to him by the beneficiary against the amount secured by the deed of trust; and that where there was not in fact any indebtedness due from the trustor to the beneficiary under the note secured by the deed of trust, the sale thereunder may be set aside. Section 440 of the Code of Civil Procedure provides: "When cross-demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other, and neither can be deprived of the benefit thereof by the assignment or death of the other."

[3, 4] Under this section plaintiffs had a set-off which they were entitled to assert. The cross-demands between plaintiffs and defendants Gates existed at the time the notice of default was declared and the sale under the deed of trust was held. By reason of their failure to deliver certain personal property to which plaintiffs were entitled under the agreement of sale, defendants Gates were indebted to plaintiffs in a greater sum than the amount of the unpaid installments owing by plaintiffs on their promissory note. These allegations of plaintiffs' complaint must be accepted as true for the purposes of demurrer, and accordingly plaintiffs were not in default at the time of the sale. Section 440 is explicit in stating that the co-existing cross-de-

mands shall be "compensated so far as they equal each other," which necessarily means that each of the claimants is *paid* to the extent that their claims may be balanced in amount.

[5] Plaintiffs and defendants Gates were aware of the cross-demands prior to the sale proceedings; plaintiffs had informed defendants Gates that they would pay the installments on their note if the Gates in turn would deliver the personal property as theretofore agreed; and then, without regard for the consequences of their own breach of contract and the damages thereby caused to plaintiffs, defendants Gates proceeded with the sale. Section 440 makes it clear that plaintiffs' right of set-off was available without the necessity of bringing an independent action setting forth the related dealings between the parties. See Walters v. Bank of America etc. Ass'n, 9 Cal.2d 46, 54–55, 69 P.2d 839, 110 A.L.R. 1259; Williams v. Pratt, 10 Cal. App. 625, 632, 103 P. 151. And the fact that plaintiffs' demand is an unliquidated claim for damages for breach of the contract of sale with the Gates does not affect their right to the set-off. Section 440 does not require that the cross-demands be liquidated. Sunrise Produce Co. v. Malovich, 101 Cal.App.2d 520, 525, 225 P.2d 973.

[6] It would not be reasonable, as contended by defendants, to interpret section 440 of the Code of Civil Procedure so as to permit the right of set-off in a foreclosure action under a deed of trust and yet to deny such right where the foreclosure was attempted by extrajudicial sale thereunder. On the contrary, it would appear that the provisions of said section are equally applicable in relation to either type of proceeding. Section 438 of the Code of Civil Procedure provides that "the right to maintain a counterclaim shall not be affected by the fact that either plaintiff's or defendant's claim is secured by mortgage or otherwise, nor by the fact that the action is brought, or the counterclaim maintained, for the foreclosure of such security". It therefore appears that the choice of remedy under a deed of trust is an extraneous factor, not going to the merits of the claimed right to a set-off.

[7, 8] Defendants argue that plaintiffs should be barred by laches from now raising the disputed issue in an effort to set aside the sale. Defendants point out that plaintiffs did not file the present action until seventy days after the sale; that four months prior to the sale plaintiffs, by the recording of the notice of default, were put on notice regarding the forthcoming sale; and that a period of "30 days is about the utmost length of time which the courts are disposed to allow" for *rescission* of a sale. Schneider v. Henley, 61 Cal.App. 758, 763, 215 P. 1036, 1038. However, the cited case has no relevancy to the problem here, for plaintiffs do not seek to rescind their purchase agreement but rather they stand on their contract and their rights thereunder. A court of equity will consider all the surrounding circumstances where the defense of laches is interposed. (10 Cal.Jur. sec. 62, p. 523.) It may be conceded that plaintiffs' most prompt procedure would have been by way of an action seeking to enjoin the trustee's sale. But the fact that they failed to so proceed does not bar them from resort to the present action for an adjudication of their rights. The delay was not unduly prolonged and does not appear to have caused any detriment to the parties involved as the sale was made to defendant Chalmers, who allegedly "was acting for and on behalf of defendants [Gates] * * * and * * * was not a purchaser in good faith or for value."

[9] For the reasons stated, we conclude that plaintiffs' second amended complaint stated a cause of action, and that the trial court erred in sustaining defendants' demurrers without leave to amend.

The judgment is reversed.

SHENK, EDMONDS, CARTER, TRAYNOR and SCHAUER, JJ., concur.

42 Cal.2d 728

In re BLAIR'S ESTATE.

BONNEN et al. v. RUOFF et al.

L. A. 22852.

Supreme Court of California.
In Bank.
April 27, 1954.

Probate proceedings wherein estate of deceased widow of the testator sought order granting a retroactive family allowance to estate of deceased widow. The Superior Court, Los Angeles County, Victor R. Hansen, J., entered order from which the residuary legatees under the will appealed. The Supreme Court, Traynor, J., held that the family allowance, authorized by statute out of concern for needs of surviving family during period of readjustment following death of spouse, is preferred to most other claims, and upon proper application, it must be granted even if the estate is insolvent, but such preferential postition is for the benefit of only those persons designated by the statute.

Order reversed.

Prior opinion, 263 P.2d 62.

1. Executors and Administrators 🔑173

The right to a family allowance exists solely by virtue of statute. Probate Code, § 680.

2. Executors and Administrators 🔑174

The family allowance is favored by law and section authorizing such allowance is to be liberally construed. Probate Code, § 680.

3. Executors and Administrators 🔑180, 182, 408

The family allowance, authorized by statute out of concern for needs of surviving family during period of readjustment following death of spouse, is preferred to most other claims, and upon proper application, it must be granted even if the estate is insolvent, but such preferential position is for the benefit of only those persons designated by the statute. Probate Code, § 680.

4. Executors and Administrators 🔑184

Statute authorizing the family allowance, and provision thereof declaring that such allowance may, in discretion of court or judge granting it, take effect from the death of the decedent, do not authorize an award of family allowance against a decedent's estate after the death of the widow, by the obtaining of a retroactive allowance by administratrix of widow's estate. Probate Code, § 680.

5. Executors and Administrators 🔑180

The statutes relating to the probate homestead and the family allowance are based upon the policy that places the welfare of the decedent's surviving family above the interests of his creditors, heirs, legatees and devisees, but the rights which they confer are for the members of the family only, and persons outside the family cannot assert them by assignment or succession. Probate Code, §§ 661, 680, 750.

6. Executors and Administrators 🔑184

Ordinarily a right that cannot be assigned, such as a right to family allowance does not survive the death of the person entitled to it. Probate Code, § 680.

7. Executors and Administrators 🔑184

The right to a family allowance or probate homestead is lost when one for whom it is asked has lost the status upon which the right depends. Probate Code, §§ 661, 680, 750.

8. Constitutional Law 🔑92

The right to a family allowance or probate homestead is not a vested right, and nothing accrues with respect thereto before the order granting it. Probate Code, §§ 661, 680, 750.

9. Executors and Administrators 🔑184

Fact that widow who did not obtain an order for the payment of the family allowance was incompetent did not make the right of the widow to the allowance survive her death, since there is no vested right to a family allowance until court has made an order granting it. Probate Code, §§ 661, 680, 750.

10. Mental Health 🔑219

The guardian of an incompetent widow who failed to procure the family allowance from her deceased husband's estate could, after widow's death, be held to account in guardianship proceedings for his alleged failure to preserve his ward's estate by failing to make timely application for family allowance. Probate Code, § 680.

Leon U. Everhart, Pasadena, Edward Payson Hart and Montgomery G. Rice, Los Angeles, for appellants.

Harry A. Pines, Adele Walsh and Roy B. Woolsey, Los Angeles, for respondents.

TRAYNOR, Justice.

The residuary legatees under the will of Alfred G. Blair, deceased, appeal from an order granting a family allowance out of his estate to the estate of his deceased widow, Susan Ann Blair.

Alfred Blair died testate on July 8, 1950. He left surviving his widow and two adult children by a former marriage, Naomi Blair Rouff and Alfred Granville Blair. Mrs. Rouff is executrix of the estate. She is also a residuary legatee under the will. In August, 1950, the widow was declared an incompetent, and Mrs. Rouff was appointed guardian of her person and estate. Her estate was sufficient to meet her needs. The court authorized Mrs. Rouff to expend from Mrs. Blair's estate the sum of $500 per month for the widow's maintenance and care. No attempt was made before the widow's death in May, 1951, to secure a family allowance from her husband's estate, although the estate was adequate. After Mrs. Blair's death the administratrix of her estate, Phoebe L. Bonnen, filed a petition for a family allowance. She later resigned, and Rebecca Riley, her successor and the present administratrix, adopted her petition. The court ordered Mrs. Rouff, as executrix, to pay to the administratrix of Mrs. Blair's estate $5,216.58, i. e., $500 for each month between the death of Alfred Blair and the death of the widow.

It is not disputed that the widow could have qualified for a family allowance during her lifetime. The issue is whether the right exists in favor of her estate.

[1] The right to a family allowance, which is entirely statutory, In re Estate of King, 19 Cal.2d 354, 362, 121 P.2d 716; Hills v. Superior Court, 207 Cal. 666, 667, 279 P. 805, 65 A.L.R. 266; In re Estate of McSwain, 176 Cal. 280, 283, 168 P. 117, is given by section 680 of the Probate Code: "The widow, widower, minor children, and adult children who have been declared incompetent by order of court are entitled to such reasonable allowance out of the estate as shall be necessary for their maintenance according to their circumstances, during the progress of the settlement of the estate, which, in case of an insolvent estate, must not continue longer than one year after granting letters. Such allowance must be paid in preference to all other charges, except funeral charges, expenses of the last illness and expenses of administration, and may, in the discretion of the court or judge granting it, take effect from the death of the decedent."

[2, 3] It is true, as respondent asserts, that the family allowance is favored by the law and that section 680 is liberally construed by the courts. The section, however, does not authorize the probate court to make an allowance in this case for the benefit of persons other than the widow. It was enacted out of concern for the needs of the surviving family during the period of readjustment following the death of a spouse. In re Estate of McSwain, 176 Cal. 280, 284, 168 P. 117; In re Walkerley, 77 Cal. 642, 645, 20 P. 150. The allowance to meet those needs is preferred to most other claims, Probate Code, § 750; and upon proper application, it must be granted even if the estate is insolvent. This highly preferential position accorded the family allowance is for the benefit only of persons designated in the statute. Hills v. Superior Court, 207 Cal. 666, 668, 279 P. 805, 65 A.L.R. 266.

[4] Respondent's claim is based upon the final clause of the section that in the discretion of the court the allowance may be granted retroactively to the date of the decedent's death. Her contention is that even though the first part of the section can serve only to provide support for an existing person, the last clause is not so restricted. We find no basis in the section for this contention. The final clause, like the pre-

ceding ones, describes the scope of the right and serves the same purposes. The section has no application when there is no person to be maintained and thus no person to whom the section could apply.

[5] The statutes relating to the family allowance, Probate Code, § 680, and the probate homestead, Probate Code, § 661, are so close in purpose, effect, and wording that cases construing one are cited authoritatively in cases construing the other. In re Estate of Brooks, 28 Cal.2d 748, 750, 171 P.2d 724. Both are based on the policy that places the welfare of the decedent's surviving family above the interests of his creditors, heirs, legatees, and devisees; but the rights they confer are for the members of the family only, persons outside the family cannot assert them by assignment or succession.

[6] Although the precise question in this case is one of first instance, it has been held that rights similar to the right to a family allowance abate on the death of the widow. In Re Estate of Bachelder, 123 Cal. 466, 467, 56 P. 97, the widow's right under former section 1469 of the Code of Civil Procedure, now Probate Code section 645, to have a small estate set apart to her "for the use and support of the family" was held to be a personal right that did not survive her death. In Re Estate of Moore, 57 Cal. 437, it was held that the widow's right to have a probate homestead set apart to her was non-assignable and that no one can succeed to the right to have a probate homestead set apart. "If a widow die before applying for a probate homestead, any right to apply which she might have had is gone; no person succeeds to that right. * * *" 57 Cal. 437, 445. Ordinarily a right that cannot be assigned does not survive the death of the person entitled to it. California Packing Corp. v. Lopez, 207 Cal. 600, 279 P. 664, 64 A.L.R. 1412; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 274 P. 959; see, 1 Am.Jur., "Abatement and Revival", § 80; 1 C.J.S., Abatement and Revival, § 132. In In re Lux's Estate, 114 Cal. 73, 45 P. 1023, on which respondent relies, the widow died pending an appeal from an order granting her an allowance. The court held that since the order was properly granted before the widow's death, her estate could recover sums that had accrued under it during her lifetime. In the present case there was no order granting a family allowance, and thus no money due or accrued under a valid order during the lifetime of the widow.

[7] Respondent invokes In re Estate of Brooks, 28 Cal.2d 748, 171 P.2d 724, and In re Estate of Moore, 170 Cal. 60, 148 P. 205, for the proposition that conditions that exist at the time of the decedent's death and not those existing later determine whether or not a family allowance can be granted. The Brooks case held that to qualify for either a family allowance or a probate homestead, the widow must be entitled to support from her husband at the time of his death. The case did not hold that the right to an allowance may not be lost by events occurring thereafter. The Moore case involved the right to a family allowance of a widow who remarried after her husband's death. An order was entered after the widow's remarriage granting an allowance for the period between the husband's death and the widow's remarriage. Subsequently the court entered an order settling the administrator's account in which he claimed credit for amounts paid pursuant to the order for family allowance. The Moore case is not directly in point. It did not involve the question whether the right to a family allowance can survive the death of the widow, cf. In re Estate of Bachelder, supra, 123 Cal. 466, 467, 56 P. 97. Moreover, it involved a collateral attack on the order for family allowance, In re Estate of Keet, 15 Cal.2d 328, 333, 100 P.2d 1045; In re Estate of Nolan, 145 Cal. 559, 561, 79 P. 428, and it was therefore necessary to decide only if the court had jurisdiction. In Rountree v. Montague, 30 Cal.App. 170, 177–178, 157 P. 623, it was held that the question of status does not go to the jurisdiction of the court and that an order setting aside a probate homestead to a remarried widow, although erroneous, was not subject to collateral attack. The Rountree case also indicated that the same rule applied to an order for family allowance. 30 Cal.App. 170, 179, 157 P. 623. The rationale of the decision

in the Moore case, however, is inconsistent with the long established rule that the right to a family allowance or probate homestead is lost when the one for whom it is asked has lost the status upon which the right depends, In re Estate of Pillsbury, 175 Cal. 454, 457–459, 166 P. 11, 3 A.L.R. 1396; In re Estate of Heywood, 149 Cal. 129, 130–131, 84 P. 834; In re Estate of Heywood, 149 Cal. XVI, 84 P. 834; In re Still's Estate, 117 Cal. 509, 514, 49 P. 463; Estate of Hamilton, 66 Cal. 576, 6 P. 493; In re Estate of Moore, 57 Cal. 437, 443; In re Estate of Boland, 43 Cal. 640, 643; In re Estate of Gosnell, 63 Cal.App.2d 38, 39, 146 P.2d 42, and is therefore disapproved.

[8] Monahan v. Monahan's Estate, 232 Mo.App. 91, 89 S.W.2d 153, 158, on which respondent relies, involved a Missouri statute in which the right to "maintenance becomes vested in the surviving spouse immediately upon the death of the mate". In California, however, it is well established that the right to a family allowance or probate homestead is not a vested right and that nothing accrues before the order granting it. In re Estate of Pillsbury, 175 Cal. 454, 457, 166 P. 11, 3 A.L.R. 1396; In re Estate of Heywood, 149 Cal. 129, 130–131, 84 P. 834; In re Lux's Estate, 114 Cal. 73, 87, 45 P. 1023; In re Estate of Boland, 43 Cal. 640, 642; In re Estate of Shapero, 39 Cal.App.2d 144, 146, 102 P.2d 569.

[9, 10] Respondent relies on Mead v. Phillips, 77 U.S.App.D.C. 365, 135 F.2d 819, 147 A.L.R. 322, to support her contention that whatever the rule may be as to a competent widow, the right of an incompetent widow to a family allowance must be held to survive her death. The court held that a statute requiring the widow to renounce rights under the will or lose her common law rights did not apply to an incompetent widow. Just as in the Monahan case, supra, the court was considering rights that vested in the widow on her husband's death and survived her own death, and the court held that her inability to make an election within the statutory period because of incompetence did not defeat the power of the court to make the election for her after her death. As noted above, however, in the present case no right accrued before the death of the widow, and none could arise thereafter. Moreover, it is not necessary to rule in favor of the administratrix to prevent fraud on the part of the guardian. The guardian may be held to account in the guardianship proceedings for any alleged failure to preserve his ward's estate by failing to make a timely application for family allowance. Respondent's contention that In re Estates of Boyes, 151 Cal. 143, 90 P. 454, precludes surcharging the guardian's account is unfounded. In that case the written objections to the guardian's accounts contained no suggestion of any claim that it was the guardian's duty to obtain a family allowance for his wards and that because of his failure to do so he could not be allowed any credit for payments out of the wards' estates. The court held that evidence in support of this claim was inadmissible since the right of the contestants to surcharge the accounts was limited to those matters set up as grounds of contest in the written objections. 151 Cal. 143, 147, 90 P. 454. The court also held that the question whether the guardian-administrator had breached a duty as *administrator* in failing to secure a family allowance for the wards could not be raised in exceptions to his guardianship accounts, 151 Cal. 143, 152, 90 P. 454. It did not hold that his alleged breach of duty as *guardian* could not be so raised.

The order is reversed.

SHENK, EDMONDS, CARTER, SCHAUER and SPENCE, JJ., and BRAY, Justice pro tem., concur.

42 Cal.2d 757

YOUNGER
v.
JORDAN, Secretary of State, et al.

S. F. 19052.

Supreme Court of California.
April 30, 1954.

Proceeding for writ of mandate or order under Elections Code to require Secretary of State and Registrar of Voters of Los Angeles County to omit name of a candidate from sample and official ballots for primary election. The Supreme Court held that where neither personal service nor authorized substituted service of order to show cause had been had upon candidate, court could not proceed to final determination of controversy.

Petition denied.

Schauer and Edmonds, JJ., dissented.

1. Elections ⚷154(9¼)
Mandamus ⚷156

In proceeding for writ of mandate or order under Elections Code to require omission of name of candidate from primary election ballots, the court could not proceed to final determination of controversy in absence of either personal service or authorized substituted service of order to show cause upon candidate. Elections Code, §§ 20, 2699, 2703, 2900, 3709; Rules on Appeal, rule 56; Code Civ.Proc. §§ 410, 412, 413, 1088 et seq.; Government Code, §§ 274, 275; Const. art. 2, § 1.

2. Elections ⚷154(9¼)

In proceeding under Elections Code to remove name of another person from ballot, that person is an indispensable party and service must be obtained upon him in manner authorized by law. Code Civ.Proc. §§ 410, 412, 413; Elections Code, § 2900.

◆

Grant B. Cooper, Los Angeles, for petitioner.

Edmund G. Brown, Atty. Gen., Leonard M. Friedman, Deputy Atty. Gen., Harold W. Kennedy, County Counsel, and George Wakefield, Deputy County Counsel, Los Angeles, for respondents.

PER CURIAM.

Petitioner, Mildred Younger, is a duly qualified candidate for the Republican nomination for the office of state senator in the Thirty-eighth Senatorial District at the direct primary election to be held on June 8, 1954. By her petition filed herein, she seeks a writ of mandate or an order under section 2900 of the Elections Code to require the respondents, the Secretary of State and Registrar of Voters of Los Angeles County, to omit from the sample and official ballots for said primary election the name of Hazel J. Younger as a candidate for such nomination.

The petition contains many allegations concerning the alleged lack of qualification of said Hazel J. Younger to be a candidate for public office and concerning the alleged fraud and other irregularities in the circulation and filing of the nomination papers of said Hazel J. Younger. An order to show cause was issued herein on April 21, 1954, setting the cause for hearing on April 29, 1954, and directing that service be made upon the named respondents and upon said Hazel J. Younger, as the real party in interest. Rules on Appeal, Rule 56. The named respondents have been served and have filed their answer herein raising numerous issues of fact. They have also filed their points and authorities raising many questions of law. It thus appears that this court could not finally adjudicate this controversy until after the issues of fact and law may have been duly heard and determined. Code Civ. Proc. § 1088 et seq.

With respect to Hazel J. Younger, the real party in interest, no personal service of the order to show cause has been made. The verified petition and the affidavits concerning service state that since the filing of her nomination papers, said Hazel J. Younger has been concealing herself or is being concealed and that her present whereabouts, after diligent search and inquiry, are still unknown. Petitioner therefore relies upon service of the order to show cause and petition on said Hazel J. Younger, by leaving copies thereof at her last known address, 431 South Downey Road, Los Angeles, which is the address given by her on her nomination papers.

[1, 2] The question then arises as to whether we may proceed to a final determination of this controversy without either personal service upon Hazel J. Younger or some form of substituted service which is authorized by law. Code Civ.Proc. §§ 410, 412, 413. We have concluded that we may not, as Hazel J. Younger appears to be an indispensable party to this proceeding. Bank of California v. Superior Court, 16 Cal.2d 516, 521–522, 106 P.2d 879; California Cotton Credit Corp. v. Superior Court, 122 Cal.App. 404, 407, 10 P.2d 176; Hershey v. Cole, 130 Cal.App. 683, 701, 20 P.2d 972; Ash v. Superior Court, 33 Cal.App. 800, 803–804, 166 P. 841.

In Ash v. Superior Court, supra, which involved a proceeding brought to compel a county clerk to cancel the registration of certain voters, it was held that the court was without jurisdiction to proceed in the absence of service upon said voters in the manner authorized by law. The superior court had ordered the mailing of the order to show cause to such voters. In granting a writ prohibiting the superior court from ordering the cancellation of such registrations, it was said at page 802 of 33 Cal.App., at page 841 of 166 P.: "The order to show cause and the mailing of notices in the manner required by said order of court did not constitute any process of law which may be recognized as applicable to the case, and cannot be recognized as having any effect to bring those persons within the jurisdiction of the court."

While the authorities above cited deal primarily with ordinary applications for prerogative writs, we cannot escape the conclusion that in a proceeding brought under section 2900 of the Elections Code, to remove the name of another person from the ballot, the latter is an indispensable party and the service must be obtained in a manner authorized by law.

It thus appears that we cannot proceed to a hearing herein until service has been duly made upon said Hazel J. Younger. Personal service appears impossible and service by publication would require an appreciable length of time. This brings us to a consideration of the time element which appears to be the vital factor here, regardless of the merits of the controversy. The certified list of candidates was transmitted by the Secretary of State to the county clerks on April 23, 1954. Elec.Code, § 2699. The county clerks must proceed to publish such lists, Elec.Code, § 2703, and to prepare and mail the sample ballots without undue delay. Elec.Code, § 3709. It is further shown that approximately 2,500,000 sample ballots and a like number of official ballots must be printed for use in Los Angeles County and "that the time required to print said sample and official ballots is approximately twenty-five days, involving a 24-hour per day operation of the printing presses." We therefore conclude that it will be impossible to obtain any form of authorized service upon said Hazel J. Younger and thereafter to proceed to determine the issues of fact and law required for a final determination of this controversy within such time as to permit the orderly functioning of the election processes. We have reached this conclusion reluctantly, as petitioner has made a strong prima facie showing that said Hazel J. Younger was committed to Camarillo State Hospital in 1953, and that she is now disqualified as an elector, Const. Art. II, § 1; Elec.Code, § 20, and is disqualified from voting or from holding office. Gov.Code, §§ 274, 275. We nevertheless cannot proceed to a final determination herein without according to said Hazel J. Younger at least the minimum requirements of due process of law.

We deem it appropriate to suggest that the difficulty encountered here in adjudicating the rights of the parties within such time as to avoid throwing the election processes into confusion is largely due to the relatively limited period of time provided by law between the last day of filing nomination papers for a primary election and the day of election. Perhaps the Legislature may see fit to consider the enactment of legislation lengthening such period or authorizing some method for speedily obtaining substituted service in a situation such as that presented here.

For the reasons stated, the petition must be denied and it is so ordered.

SCHAUER, Justice.

I dissent.

The material facts, upon which the claim of disqualification rests, are not only admitted by the respondents but appear as matters of public record. On July 5, 1953, Hazel J. Younger was duly committed as a "mentally ill person" to the Department of Mental Hygiene for placement in Camarillo State Hospital. Pursuant to a certificate to that effect received by the respondent Registrar of Voters in accordance with the provisions of section 297 of the Elections Code, the registrar, on April 16, 1954, cancelled the name of Hazel J. Younger upon the register of voters of Los Angeles County. She has never been restored to the status of competency by decree of the court which committed her and she has never been discharged from Camarillo State Hospital as one who, in the judgment of the superintendent of the state hospital, has recovered. (Welf. & Inst.Code, § 6728.) She has not been discharged, either by the superintendent on his own motion or by the department upon its order, as a patient who is not insane. (Welf. & Inst.Code, § 6733.) Although never discharged, Hazel J. Younger was granted a leave of absence by the superintendent of Camarillo State Hospital on October 2, 1953. Such leave of absence continues to this date and is consistent only with the status of legal incompetency which was established by the judicial decree of July 5, 1953. It thus appears that after her commitment to Camarillo State Hospital, Hazel J. Younger has never been declared sane or restored to reason in any manner provided by law.

A person duly committed to a state institution as a "mentally ill person" is an "insane" person within the meaning of the Welfare and Institutions Code. The words "mentally ill" and "insane" are construed to mean the same thing. (Welf. & Inst. Code, § 5041.) They are used synonymously throughout the cited code sections. (Welf. & Inst.Code, §§ 6733, 6734, 6735.) To permit an insane person to hold public office would jeopardize public interest and safety. The provisions of our Constitution and the codes prevent this possibility. In this state, "An elector has no rights * * * beyond those of a citizen not an elector, except the right * * * of holding office and voting." (Gov.Code, § 274.) The right to hold office is lost to one who is not an elector. (Gov.Code, § 275.) An "elector" is defined by Elections Code, section 20, as a person who qualifies under section 1 of Article II of the Constitution of California. An insane person does not so qualify because section 1 of Article II (Cal.Const.) provides that "* * * no insane person * * * shall ever exercise the privileges of an elector in this State."

The status of Hazel J. Younger as an insane person, unqualified to be a candidate for public office in this state, has been determined by judicial decree of a court of competent jurisdiction of this state. There is no question but that that court acted within its jurisdiction and its decree has become final. There is, therefore, no occasion for us, in this proceeding, to inquire into a matter which is already res judicata. It follows that Hazel J. Younger is not a necessary party to this proceeding which seeks only to compel respondents to perform a ministerial act, the duty to perform which is established by the final judgment of the superior court above mentioned and the provisions of the Constitution and statutes above cited.

I would issue the peremptory writ of mandate forthwith directing the respondents to omit from the sample and official ballots for the direct primary election on June 8, 1954, the name of Hazel J. Younger as a candidate for the Republican nomination for the office of state senator from the Thirty-Eighth Senatorial District.

EDMONDS, J., concurs.

DIKE et ux.

v.

GOLDEN STATE CO., Limited et al.

Civ. 8205.

District Court of Appeal, Third District, California.

April 30, 1954.

Hearing Denied June 23, 1954.

Action by parents for damages for death of two year old child allegedly resulting from negligent operation of a truck. The Superior Court, Sacramento County, Henry, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Peek, J., held that where child was too young to be chargeable with contributory negligence, instructions that "contributory negligence is negligence on part of a person injured," and that "One who is guilty of contributory negligence may not recover from another for the injuries suffered," were error, even though additional instructions tended to indicate that contributory negligence of the parents, not of the child, was in issue.

Judgment reversed.

Van Dyke, P. J., dissented.

1. Appeal and Error 🔑1057(1)

The mere exclusion of cumulative testimony will not ordinarily warrant a reversal.

2. Evidence 🔑99

All facts having rational probative value are admissible, unless some specific rule forbids.

3. Evidence 🔑99

Evidence at all times is to be confined to the issues, but it is not necessary that it should bear directly upon an issue, and it is admissible if it tends to prove the issue, or constitutes a link in the chain of proof, or if it affords any reasonable presumption or inference as to the principal fact or matter in dispute.

4. Automobiles 🔑243(1)

In parents' action for damages for death of child who had been struck by truck, wherein an issue was whether child had been struck by front or rear wheel of truck, doctor's testimony of result of autopsy, allegedly tending to show that an injury resulted from contact with front bumper, was improperly excluded.

5. Automobiles 🔑223(2)

Two year old boy, who had been killed when struck by truck, could not be charged with contributory negligence, absent evidence that he had sufficient mind or understanding to enable him to be so charged.

6. Trial 🔑296(2)

Where a jury has been erroneously instructed by injecting into the charge a rule of law completely outside of the issues, the error is not generally remedied by a correct declaration in other instructions, of the general rule involved.

7. Trial 🔑296(4)

Instructions, in parents' action for damages for death of two year old son, who was incapable of being charged with contributory negligence and who was killed when struck by truck, that "contributory negligence is negligence on the part of a person injured," and that "one who is guilty of contributory negligence may not recover from another for the injury suffered," were erroneous, even though additional instructions tended to indicate that contributory negligence of parents, not of the child, was in issue.

◆

Desmond, Miller & Artz, Sacramento, for appellants.

Russell A. Harris, Sacramento, for respondents.

PEEK, Justice.

Plaintiffs, as the surviving parents of Barry Wayne Dike, instituted this action to recover damages for the death of their two-year-old child, alleged to have resulted from the negligent operation of one of defendant company's trucks by its employee, defendant Ehrhart. The defendants' answer denied negligence on the part of defendants, and as an affirmative defense, alleged contributory negligence on the part of plaintiffs. At the conclusion of the trial the jury returned a verdict in favor of defendants. Plaintiffs' motion for a new trial was denied. They now appeal from the judgment entered pursuant to the verdict and from the order denying their motion.

Three main contentions are made: (1) That it was error for the court to exclude the testimony of the autopsy surgeon; (2) that it was error for the court to give an instruction offered by defendants relative to the contributory negligence of a "person injured;" and, (3) that it was prejudicial error to instruct on unavoidable accident.

Since the first two contentions appear to be well founded, and since the sufficiency of the evidence is not attacked, it is unnecessary to discuss the third contention or the evidence at length except as the latter relates to the questions so raised.

The accident occurred on El Camino Avenue in the County of Sacramento near plaintiffs' home. The street at that point is divided; that is, the northerly half is used for through traffic, and the southerly half is used primarily as an access road to the homes fronting thereon. The Dikes' home was one of several houses of similar design on that street. To the west of their home was the residence of the Green family; the Zimmermans' home was to the east; and immediately next to them the Dreyfus family. The Dike and Green garages adjoin, as do the Zimmerman and Dreyfus garages. From the point in front of the Zimmerman house where the child was struck, to the Green garage where he had been playing, was approximately 110 feet, which area was open lawn, there being no sidewalk. Defendants' truck was parked on the wrong side of the street in front of the Dreyfus home, Ehrhart's only customer in that block. The Zimmermans' car was parked immediately in front of the truck. The accident occurred as the defendant driver pulled away from the curb to go around the Zimmerman car.

Testimony concerning the whereabouts of the child prior to the accident was given by Mrs. Dike and two neighbors, Mrs. Green and Mrs. Zimmerman. Mrs. Green testified that while working in the front bedroom of her home she saw Mrs. Dike standing by Mrs. Zimmerman near the Zimmerman car; that she heard her small daughter, Peggy Zimmerman and the Dike child playing in the garage; that being apprehensive that they might mar some laundry she had just hung there to dry, she instructed them to leave the garage, closed the garage door and took her daughter into the house; that when she last saw the Dike child he was going toward his home; that Peggy stayed on for a moment and then ran after Barry; that she immediately reentered her home, going directly to the bedroom where she was working; that as soon as she reached that room she heard the driver scream.

Mrs. Zimmerman testified that when she had first walked out to the car where her husband was sitting, all three children were there; that the children then left to play on the lawn; that she heard Mrs. Dike say something about getting Barry off of the lawn because he would catch cold; that she did not notice the truck until it was just starting up from where it had been parked at the curb; that she could not remember whether at that time the children were near the adults or were on the lawn; that she had just reached the house when she heard the truck driver; that she had no recollection of seeing Barry at that time; that the last time she saw him was when the children left from where they were by the car to go on the lawn to play.

Mrs. Dike testified that when she first saw Mr. Zimmerman in the car she picked Barry up and started with him to where the car was parked; that she set him on the lawn to play while she went to inquire of Mr. Zimmerman concerning some photographs which had been taken of the children; that she watched the children as they played on the lawn; that she saw them when they left to play in the Green garage where there were toys and a sandbox; that during her conversation with the Zimmermans she continued looking towards the garage; that she saw Mrs. Green close the garage door, but did not see the children come out; that after leaving the Zimmerman car and while walking towards the garage to get Barry, the Zimmerman girl passed her coming from the Green garage; that it was her intention to go there and get the boy, however, she noticed the front door to her home was open and went there to investigate before going to the garage; and that just as she stepped into the livingroom she heard the driver scream. She further testified that Barry only played on the front lawn when she was with him; that he never played in the street; that on one occasion he had started to cross the street to go to a school near their home with some neighbor children, but that she brought him home; that when she left the Zimmermans' car she did not look for Barry, feeling that he was still playing in the Greens' garage.

The defendant driver testified that the truck was more than 16 feet long; that it had large doors on either side; that it was built low to the ground, there being only one step into the truck; that because of its construction there were blind spots for a distance to the front and sides; that when he first stopped his truck to make his delivery, he noticed two women and several children standing near the front of the Zimmerman car; that when he returned from making the delivery and started his truck, he saw the women, but only two of the three or four children who were there previously; that in starting, he turned his truck away from the curb to pass the Zimmerman car; that after first stopping to allow Mrs. Zimmerman and two children to walk around the car he proceeded forward in low gear; that when she left he took it for granted that there were no more children around; that he then watched only Mrs. Dike who was walking along the curbline about 20 feet ahead of him; that until he stopped he did not take his eyes off of her; that he did not look for the other children; that when he was some 20 to 30 feet from where he had started he felt a bump; that he stopped the truck approximately 35 or 40 feet from the starting point and got out to see what had happened. In particular his testimony was the bump was "* * * definitely the left hind wheels. Had it been anything else I would have felt it." His testimony was in conflict with the statements he made to a highway patrolman immediately following the accident when he stated he did not know how it happened.

Officer Eklund of the Highway Patrol testified that the truck was stopped approximately 47 feet from the point of impact which he placed at a point directly in front of the Zimmerman driveway and approximately 5 feet and 6 inches from the curb. The officer further testified that the vision of one sitting in the driver's seat of the truck and looking directly forward would be obscured for a distance of approximately 21 feet; on an angle of approximately 45 degrees to the left side one's vision would be obscured for a distance of 15 feet, and for approximately 4 feet directly through the door on the left side of the truck. He testified further that the defendant driver told him he did not know how the accident happened; that he had not seen the child; and, that when he had started up he thought he ran over a boulder in the road, and then, realizing he had seen nothing of that sort, he immediately stopped and went back to where he saw the child's body. The officer then testified to making an examination of the truck and finding an abrasion on the left front wheel and a strand of curly blonde hair which was similar to that of the child. He further testified that he found nothing unusual on any of the other tires. This testimony was corroborated by Mr. Zimmerman who examined the tires with Officer Eklund and saw the condition thereof as well as the blonde hair which the officer found.

Dr. Arthur Wallace who was called as a witness for plaintiffs, testified that he performed an autopsy on the body of the child; that in the course of the same he observed that there was a contusion of the abdomen; that the abdomen was examined internally and there were no organs injured; that the abdominal wall had been struck; that there was resultant hemorrhage within the wall but not within the abdominal cavity itself; that there were also multiple scratches or abrasions, small lacerated wounds of both upper and lower extremities. The child's death, he further testified, was due to the hemorrhage of the brain caused by the fractures of the bones of the skull. This evidence was first objected to by counsel for defendants as being immaterial, and thereafter upon the ground that it was offered solely "for enraging the jury by dwelling on the injuries on the body of the child." His motion for a mistrial on that ground was denied by the court. However, the court struck all of the doctor's testimony from the record and instructed the jury "to strike it from your minds and absolutely disregard it on the grounds it is immaterial."

Plaintiffs' argument in support of the admission of the testimony of the doctor is that such testimony, when coupled with the testimony of the highway patrolman and Mr. Zimmerman concerning the condition of the left front wheel of the truck and the strand of hair found on the tire, was proper evidence in support of their position that the child was first struck by the front bumper of the truck, thereby knocking him under the truck; that it was the left front wheel of the truck which passed over his body—not the left rear wheel as the driver testified. Defendants reply that since they admit that *a* wheel passed over the child causing death, the testimony of the doctor was merely cumulative and hence it was not error to exclude the same. We cannot agree with this conclusion.

[1–3] As respondents state, the mere exclusion of cumulative testimony will not ordinarily warrant a reversal, but it is also true that "All facts having rational probative value are admissible, unless some specific rule forbids." (I Wigmore on Evidence 3d, sections 9 and 10.) A like statement of the rule is found in the early case of Craven v. Central Pac. R. Co., 72 Cal. 345, at page 350, 13 P. 878, at page 880. There the court stated:

> "It may be remarked generally that, unless the case falls within some well-recognized class of exceptions, an evidentiary fact is relevant to the principal fact when the former tends to show that the latter probably did or did not occur; * * * remoteness usually goes to the weight, and not to the admissibility, of evidence."

While it is true that evidence at all times is to be confined to the issues, nevertheless "* * * 'it is not necessary that it should bear directly on the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof * * *'." Firlotte v. Jessee, 76 Cal.App. 2d 207, at page 210, 172 P.2d 710, at page 712, or if it affords any reasonable presumption or inference as to the principal fact or matter in dispute.

[4] Defendants' answer admitted that as a result of the collision between the truck and the child, the latter "sustained injuries resulting in his death." However, defendants denied negligence in the operation of the truck. The record also shows that when, during the course of the trial, a discussion arose relative to the admissibility of the doctor's testimony, defendants' counsel stated that the defendant driver had admitted it was the left rear wheel of his truck, and that there was no question in counsel's mind but that a "wheel went over the boy." It is now defendants' argument in support of the ruling of the trial court that since the officer and the witness, Zimmerman, testified concerning the hair and the abrasion which were found on the left front wheel, and since it was admitted that a wheel passed over the child, therefore, the testimony of the doctor was only cumulative and no prejudicial error resulted from the action of the trial court in striking the same. Furthermore, say the defendants, the argument of plaintiffs ignores the testimony of plaintiffs' own witness concerning the limited visibility which the driver had while sitting in the driver's seat. Thus, say the defendants, plaintiffs' argument is in direct contradiction of their own evidence and in any event could not have affected the ultimate determination of the case by the jury. Particularly they say this is true in view of the obvious contributory negligence of the mother.

We do not so understand the question posed. It was not as defendants argue whether the child was within the range of view of the driver, but rather whether or not the driver, in view of his knowledge of children being immediately in front of his truck, and his knowledge of his limited visibility to the front and side of the truck, exercised the degree of care that was demanded of him under such circumstances. In view of the state of the record it could not have been both wheels which passed over the child. The only direct evidence was that of the driver, who at the trial testified definitely that it was the left rear wheel. However, in a statement to the police officer immediately following the accident, he said he did not know how the accident occurred. Two witnesses were called by plaintiffs who testified as to the condition of the left front wheel. In resolving the conflict so presented, not alone in the driver's own testimony, but by virtue of the other witnesses, the jury had a right to have before it for consideration the evidence offered by the doctor. Certainly, the testimony not alone had some "probative value" but it was also a "link in the chain of proof" which was neither forbidden by any specific rule nor was it too remote. While there is no offer of proof on the part of plaintiffs of additional evidence to be adduced, it is quite apparent that the testimony as the doctor gave it could well be linked into a rational theory as to the manner in which the fatal accident occurred.

Appellants' next contention attacks the giving of an instruction offered by defendants which was as follows:

> *"Contributory negligence is negligence on the part of a person injured* which, cooperating in some degree with the negligence of another, helps in proximately causing the injury of which the former thereafter complains.
>
> *"One who is guilty of contributory negligence may not recover from another for the injury suffered."* (Emphasis added.)

It is appellants' contention that this instruction was erroneous since it referred to the "person injured," which to the lay mind would mean the infant child, and therefore if it was found that the child was contributorily negligent he could not recover from the defendants for the resulting injuries.

In answer to this contention respondents argue that the instruction was explained and made more certain by their instruction Number One which in effect told the jury that the action was brought by the parents of the child; that the defense of contributory negligence had been raised, and that such issue related to the conduct of the parents. Defendants then conclude their argument with the comment that even if the clear and unequivocal language of that instruction did not remove from the minds of the jury any question of contributory negligence on the part of the child, the result was merely a conflict in the instruction which would not warrant a reversal since, from a reading of the charge as a whole and its probable effect upon the jury, it appears unlikely that the jury followed the general language. Furthermore, they argue that no prejudice could have resulted to plaintiffs, particularly in view of the ample evidence of contributory negligence on the part of Mrs. Dike.

[5] The instruction attacked by plaintiffs was taken verbatim from BAJI, Number 103, entitled "Contributory Negligence —Definition." In the note at the top of the instruction, the authors state that the last sentence thereof "is designed to educate jurors as to the reason for the rule of law." But in a negligence case involving a child of two years and one month of age there could be no necessity for educating the jurors on the question of contributory negligence as it relates to the "injured person." As the court said in Conroy v. Perez, 64 Cal.App.2d 217, at page 226, 148 P.2d 680, at page 685, "While there is no precise age at which, as a matter of law, a child is to be held accountable for his actions, it is obvious that a child of two years and eight months of age could not have sufficient capacity to be guilty of contributory negligence which would bar its parents' recovery for damages for its death; and that it was error to have so instructed the jury." See also Gonzales v. Davis, 197 Cal. 256, 240 P. 16, and Parra v. Cleaver, 110 Cal.App. 168, 294 P. 6, 7. Here, as in the Parra case "there was no evidence indicating that he had sufficient mind or understanding to enable him to be guilty of contributory negligence, and as the record is barren of any evidence pointing to contributory negligence on his part, we cannot charge him with it."

Paraphrasing the rule above stated, if Barry was incapable of foreseeing the peril to which he was exposed, then no question of his contributory negligence could be submitted to the jury, and if it was error so to do, it necessarily follows it was equally erroneous for the court to instruct the jury as it did in this case.

It further should be noted that the same authority from which the attacked instruction was taken suggests two entirely different instructions as being specifically designed to cover a case such as the present where parents of a child appear alone as plaintiffs and seek to recover for the death of their child. (BAJI, Instructions numbered 146 (a) and 146 (b).) However, neither of those two instructions was given nor was any instruction of any kind given that would have informed the jury in any way concerning the rule as applied to children of such young and tender years.

[6] Furthermore, we cannot minimize as do respondents the effect the instruction had upon the jury by reason of the giving of their instruction Number One, nor can we say as they do that the contributory negligence of Mrs. Dike was so "obvious" that even if the instruction was erroneous no prejudicial error resulted. Where a jury has been erroneously instructed by injecting into the charge a rule of law completely outside of the issues, the error is not generally remedied by a correct declaration of the general rule involved by other instructions, Conroy v. Perez, supra, since "It is ordinarily impossible to determine which of the conflicting rules was followed by the jury." Wells v. Lloyd, 21 Cal.2d 452, 458, 132 P.2d 471, 475.

[7] We conclude therefore that under the facts in this case it was error to have given the attacked instruction. The child involved in this proceeding, as in the Conroy case, was too young to have been capable of foreseeing the peril to which he was exposed, and therefore could not be guilty of contributory negligence, but the jury was not so instructed. To the contrary, it was instructed that he could be. Taking the attacked instruction in its common, everyday meaning the jury was told that if the injured child was contributorily negligent he could not recover from the defendants. In view of all the facts, the instruction at best was ambiguous and could only have confused and misled the jury.

The judgment is reversed.

SCHOTTKY, J., concurs.

VAN DYKE, Presiding Justice.

I dissent. The errors complained of are, misdirection of the jury and improper rejection of evidence. For such errors we are commanded by the Constitution not to reverse the judgment unless, after an examination of the entire cause, including the evidence, we shall be of the opinion that the errors complained of have resulted in a miscarriage of justice. Article VI, § 4½, Calif. Const.

The testimony of Doctor Wallace, which the court struck out, was upon matters admitted by the pleadings or at trial, except as to the bruising of the abdominal walls of the deceased child. It is claimed the existence of the bruises would sustain an inference they had been caused by the front of the child's body being struck by the bumper of the milk truck. I agree it was material that plaintiffs should establish, if they could, that the child was fatally injured by being run over by the front tire instead of the rear tire for it affected the conclusion of negligence. The evidence directed to this point was entirely circumstantial. No witness saw the accident. The circumstantial evidence, other than that stricken, consisted of testimony of two witnesses who examined the front tire and found thereon a curly blonde hair which matched the hair of the infant, and an abrasion upon the surface of the tire. From this evidence the jury certainly could have inferred that the front tire had struck and passed over the head of the infant, causing its death. Indeed it is difficult, assuming the truth of this testimony—and there was no contradictory testimony—to explain the presence of the hair on the front tire except by inferring that it was that tire which caused death. The evidence excluded, which was likewise circumstantial, was not only cumulative but was most unsatisfactory. It could have no application unless the jury could reasonably infer from the existence of bruises upon the abdominal wall of the infant that these bruises were more probably caused by the bumper of the car than by other means. No expert evidence was offered, and probably none could have been offered, that there was such greater probability. Granting, however, that the evidence could have been so evaluated, it must be said, in fairness, that such evaluation involves more of surmise and speculation than of rationalization. This evidence could have added little, if anything, to the much stronger evidence in the record upon the particular issue under discussion. In my opinion it had no material weight and I think further that the jury would have come to no other conclusion had it been admitted instead of being stricken.

The next error complained of was the giving of an instruction on contributory negligence which had been pleaded in defense and as to which much evidence had been introduced. The plaintiffs, contending that the driver of the truck had been negligent and that his negligence had been the sole proximate cause of the death of the infant, stood in this position: The mother of the child, which child was but two years old, had left the infant about 100 feet away from the point where the accident occurred. She had gone to the scene of the accident to talk with a neighbor woman who was standing close to where the milk truck had been stopped. While she was there the infant, in some unexplained way, wandered from the point where it had been left and went to the same vicinity where the mother had gone. As the truck was about to start the two women and two children began walking away. The mother had not seen the child follow her. The issue of contributory negligence, therefore, was as prominent in the case as was the issue of the driver's negligence. It was, of course, proper that clear and full instructions should be given by the court concerning both issues. On the issue of contributory negligence the court instructed the jury as follows: That contributory negligence was negligence on the part of the *"person injured"* which had cooperated in some degree with the negligence of another and helped in proximately causing *"the injury of which the former thereafter complains"*; that the one who is guilty of contributory negligence could not recover from another "for the injury suffered"; that to establish the defense of contributory negligence the burden was upon the defendants to prove by a preponderance of evidence that *plaintiffs* were, or that *either of them* was, negligent and that such negligence contributed in some degree as a proximate cause of the death; that the action had been brought *by the parents* of the deceased infant and that the defense of contributory negligence had been raised by the answer, thus presenting "an issue *having to do with the conduct of the parents* who are the plaintiffs in this action relative to their control over, instructions and warnings to, and discipline, care and supervision of, the child, or the absence of a reasonable measure of those factors"; that the question raised in this regard was, *"Did the parents* and each of them use ordinary care in the exercise of their parental duties, and if not, *did the negligence of the parents or either of them* in that respect contribute in any degree as a proximate cause of the death"; that *"If the parents, or either of them,* did not use ordinary care in the exercise of their parental duties" and if this neglect was a "proximate cause of the injury or death of the child of which they here complain, then the said parents may not recover in this action"; that a violation of law on the part of the driver was of no consequence unless it was a proximate cause *"of an injury found by you to have been suffered by the plaintiffs."* (Italics supplied.)

Now it is contended by the appellants and concurred in by the majority opinion that because once in the instructions contributory negligence was defined as negligence on the part of "a person injured" this may have been taken by the jury as referring to the infant child. The assumption is that the "person injured" may or could be taken as meaning the person injured physically, and not the person injured financially. This might ordinarily be the meaning, but the assumption cannot be made here.

To my mind the assumption has validity only if we disregard a number of matters which ought not to be and in fact cannot be disregarded. There are the facts that this jury knew who the plaintiffs were; that they knew they were not asked to make an award to the child; and that they knew that nowhere in the record had there been any suggestion that the child had been or could have been, in view of its age, guilty of any negligence. This knowledge surely included knowledge that the reference in the instruction to the person injured was not to the child, but rather, as the instruction so plainly stated, was a reference to one who *sought a recovery,* that is, to the plaintiffs. Over and over the jury were told the issue of contributory negligence dealt with the conduct of the plaintiffs. I think that to consider this instruction, when read with the other instructions, as being error, or to conclude that it confused the jury, is wholly unjustifiable.

There is a third contention of error not treated in the majority opinion, but presented in the briefs, which has to do with a claim the trial court erred in giving an instruction, admittedly correct in form, on the subject of unavoidable accident. Little time need be spent in treating this claim of error. The record presented issues both of negligence and of proximate cause and in such cases it has been held proper to instruct the jury upon the subject of unavoidable accidents. Parker v. Womack, 37 Cal.2d 116, 120, 230 P.2d 823.

There is an additional consideration which is that these same contentions of error were presented to the trial judge who heard the case. While this Court is not bound by the order denying the motion for new trial, nevertheless the reaction of the trial judge to the motion and his ruling upon it is entitled to weight when the same issues are presented on appeal.

It is my conclusion that there was no error in the instructions and that the striking out of the evidence of the autopsy surgeon was a matter of little moment. This is a case where, in my opinion, the constitutional provision amounts to a clear mandate to this Court to affirm the judgment. I would do so.

Hearing denied; EDMONDS, SCHAUER and SPENCE, JJ., dissenting.

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124 Cal.App.2d 861

NELSON v. ANGEL et al.

Civ. 15551.

District Court of Appeal, First District, Division 1, California.

April 30, 1954.

Rehearing Denied May 28, 1954.

Proceeding by landlord against tenant for alleged breach of lease. The Superior Court, City and County of San Francisco, Preston Devine, J., denied landlord's motion for new trial and entered judgment upon verdict for tenants. The District Court of Appeal, Finley, J. pro tem., held that, where lease provided that, in event of breach through filing in bankruptcy "and notwithstanding any other provisions of lease, landlord should forthwith upon such termination be entitled to recover damages for such breach in amount equal to amount of rent reserved for residue of term less fair rental value of premises for residue of term, termination by such breach abrogated landlord and tenant relationship and limited landlord's remedy to that provided in lease.

Appeal from order denying new trial dismissed, and judgment affirmed.

1. Appeal and Error ⚷110

No appeal lies from an order denying motion for new trial.

2. Landlord and Tenant ⚷101½

Where lease provided that, in event of breach through filing in bankruptcy "and notwithstanding any other provisions of lease, landlord should forthwith upon such termination be entitled to recover damages for such breach in amount equal to amount of rent reserved for residue of term less fair rental value of premises for residue of term", termination by such breach abrogated landlord and tenant relationship and limited landlord's remedy to that provided in lease. Bankr. Act, § 1 et seq., 11 U.S.C.A. § 1 et seq.

3. Pleading ⚷248(3)

Trial ⚷203(1)

Where ruling of court upon remedies available to landlord under lease depended upon question of law rather than one of fact, landlord was not entitled to amend complaint or to try case or require instructions upon any theory other than that dependent upon lease provisions applied by court.

4. Trial ⚷203(1)

Trial court, if requested, should give submitted instructions on each theory relied upon by parties and supported by law and evidence, but court should not instruct upon any proposed theory which is untenable as matter of law.

5. Trial ⚷203(1)

Trial court is not required to instruct upon proposed theory just because party may differ with court in court's interpretation of the law.

6. Pleading ⚷237(3)

Where, even if under leased provisions landlord had right to make election of remedies after breach of lease, pleadings and proof established that landlord had chosen remedy provided in lease, and action was pleaded and tried upon such theory, landlord, upon completion of evidence, was not entitled to amend his complaint for purpose of setting up an alternative theory of recovery. Civ.Code, § 3308.

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Charles A. Christin, J. W. Radil, San Francisco, Oswald A. Hunt, Oxnard, Rhein, Dienstag & Levin, Edward Dienstag, Jay Jackson, Jr., San Francisco, for appellant.

Philander Brooks Beadle, Morton L. Silvers, San Francisco, for respondents.

FINLEY, Justice pro tem.

[1] This is a second appeal in this action by plaintiff. In this instance it is from the judgment entered upon a jury verdict in favor of defendants. The notice of appeals also states that it is from the order denying plaintiff's motion for a new trial. No appeal lies from such an order. Reeves v. Reeves, 34 Cal.2d 355, 209 P.2d 937. The appeal from said order is therefore dismissed.

The purpose of the action is to recover damages for an alleged breach of a lease wherein appellant as lessor leased to respondents a certain building and premises located on Mason Street in San Francisco. The period of the lease was ten years and the total rental $270,000, payable in monthly instalments of $2,250 each.

Among other provisions in the lease, respondents agreed in paragraph 4 to execute and deliver to appellant and to record chattel mortgages covering all personal property in the building belonging to respondents and all subsequently acquired personal property placed therein, subject, however, to the paramount claims of the holders of any conditional sales contracts, and to provide appellant with copies of any such conditional sales contracts.

In paragraph 16 it is provided that: "The filing of any petition in bankruptcy or insolvency by or against the Lessees shall be deemed to constitute a breach of this lease and thereupon, ipso facto and without entry or other action by Lessor, this lease shall become and be terminated; and notwithstanding any other provisions of this lease, Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the then fair rental value of the premises for the residue of said term."

Paragraph 19 of the lease contains general provisions governing remedies of the lessor for breach. It provides that in the event of failure by lessors to pay rent or to perform or to observe any of Lessees' obligations thereunder Lessor might at any time thereafter, without notice or demand, lawfully declare the term ended and re-enter the premises and that: "Upon such entry the Lessees shall be liable to the Lessor as follows: (a) for the installments of rent and other sums falling due hereunder for the period or periods after entry during which the premises remain vacant, which sums shall be payable as they become due hereunder; * * * and (c) while said premises are subject to any lease or leases made by Lessor pursuant to this paragraph, for the amount by which the monthly installments payable under such new lease or leases is less than the monthly installments of rent payable hereunder, which deficiency shall be payable monthly as the same is determined."

In paragraph 5 of the lease it is provided that Lessees might assign the lease to a California corporation organized by them provided they were not then in default "and upon the written assumption of this lease by such corporation and the compliance by said Lessees or by said corporation of the terms of paragraph 4 above relating to the security for this lease, [the chattel mortgages on the personal property] Lessees shall be personally discharged from all liability under this lease, except that Lessees shall severally remain liable to Lessor upon their covenants in said paragraph 4 to pay to the conditional vendors and to Lessor all balances due under all conditional sale contracts not later than July 31, 1948, * * *"

The lease was executed on April 30, 1947. On July 1, 1947, before there was any breach, it was assigned to and accepted by Hellenic Enterprises, Inc., a corporation. On December 13, 1947, Hellenic Enterprises, Inc., filed a petition under the Bankruptcy Act.

Appellant in his complaint claimed that respondents violated the terms of the lease in the following respects: (a) That they failed to execute and deliver to appellant the chattel mortgages referred to in paragraph 4 of the lease; (b) that they purchased personal property under conditional sales contracts and failed to furnish appellant with copies of these contracts; (c) that Hellenic Enterprises, Inc., filed a petition in bankruptcy.

During the trial it was admitted that the chattel mortgage had not been given; that copies of the conditional sales contracts were not furnished to the lessor; and it was stipulated that Hellenic Enterprises, Inc., had filed a petition for relief under the bankruptcy statutes which terminated the lease.

The first appeal herein was from the judgment following an order sustaining a demurrer to the complaint without leave to amend, apparently on the theory that after assignment of the lease to Hellenic Enterprises, Inc., the original lessees were no longer liable thereunder. It is reported in 94 Cal.App.2d 136, 210 P.2d 256. Therein the judgment of the trial court was reversed and it was held that according to the allegations in the complaint there had been a failure to execute the chattel mortgages and to furnish copies of the original sales contracts and that, as a matter of law, respondents were still liable for any breach of the lease.

In this appeal the parties seem to have been a bit uncertain as to just how the issues should be defined. Appellant asserts in his opening brief that the trial court was in error:

(1) In not following the law of the case as set forth in 94 Cal.App.2d 136, 210 P.2d 256;

(2) that the court improperly refused to allow a proffered amendment to the complaint which would have amended it to conform to the proof; and

(3) that the court erred in rejecting a proffered instruction. In appellant's closing brief under the heading "Questions Involved," the issues are stated as follows:

"1. Can a lessor terminate a lease and hold the lessee for the difference between the amount of the rent reserved in the lease and the avails of a reletting, if the lease so provides?

"2. Was the refusal of the Court to so instruct the jury prejudicial error?"

In respondents' supplemental reply brief filed herein under permission granted at the time of argument, respondents disagree with this latter statement by appellant, claiming that "It fails to include the following essential considerations:

"1. The lease was *not* terminated by the lessor. It was automatically terminated pursuant to an express forfeiture clause. Such clause provided that, notwithstanding any other provisions in the lease, lessor was thereupon entitled to recover certain liquidated damages.

"2. The lessor elected to exercise his remedy of seeking recovery of such damages. The pleadings upon which the case was tried were based upon that election. After the evidence was closed, it was agreed by both sides that the only issue to be submitted to the jury was that upon which such liquidated damages depended.

"3. Not until after both sides had rested, and after such agreement as to the issue to be submitted to the jury, did appellant request leave to amend his complaint or request the refused instruction.

"4. The proposed 'amendment to conform to proof' attempted to introduce a new issue into the case after both sides had rested. Leave to so amend was denied by the trial Court, and accordingly the requested instruction, which had no relation to the issues created by the pleadings, was refused."

[2–5] Actually the main question to be answered here is: What remedy or remedies does the lease make available to the lessor under the circumstances that while lessees were in default in other respects the lease was terminated by the filing of a petition under the Bankruptcy Act, 11 U.S.C.A. § 1 et seq.? The answer is provided in paragraph 16 of the lease, which is the only paragraph relating to a breach founded upon bankruptcy, or which treats the subject, or in which bankruptcy is even mentioned. Not only are all the considertions of breach by act of bankruptcy set forth therein, but the penalty for such a breach is prescribed and the measure of damages for such a breach specifically delineated. As stated above it provides that in the event of a breach through filing in bankruptcy *"and notwithstanding any other provisions of this lease,* Lessor shall forthwith upon such termination be entitled to recover damages for such breach in an amount equal to the amount of the rent reserved in this lease for the residue of the term hereof, less the then fair rental value of the premises for the residue of said term." (Italics added.) This language excludes any remedy other than the one specifically provided upon termination of the lease ipso facto by the filing of a petition in bankruptcy. Inasmuch as the parties stipulated at the commencement of the trial that the lease was "terminated by act of the Hellenic Enterprises, Incorporated, in filing this petition for an arrangement under the Bankruptcy Act," such termination abrogated the relationship of landlord and tenant and defined Lessor's only remedy, for any other interpretation would render the words "notwithstanding any other provisions of this lease," nugatory and without effect or meaning. Appellant Lessor does not claim injury to the premises or that he was in anywise actually damaged other than by the loss of rentals. The termination of the lease by filing in bankruptcy would, of course, not deprive lessor of his right to damages actually sustained on account of any breach under paragraph 19 of the lease. But his complaint is that the trial court restricted him to the remedy concerning lost rentals provided in paragraph 16 when, according to his interpretation of the lease, he was entitled to elect the remedies provided in paragraph 19 if he so desired. We have shown that the lease cannot be so interpreted and that as to rentals lost by termination of the lease, the trial court was not in error in restricting appellant to the remedy provided in paragraph 16. This ruling by the trial court depended not upon a question of fact, but upon a question of law. This being so, appellant was not entitled to amend his complaint as proposed or to try the case or to require instructions on any other theory than that dependent upon the provisions of paragraph 16 of the lease. While a trial court, if so requested, should give submitted instructions on each theory relied upon by the parties and supported by the law and the evidence, it would be error for the court to instruct on any proposed theory untenable as a matter of law. A trial court is not required to instruct on a proposed theory just because a party may differ with the court in its interpretation of the law. Branger v. Chevalier, 9 Cal. 353.

[6] Going further, even though it be assumed that under the provisions of the lease plaintiff originally had an election of remedies, the pleadings and proof plainly establish that he made his election and chose the remedy provided in paragraph 16 of the lease. The case was pleaded and tried on that theory, and under the plain provisions of Civil Code, section 3308, plaintiff was certainly bound to the extent that upon completion of the evidence he

was not entiled to amend his complaint so as to set up an alternative theory of recovery available to him at the beginning but rejected in favor of the one pursued. Had plaintiff framed his pleadings on one theory and without objection submitted proof on an alternative theory, it may well be that the provisions of Civil Code Section 3308 would not preclude the granting by the trial court of a motion to amend the pleadings to conform to the proof. But such is not the case here. The proposed amendment to the complaint and the proposed instruction go far afield of finding any substantial support or justification in the evidence.

The appeal from the order denying the new trial is dismissed; the judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

WOLFF v. FALLON et al.*

Civ. 15789.

District Court of Appeal, First District, Division 2, California.

April 30, 1954.

Hearing Granted June 25, 1954.

Suit for declaratory relief and to quiet title in plaintiff against certain building restrictions imposed by the original subdividers. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment from which the defendants and intervening home owners' association appealed. The District Court of Appeal, Kaufman, J., held that evidence showed such a change of use of property in immediate neighborhood of property of plaintiff as to render inequitable the enforcement of the restriction to single family residences.

Judgment affirmed.

Dooling, J., dissented.

1. Covenants 🔑72

Where suit is brought to have building restrictions, imposed upon real property by original subdividers, removed, courts will look to the change in the uses to which the neighboring property has been put since imposition of restrictions, and if such change renders restricted parcel unsuitable or undesirable for the residential purposes to which restricted, relief may be granted, if to enforce the restrictions would be inequitable and oppressive as to the one party, because of the change in uses, and would not materially benefit the other.

2. Covenants 🔑72

Although a zoning of property by city for commercial purposes does not nullify covenants in deed restricting the use of the property to residential purposes, it is persuasive evidence of a change in the immediate neighborhood, as bearing on whether the restrictions should be enforced.

3. Covenants 🔑72

It is not required that property be worthless for the use to which it is restricted by covenants in deeds, placed therein by the original subdividers, before the restrictions may be lifted, but even though the property has substantial value for the restricted use, it may be lifted if the change in the immediate neighborhood is such as to make the enforcement of the restrictions inequitable and oppressive without benefiting the party seeking to have them enforced.

4. Covenants 🔑72

The granting or withholding of equitable relief from use restrictions contained in deeds from original subdividers is a matter primarily for the discretion of the trial court, under the facts of the particular case.

5. Appeal and Error 🔑1009(1, 2)

The findings of a trial court in a suit for equitable relief from restrictive covenants contained in deed as result of placement therein by original subdividers, are entitled to the same weight as in any other case, and if based on any substantial evidence, they are final.

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* Opinion vacated 284 P.2d 802.

6. Covenants ⚷72

In suit for declaratory relief and to quiet title in plaintiff against certain building restrictions imposed upon property by the original subdividers, wherein defendants were individual property owners in the original subdivision, and a home owners' association intervened on behalf of all property owners, record showed such a change of use of the property in the immediate neighborhood of plaintiff's lot as to render inequitable the enforcement of restriction to one family residences, except that restriction as to set-back.

John A. Gorfinkel, Julian W. Mack II, San Francisco, for appellants.

Jefferson E. Peyser, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of plaintiff in a suit for declaratory relief and to quiet title against certain building restrictions imposed upon the real property here involved by the original subdividers. The individual defendants are property owners of parcels of property in Ingleside Terraces in San Francisco. Ingleside Terraces Home Owners Association, a nonprofit corporation, intervened on behalf of all property owners in the tract. It was the contention of plaintiff at the trial that the restrictions, valid and enforceable when imposed, were no longer binding or enforceable because of the changed conditions in the neighborhood. The trial court quieted title against all restrictions except the 15 ft. building line "set-back" on Paloma Avenue. Defendants and intervenor have appealed.

Ingleside Terraces, a residential district, is bounded by Ocean Avenue on the north, Ashton on the east, Holloway on the south, and Junipero Serra Boulevard on the west, except for a small corner at the intersection of Ocean Avenue and Junipero Serra Boulevard. There are more than 700 lots in the tract, of which only 7 or 8 were vacant at the time of trial. Approximately 741 lots in Ingleside Terraces were originally reserved for residential purposes.

The Urban Realty Company was the original subdivider. In the original plan two specific areas of the tract were excepted from the restrictions. The entire tract, other than the unrestricted area was subdivided as a "high class" residential district. The following restrictions were contained in the grant deeds of the original grantees:

(a) that no building or structure except a one-family dwelling house or appurtenances thereto, to be used exclusively as a dwelling house shall be placed upon each lot;

(b) that no flats, duplexes, apartments, lodging or boarding houses or hotels shall be erected thereon;

(c) that no main wall of any building shall be nearer to the street line than the building line;

(d) that no house, appurtenance or outbuilding shall be less than 4 feet from the northerly exterior side of any lot, nor less than 10 feet from the exterior southerly line of any lot, and in the case of lots having easterly and westerly side lines that no improvements shall be erected within less than 4 feet of such exterior easterly line or within less than 10 feet of said exterior westerly side line of such lots.

(e) that no building shall be more than 2 stories in height, and shall not exceed 21 feet in height from the top of the floor of the first story to the underside of the ceiling of the second story.

The deeds to all original grantees of the Urban Realty Company, including that of plaintiff's predecessor in interest contained such restrictions. These deeds further provided that said restrictions constituted covenants real running with the land, and that each and every part of Ingleside Terraces constituted an easement appurtenant to each and every portion of said tract.

Plaintiff Wolff is the legal owner of lot 14 in block 2 of the tract, but holds title as trustee for Julian W. Weston who furnished the consideration for the purchase price. Weston had agreed to purchase the lot in 1938 on condition that it could be conveyed to him free of the above restrictions. A quiet title action entitled Liebman v. Choynski was brought in Superior Court in San Francisco to secure relief against the restrictions. Judgment granting such relief was entered, and the property was thereafter conveyed to Weston's nominee. However, this judgment was subsequently vacated on the ground that the real parties in interest had not been made defendants and the order vacating said judgment was affirmed on appeal. 37 Cal.App.2d 565, 99 P.2d 1119.

The lot here in question, lot 14 in block 2, is the corner lot at the southwest corner of Ocean Avenue and Paloma Avenue. It has a frontage of 113 feet on Ocean and 50 feet on Paloma. All the remaining lots in this block fronting on Ocean and extending westerly to Junipero Serra Boulevard are within the unrestricted area. All lots fronting on Paloma on both sides of said street are subject to the restrictions.

Every lot in the tract originally conveyed subject to the restrictions with the exception of the vacant lots (of which plaintiff's is one) is now occupied by a single family residence. The only commercial structure on any lot originally subject to the restrictions is a popcorn stand and dental offices on the southeast corner of Victoria and Ocean Avenue.

The area on the north side of Ocean Avenue across the street from Ingleside Terraces is known as Balboa Terraces. They are subject to an "exclusively family residence" restriction. The side of Ocean Avenue opposite Ingleside Terraces is occupied by The Commodore Sloat Grade School, St. Francis Church, property of the Aptos Junior High School and single family residences. There is no commercial structure on the north side of Ocean Avenue in the block opposite plaintiff's lot or in the blocks from there westerly to Junipero Serra Boulevard or easterly for 3 blocks. There has been a street car line on Ocean Avenue since before 1920.

Since 1913 when the deed restrictions were imposed, and particularly since 1937 there has been a substantial increase in motor, street car and pedestrian traffic and in traffic noises on that part of Ocean Avenue bordering respondent's lot.

The value of plaintiff's lot for single family residence purposes is estimated at between $3,000 and $4,000. Its value for unrestricted commercial use is between $15,000 and $17,000. The lot would not be readily saleable if improved with a single family dwelling, partly because it is adjacent to the unrestricted area, partly because lots on Ocean Avenue are not as desirable as other lots in the vicinity, and partly because of the slope of the lot and the fact that it is on the south side of the street. The residence fronting on Paloma Avenue and adjoining plaintiff's lot to the south is valued at between $15,500 and $18,000, while the residence on the southeast corner of Paloma and Ocean, directly across Paloma Avenue from respondent's lot, is valued at between $23,000 and $24,000. A new home in Balboa Terraces on the opposite side of Ocean Avenue and slightly east of respondent's lot is valued in excess of $20,000.

Building on the unrestricted area west of respondent's lot began about 1923. It was then improved with one family cottage type detached residences. These residences were subsequently converted to commercial use, and the entire block with the exception of 4 parcels, is now occupied by commercial enterprises or medical offices. At the time of the trial 883 feet out of 963 front feet were being used for non-residential purposes. The block contained a market, a gasoline service station, retail stores, gas and electric sub-station, medical and dental offices, real estate offices, cleaning and dyeing establishment, beauty salon, pharmacy, photographic studio, and a dance studio.

In 1921 Block 2, including respondent's lot, was zoned and classified by the City and County of San Francisco as a "Commercial District."

By 1938, 8 lots out of 20 and 480 feet of the 963 feet frontage of Block 2 were used for nonresidential purposes. Between 1942 and 1952, 8 more buildings in the block had been converted to non-residential use.

Appellants contend that in order to secure relief against such restrictions respondent must, under the California cases, show that (1) there has been a change in the neighborhood; (2) that such changed conditions have rendered useless the original purpose of the restrictions to the extent that it would be inequitable to enforce them; (3) that the property is unsuitable or useless for the purposes for which it was restricted—it is not sufficient that its unrestricted use would be more valuable; (4) it must be in the best interest of the entire area and not just in the best interest of plaintiff's lot; (5) maintenance of the restrictions will not restore or preserve the locality as a residential area; (6) unrestricted use of plaintiff's lot will not damage or adversely affect other property in the vicinity. Marra v. Aetna Const. Co., 15 Cal.2d 375, 101 P.2d 490; Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348; Strong v. Hancock, 201 Cal. 530, 258 P. 60; Robertson v. Nichols, 92 Cal.App.2d 201, 206 P.2d 898; Forman v. Hancock, 3 Cal.App.2d 291, 39 P.2d 249.

Respondent notes that several important cases are absent from the group from which appellant has formulated the conditions listed above. It has been held in Downs v. Kroeger, 200 Cal. 743, 254 P. 1101, and in Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782, that a condition for relief is that the subject lot is now essentially business property, in a business district or on a business street, and that such lot is now no longer suitable or desirable for residential use. See, also, Alexander v. Title Ins. & Trust Co., 48 Cal.App.2d 488, 119 P.2d 992. The court will also consider the facts that the property is more valuable for business than residential use, according to the cases above as well as Marra v. Aetna Construction Co., supra. Another factor to be considered, which is present in the case now before the court is that a zoning ordinance now permits non-residential use of the lot. Jewett v. Albin, 90 Cal.App. 535, 266 P. 329; Hess v. Country Club Park, supra. Heavy traffic and traffic noises on the street where the lot is situated are also to be considered, Hurd v. Albert, Alexander v. Title Ins. & Trust Co., supra, as well as the fact that the subject lot is now near unrestricted property whether within or without the tract wherein the lot is situated.

Appellants contend that the evidence does not demonstrate that there has been a change in the neighborhood, and that all the evidence showed only a commercial use of the south side of Ocean Avenue from Paloma to Junipero Serra Boulevard with the exception of four lots. The property on the opposite side of Ocean is not commercial. It is true that the evidence shows that the restricted area of Ingleside Terraces is still a completely residential tract, with apparently non-conforming uses on but one corner, Victoria and Ocean—the dentist's office and a popcorn stand. Real estate values in the tract are still very good. Appellants maintain that the fact that Ocean Avenue west of respondent's lot has been filled in with commercial enterprises is a development exactly in accordance with the original plan of the tract since it was designated as "unrestricted" therein. The street car line on Ocean Avenue was there before the tract was laid out. That there has been an increase in traffic and traffic noises since 1913 is admitted, but appellants contend that there is nothing in the record to show that such increase is not merely the normal growth in traffic, and hence no ground for avoiding the restrictions. They note that the only evidence in the record which attempts a comparison with the traffic conditions on Ocean Avenue is that given for Monterey Boulevard west of Montecito in a residential district. The percentages of increase in traffic on that street are almost the same as those for Ocean Avenue from 1937 to 1951. Respondent replies that there is no probative value in this evidence, for it well might be that the increase in traffic together with other changes in the neighborhood might entitle property owners in that area to relief from restrictions. However, it is true, as appellants contend, that there has not been a showing that the property has been rendered useless for residential purposes because of traffic conditions. However, there definitely has been a showing that it has been rendered less desirable for residential purposes.

[1] In reply to appellant's contention that there has been no change from the *original plan* for the neighborhood, and therefore no change in the neighborhood, respondent points out that every case granting relief involves a change from the original plan, hence the "original plan" is not a factor in such cases. What the courts look to in this state is a *change in the uses* to which neighboring property has been put since the imposition of the restrictions. If such change renders the restricted parcel unsuitable or undesirable for residential purposes, relief may be granted. Such a change did occur in the immediate neighborhood of respondent's lot. In 1913 when the restrictions were imposed the block was vacant and so remained until 1923 when 16 single family residences were built thereon. During all the period the use of the remainder of the block was consistent with the restrictions placed on respondent's lot. However, a change in use began taking place in 1924, until at the time of trial the block was almost entirely commercial. The cumulative nature of these changes is recognized in Hurd v. Albert, 214 Cal. 15, 26, 3 P.2d 545, 549, 76 A.L.R. 1348, where it is said that "The effect of each business structure located near the tract continues until finally the cumulative effect of all the business invasions on the restricted area is such that to enforce the restrictions would be inequitable and oppressive as to one party, and would not materially benefit the other."

Appellants have cited two out of state cases, Cuneo v. Chicago Title & Trust Co., 337 Ill. 589, 169 N.E. 760, and Bickell v. Moraio, 117 Conn. 176, 167 A. 722, 724. In the first case relief was denied where the owners whose property was covered by residential restrictions sued to quiet title against them. No restrictions had been imposed on the 44 lots of the boundary streets in the subdivision, and these had been used for apartments and business building. The court there held that there has been no change from the original plan, and plaintiffs had purchased their lots with notice of that plan. Respondent notes that in the Cuneo case there were no changes in the uses to which property in the same block was being put, as is the case here. However, if the Cuneo case stands for the proposition that a change from the original plan must be shown before relief can be granted, it is not in harmony with the California authorities. The case of Bickell v. Moraio, supra, is distinguishable, since in that case there were still no business operations within the residential tract.

[2] Appellants never refer in their brief to the fact that the block in which respondent's lot is situated was zoned for commercial purposes by the City and County of San Francisco in 1921. While such zoning does not nullify restrictive covenants in deeds, it is certainly pursuasive evidence of a change in the immediate neighborhood of respondent's lot since the restrictions were imposed in 1913.

Appellants contend that there is no showing that granting the relief herein to respondent will not be a detriment to the adjoining residential property. Hurd v. Albert, supra, holds that restrictive covenants will not be enforced if it would be oppressive and inequitable to give them effect without benefitting the party seeking to have them enforced. This implies, appellants say, the corollary that if granting relief will merely pass the burden on to the neighbor, relief must be denied. There was definite testimony by real estate experts that as to all lot owners in the tract, other than the immediately adjoining lot on Paloma, that the commercial use of the lot would have no more effect than the already existing commercial uses in that block which had been beneficial to the entire tract. There was also testimony that any intelligently developed structure would enhance the value of the adjoining lot on Paloma. It is true that appellants can point to some testimony that certain types of structures and certain possible uses, such as a gas station or a veterinarian hospital would cause some damage to the adjoining lot. Respondent notes that appellants have offered no evidence to show that retention of the restrictions would substantially or materially benefit any property owner in the tract.

Appellants contend that since the property is saleable and useable for residence purposes, relief cannot be granted merely because it is more valuable for unrestricted use. For residential use the court found the value to be between $3,000 and $4,000 while for non-residential use the value is $15,000 to $17,000, and that it is not desirable for residential use and that there is no ready market for its sale for residential purposes. They argue that the testimony shows that there has always been sales resistance to the lots on Ocean Avenue, and therefore the commercial use in the block is not the reason for sales resistance to that lot. However, there is testimony that one of the factors in sales resistance to this particular lot is the fact that the established pattern of this block is commercial.

[3] That it is not a requirement that property be worthless for the restricted use before restrictions may be lifted is attested by the case of Marr v. Aetna Const. Co., supra, a case in which the trial court found that unrestricted the property was worth $12,000, while restricted it was worth $2,000. This is fairly comparable to the restricted and unrestricted use values as given by the real estate experts herein in regard to the subject lot.

It is emphasized by appellants that there has been no abandonment of the restrictions in the tract, and they state that in every case where relief against restrictions has been granted there has been an abandonment of the restrictions, making compliance therewith unreasonable and useless to adjoining owners. Only one non-conforming use in the tract has been established, the use of a dwelling for a doctor's office at Ocean and Victoria, about one-half a mile from respondent's lot. However, in Hess v. Country Club Park, 213 Cal. 613, 619, 2 P.2d 782, 784, relief from restrictions was granted and the trial court there found that "It is true that none of these buildings [referring to commercial operations] is within said tract No. 1600, and that there have been no violations of the building restrictions in said tract."

[4] It is urged that the trial court erred in lifting all restrictions except the set-back restriction on Paloma Avenue. The ten foot set-back restriction on the exterior southerly line was not maintained nor the two story height restriction. There is no assurance under this decree that respondent might not erect a height-limit building or a solid wall structure. It is true that in upholding a trial court's decision denying relief from restrictions, the court referred to the fact that if restrictions were lifted there was no assurance that plaintiff therein would not erect a height-limit apartment building. However, in Hess v. Country Club Park and Marra v. Aetna Const. Co., supra, decisions were affirmed where relief was given from all restrictions. The granting or withholding of equitable relief, and the degree thereof, is within the discretion of the trial court. Fairchild v. Raines, 24 Cal.2d 818, 826, 151 P.2d 260.

[5] It is well established that the right to relief from restrictive covenants such as those herein, depends upon the facts of each case. The findings of the trial court in such a case are entitled to the same weight as in any other case, and if based on any substantial evidence, they are final. Strong v. Hancock, 201 Cal. 530, 258 P. 60; Robertson v. Nichols, 92 Cal.App.2d 201, 207, 206 P.2d 898.

[6] A review of the record herein does not establish that the trial court abused its discretion in lifting all restrictions from respondent's property except the set-back restriction on Paloma Avenue.

The judgment of the trial court finds support in the record and no prejudicial error appearing therein, it must be affirmed.

Judgment affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I dissent. When Ingleside Terrace was laid out certain lots on Ocean Avenue which were a part of the tract itself were not restricted to residence use. The respondent's lot adjoined these but it was restricted. It was contemplated as a part of the plan of subdivision that the unrestricted lots should be used for business and that respondent's lot should not. What the scheme of subdivision contemplated has occurred exactly as planned. The lots set apart by the subdivider for business are being used for that purpose. I apprehend that this is the first case in which a court has held that the development of a subdivision exactly according to the original plan renders the restrictions on a particular lot unenforceable.

There is no such change outside the restricted tract as to make the rule of Hess v. Country Club Park, 213 Cal. 613, 2 P.2d 782, applicable. Ocean Avenue, except for the lots set aside in the subdivision plan itself for business use, has not become commercial in the neighborhood of respondent's lot. It is a bootstrap-lifting operation to say: "The original plan contemplated business on certain lots on Ocean Avenue. Those lots are now used for business just as planned. Therefore the character of the neighborhood has changed and the original plan can no longer be carried out."

Some line must be drawn between residential and commercial use in any tract where both are permitted. The residential lots on the line drawn will necessarily be somewhat less valuable. That is inherent in the plan itself and cannot justify raising the restrictions unless the plan is to be destroyed.

If each lot next to a business lot is entitled to have the restrictions lifted soon there would be no restrictions left in any tract where the plan permits business use on any of the lots, because as the restriction is lifted from each lot the adjoining lot owner would in turn become entitled to have his restrictions similarly lifted. The restrictions would successively fall like a house of cards.

Respondent bought this lot with his eyes open. He wants to get a bargain at the expense of his neighbors but his neighbors built their homes in reliance on the covenant which he seeks to set aside. The equities are all with his neighbors and not with him.

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124 Cal.App.2d 858

PETERSEN v. FRIIS-HANSEN et al.

Civ. 4668.

District Court of Appeal, Fourth District,
California.
April 29, 1954.

Action to recover $9,200 as salary or, in alternative, as reasonable value of services allegedly rendered by plaintiff under an oral agreement whereby plaintiff managed defendants' motel and restaurant. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment for plaintiff in amount sought, and defendants appealed. The District Court of Appeals, Barnard, P. J., held that the evidence sustained the verdict and judgment.

Judgment affirmed.

1. Master and Servant 🔑80(10)

In action to recover $9,200 as salary or, in alternative, as reasonable value of services allegedly rendered by plaintiff under an oral agreement whereby plaintiff managed defendants' motel and restaurant, evidence sustained verdict and judgment for plaintiff in amount sought.

2. Trial 🔑233(4)

In action to recover for services allegedly rendered to defendants, wherein plaintiff set forth a cause of action for $9,200 based on the specific salary agreement, and a second cause of action based on a common count for labor and services of the reasonable value of $9,200, instructions which, in effect, told jury that recovery could be had on one of the causes of action only, and that if it found in favor of plaintiff on first cause of action no consideration should be given to the other, were proper.

◆

L. Kenneth Say, Fresno, for appellants.

Martin C. Thuesen, Fresno, for respondent.

BARNARD, Presiding Justice.

This is an action to recover for services alleged to have been rendered to the defendants. The parties entered into some kind of oral agreement under which the plaintiff became manager of a motel and restaurant owned by the defendants as copartners, and acted in that capacity from December 1, 1950 to March 10, 1952.

In a first cause of action the plaintiff alleged that he rendered such services at the request of the defendants; that the defendants promised to pay him for said services a salary of $600 per month or one-half of the gross profits of the business, whichever was the greater; that the gross profits for the time in question were less than $600 a month; that by reason of their oral agreement he was entitled to $600 a month for that period; and that the entire amount of $9200 remains unpaid. A second cause of action was based on a common count for labor and services of the reasonable value of $9,200. By their answer and cross-complaint the defendants claimed that these services were rendered pursuant to an oral agreement providing that the parties should operate this business as a joint venture, with the net profits to be equally divided between them; that the plaintiff withdrew from the joint venture on March 10, 1952; that the joint venture lost about $33,000; and that the plaintiff should be required to pay his share of that loss.

A jury brought in a verdict in favor of the plaintiff for $9,200, and found against the defendants on their cross-complaint. The defendants' motion for a new trial was denied, and they have appealed from a judgment entered in accordance with the verdict.

[1] It is first contended that since the action was one to recover salary only, and was not based "on any contract, oral or otherwise", proper deductions should have been made for "unemployment insurance and old age security"; and that no consideration was given to the fact that the plaintiff and his wife had board and lodging during the period in question. It is not true that plaintiff's claim was not based upon a contract. Both parties alleged that these services were performed pursuant to an oral contract, the testimony on both sides was to the same effect, and the jury apparently accepted the plaintiff's testimony as to the terms of that contract. The matter of deductions for unemployment insurance and old age security, and the fact that board and lodging had been furnished, were not pleaded as an offset, and no evidence was received or offered which would have sustained an allowance for such a claim. There was no evidence that the defendants had made any such insurance or security payments. There was evidence that the plaintiff's wife also worked throughout this period, and the evidence would indicate that it was intended that both should receive board and lodging. In any event, on the record before us, the evidence is sufficient to sustain the verdict and judgment.

[2] It is further contended that the court erred in giving three instructions. The first two told the jury that if it was not convinced that the parties had entered into an agreement as alleged in the first cause of action, it should then determine whether or not the plaintiff was entitled to recover on the second cause of action. The third instruction merely told the jury that in the event it found that there was a specific agreement of the kind referred to in the first cause of action this would eliminate and prevent any consideration of the second cause of action, based on the reasonable value of the services. It is argued that these instructions could only have confused the jury since they implied that the plaintiff was not basing his claim solely on the fact that he was an employee of the defendants. There is no merit to this contention and we find neither error nor prejudice in these instructions. In effect, they told the jury that recovery could be had on one of the causes of action only, and that if it found in favor of the plaintiff on the first cause of action no consideration should be given to the other.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

125 Cal.App.2d 62

ILLERS v. CRARY et al.

Civ. 15647.

District Court of Appeal, First District,
Division 2, California.
May 5, 1954.

Action by administratrix for death of husband when tugboat on which he was working capsized. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., entered judgment of nonsuit and plaintiff appealed. The District Court of Appeal, Dooling, J., held that whether person of ordinary prudence would have hitched two tugboats in tandem in towing heavy oil barge through heavy crosscurrents of flooding waters from three converging streams, or would have placed second tugboat on which deceased was working behind barge to prevent overturning from shearing action of barge, was question for jury.

Judgment reversed.

1. Death ⚷77

In action for death of seaman, evidence that deceased twice a month sent money to former wife to help provide for children, and sent $80 per month to daughter for her support and had promised to help her through college, was sufficient to establish pecuniary loss resulting to beneficiaries of deceased. 46 U.S.C.A. § 688.

2. Appeal and Error ⚷997(2)

Reviewing court will affirm judgment of nonsuit only when it has given plaintiff's evidence all probative value to which it is legally entitled and indulged in every legitimate inference which may be drawn from such evidence, and there is still no evidence of sufficient substantiality to support verdict for plaintiff.

3. Seamen ⚷29(5.16)

In action for death of seaman when tugboat on which he was working capsized in heavy crosscurrents of flooding waters from three converging streams, whether person of ordinary prudence would have hitched two tugboats in tandem with heavy oil barge in tow which prevented control over direction of second tugboat when barge sheared off to either side, or would have placed second tugboat behind barge so that when barge sheared off second tugboat could have remained clear, was question for jury. 46 U.S.C.A. § 688.

4. Seamen ⚷29(5.16)

In action for death of seaman when second tugboat on which he was working capsized, where two tugboats arranged in tandem were towing heavy oil barge through heavy crosscurrents of flooding waters from three converging streams, whether person of ordinary prudence would have ordered deceased to go to bed to await second watch, or would have stationed him at tow line to cut barge free in event shearing action of barge threatened to capsize second tug boat, was question for jury. 46 U.S.C.A. § 688.

5. Seamen ⚷29(5.12)

Where tugboats with tows in all weathers had without casualty navigated point in river where second of two tugboats arranged in tandem capsized while towing heavy oil barge through heavy crosscurrents and whirlpool of flooding waters from three converging streams, and both tugboats were exclusively in control of defendants, capsizing of second tugboat was within rule of res ipsa loquitur.

6. Negligence ⚷121(2)

Fact that plaintiff introduces affirmative evidence tending to show specific acts of negligence does not prevent application of res ipsa doctrine.

7. Seamen ⚷29(5.14)

In action for death of seaman when tugboat on which he was working capsized, evidence from experts in field of navigation was sufficient basis for jury to conclude that in absence of negligence tugboat under circumstances in evidence would not ordinarily capsize, even if navigation is such expert field that only expert evidence will support application of res ipsa doctrine.

◆

Robert J. Popelka and Donkin & Mulholland, San Jose, for appellant.

Dana, Bledsoe & Smith, San Francisco, for respondents.

DOOLING, Justice.

This is an appeal from a judgment of nonsuit entered in favor of defendants in an action brought pursuant to the Jones Act, 46 U.S.C.A. § 688.

[1] Plaintiff is the former wife of deceased and brings this action as administratrix on behalf of the sole beneficiaries of his estate. They are his two children, Eugene L. age 23 and Elizabeth Pollmann, a minor. The testimony of the plaintiff and Elizabeth is sufficient to establish the fact that there was pecuniary loss resulting to the beneficiaries from the death of their father so that they can recover under the statute. The plaintiff testified that deceased sent money to her twice a month without fail to help provide for the children. Elizabeth testified that her father sent $80 per month for her support and also sent various sums of money for different holidays and had promised to help her through college.

Deceased, Ferdinand Pollmann, worked as a deckhand on a tug boat for the defendants and at the time of his death by drowning he was working in such position on the tug boat "Ruth Freese". Beside deceased the crew consisted of Edward Jocz, the captain and Manual Santos, the assistant operator. The tug boat set out from Oakland on December 4, 1950 with a loaded tank barge in tow. They started out for Sacramento, proceeding by Rio Vista, and the Grand Island echo light. They had gone up the Sacramento River for about a mile, but the "Ruth Freese" did not have sufficient power to go any further. Therefore they went back to Rio Vista where the captain called the office for advice. The dispatcher sent down the "Oil Pilot", another tug boat, to give the "Ruth Freese" a hand. The two captains talked it over and decided to tow in tandem with the "Oil Pilot" in the lead followed by the "Ruth Freese" and last the barge. They took into consideration the fact that there was a heavy current in the river and that a heavy current was coming down Steamboat and Cash Sloughs. The two sloughs and Sacramento River all join together around the vicinity of the Grand Island light.

After leaving the docks the captain ordered the deceased to go to bed because he and the captain would take the second watch. Santos was standing the first four hour watch. The captain testified that the most treacherous spot to navigate is the mouth of the river where the two sloughs and the river join together. The river was at high water at the time, and the three converging streams create crosscurrents, whirlpools, etc., which are accentuated by the increased volume of water during the winter. The captain admitted that he delayed retiring until they had passed through this area because it was more troublesome than any other.

The barge sheared to the left as the tugs were making a right turn into the river. The "Oil Pilot" moved over to counteract this, but the barge then sheared to the right. At this point this shearing force caused the "Ruth Freese" to turn over on its side so that the mast was lying in the water. The captain of the "Oil Pilot" testified that as the "Ruth Freese" was capsizing he saw a figure come out of the galley and run aft. That was the last seen of the figure, but he heard a "man holler for help".

[2] Where a nonsuit has been granted it is well settled that this court must give the plaintiff's evidence all the probative value to which it is legally entitled and indulge in every legitimate inference which may be drawn from such evidence. Only when this is done and there is still no evidence of sufficient substantiality to support a verdict for the plaintiff, can the court affirm such a judgment. Raber v. Tumin, 36 Cal.2d 654, 656, 226 P.2d 574.

Plaintiff makes two contentions: (1) There was sufficient direct evidence presented to support an inference of negligence by the defendants; (2) under the facts presented the doctrine of res ipsa loquitur was applicable to establish a prima facie case. We are convinced that both points are well taken. The witness Holmes who was second in command on the "Oil Pilot" and "Jocz", the skipper of the "Ruth Freese" were both examined by the plaintiff under Code Civ.Proc. sec. 2055.

From their testimony it appears that there are other methods of towing a barge with two tugs besides hitching the tugs to the barge in tandem. One of these is to put one tug ahead of the barge and the other tug behind it. When a barge is being towed it has a tendency at times to shear off to the right or left. This shearing is corrected by the tug turning in the opposite direction to bring the barge back to its proper course. When two tugs are hitched to a barge in tandem and the barge shears off in one direction and the lead tug turns in the other the second tug has no maneuverability. It must follow the lead tug with its bow while its stern is subject to the pull of the shearing barge in the opposite direction. The following testimony given by Holmes points this up:

> "Q. Mr. Holmes, it is a fact is it not, when you are towing in tandem, with one tug boat ahead of the other and the barge behind, that the tow boat in the center * * * has no control over which way it is going to go? A. Yes.
>
> "Q. In other words, if the barge shears off to the left, and this tug boat ahead is pulling, this one in the center can't turn to go with the barge? A. Not unless he turns with the other boat.
>
> "* * * * * *
>
> "Q. Yes. In a case where you have it hooked up in tandem, and the barge takes a shear off to the right or starboard, and the first boat continues on straight, what happens to the one in the middle? A. It follows the heaviest, the barge. * * * The barge will pull it over.
>
> "* * * * * *
>
> "Q. I mean does he have the same steering ability as the lead boat, or more or less? A. No, he doesn't have hardly any."

Holmes further testified as to what caused the "Ruth Freese" to capsize:

> "Q. * * * On December 5, 1950, when you were on the 'Oil Pilot' which was forward of the 'Ruth Freese', which was towing that barge, my question is: That is exactly what happened that night, didn't it, the barge took a shear off to the right that was great enough so that it tipped the 'Ruth Freese' entirely over in the water, so that its mast was underwater? A. That is right.
>
> "Q. And did you see that happen? A. Yes."

On the other hand Holmes testified that where one of the two tugs is behind the barge when the barge shears off the rear tug can shut off its power and remain clear of the barge until the lead tug has righted the barge.

It was also in evidence that both the Sacramento River and the two sloughs emptying into it were in flood, that the crosscurrent of the water from the sloughs against the side of the barge would force it to shear off to the right, that on previous trips during times of flood the effect of the current from these sloughs upon both tug and tow had been observed and that a loaded tank barge, such as the one under tow at the time, has a greater tendency to shear off than a barge loaded with dry cargo. Holmes also testified that while he had seen tugs hitched to a barge in tandem on the bay he had never before seen this done on the Sacramento River.

[3] It is clear from this evidence that the jury could find that the skippers of the two tugs when they hitched them in tandem to the barge knew the danger of the barge shearing off under the force of the crosscurrent created by the floodwaters of the two sloughs at the point of the casualty and knew or should have known that the danger of the "Ruth Freese" being capsized if this shearing off occurred was markedly increased by the fact that, as the second tug in the tandem, it would be in a position where no effective steps could be taken to counteract the careening effect of the lead tug pulling its bow in one direction while the barge pulled its stern in the other. Whether a person of ordinary prudence would have added to the hazards of the navigation by hitching the tugs in tandem with knowledge of all of the facts disclosed clearly presents a fact question for the jury.

It was also in evidence that an ax is provided on each tug to cut the tow rope when an emergency makes this necessary. Holmes testified as to the precautions taken on the "Oil Pilot" in passing through this hazardous part of the river.

> "Q. And it is a fact, is it not, that it is the custom and practice when you get in waters that have severe currents, or real rough weather, to keep a man stationed back by the line to cut it if necessary, if something happens to it? A. Yes.
>
> "Q. And you had a man stationed out on deck that night just in case of emergency at the time the accident happened? A. That is right."

[4] It is further in evidence that this man on the "Oil Pilot" did cut the line from the "Oil Pilot" to the "Ruth Freese" when the "Ruth Freese" was seen to be capsizing. This presented a question of fact for the jury as to whether the failure of the skipper of the "Ruth Freese" to take a similar precaution, instead of instructing Pollmann to stay below as he did, was the act of a person of ordinary prudence under the circumstances. It is a fair inference from the evidence that Pollmann did in fact come from below and run to the stern of the "Ruth Freese" and loosen the tow rope to the barge, but too late to prevent its capsizing. This tow rope was in fact free of the "Ruth Freese" afterwards and the evidence is that unless it was freed manually this was unlikely to occur. The jury might well find that if Pollmann had been stationed on the deck, as was the deckhand on the "Oil Pilot", instead of being below decks, he might have reached the tow rope in time to cut or free it before the "Ruth Freese" capsized. Other theories of liability under the evidence are suggested by appellant but the two above discussed sufficiently demonstrate the error in granting the nonsuit.

[5] On the question of res ipsa loquitur it is in evidence that tugs with tows navigated this point in the Sacramento River in all weathers without casualty. The "Oil Pilot" alone had taken a heavier barge to Sacramento on the same day that this casualty occurred and on the following day towed this very barge to Sacramento without any untoward incident. The two tugs and the barge were exclusively in the control of defendants through their employees. The capsizing of the "Ruth Freese" under these circumstances falls fairly within the res ipsa rule. Raber v. Tumin, supra, 36 Cal.2d 654, 659, 226 P.2d 574.

[6] The fact that appellant introduced affirmative evidence tending to show specific acts of negligence does not prevent the application of the res ipsa doctrine. Leet v. Union Pac. R. Co., 25 Cal.2d 605, 622, 155 P.2d 42, 158 A.L.R. 1008.

[7] Respondents also urge that navigation is such an expert field that only expert evidence would support the application of the res ipsa doctrine. If this were to be conceded, the evidence above summarized from experts in the field, furnishes a sufficient basis for a jury to conclude that in the absence of negligence a tug boat under the circumstances here present would not ordinarily capsize.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

KENNY
v.
CITIZENS NAT. TRUST & SAVINGS BANK OF LOS ANGELES et al.

Civ. 19853.

District Court of Appeal, Second District,
Division 2, California.

April 27, 1954.

As Corrected on Denial of Rehearing
May 24, 1954.

Hearing Granted June 25, 1954.*

Action by executor of estate of contingent remainderman under testamentary trust, against corporate trustee and trustee's executive officer, seeking, inter alia, damages for breach of fiduciary duty and to impose a constructive trust. The Superior Court, Los Angeles County, John J. Ford, J., sustained demurrers to complaint, and plaintiff appealed. The District Court of Appeal, Fox, J., held, that where complaint alleged that plaintiff's decedent, as husband of life beneficiary of testamentary trust, had a remainder interest in trust property contingent upon wife's failure to exercise her power of appointment, and charged that the trustee, and its executive officer, undermined decedent's rights as contingent remainderman, induced decedent's wife to make the officer the principal beneficiary of her power of appointment under trust, and thus diverted to the officer the principal part of the trust corpus, the complaint stated cause of action for damages against defendants, as well as sufficient facts to constitute the officer a constructive trustee of assets received from trust as distributee under the wife's will, and to establish the chargeability of the trustee to the extent it might still hold undistributed assets of the trust.

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* Dismissed Nov. 17, 1954.

Judgment affirmed in part and reversed in part, with instructions.

McComb, J., dissented in part.

1. Trusts 🔑250

Where wife's will, which benefited officer of corporate trustee of trust of which wife was life beneficiary with power of appointment, was admittedly valid, and, although a fiduciary relationship may have existed, as to trust property, between the trustee and its officer, on one hand, and the beneficiary's husband, on the other, no such relationship existed between them as to wife's separate property, thus precluding any breach of fiduciary relationship as to such property, husband was simply in position of a disappointed heir, as to wife's separate property, and was not entitled to any relief, legal or equitable, against trustee and its officer.

2. Wills 🔑439, 440

A will or decree embodying a testamentary instrument is to be construed according to the expressed intention of the testator, and this intention must be given effect as far as possible.

3. Wills 🔑634(3)

Where testamentary trust provided for a gift over, should life beneficiary fail to exercise her power of appointment, to those entitled to succeed to life beneficiary's estate in accordance with laws of intestate's succession, a remainder interest was created in life beneficiary's husband, as one of her possible heirs at law, such remainder being rendered contingent by the uncertainty as to whether the right to its enjoyment would vest in the husband.

4. Remainders 🔑1

The interest of a contingent remainderman is not a mere possibility, such as the expectancy of an heir apparent, but an estate in the property.

5. Trusts 🔑247

Generally, a cestui que trust who can allege an existing interest, however minute or remote, may, upon reasonable cause shown, apply to court to have his interest properly secured.

6. Trusts 🔑179

A trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property, and duty so cast upon the trustee with relation to the beneficiary is that of uberrima fides, or utmost fidelity.

7. Trusts 🔑179, 262

Statutory provisions relating to the fiduciary duty owed by trustee to beneficiary of trust disclose a legislative design to inhibit temptation of trustee to use his fiduciary position for personal gain and to protect beneficiary from any unwholesome influence trustee might wield to obtain advantage over him, and their practical effect is to place upon fiduciary the burden of overcoming presumption of fraud and undue influence which arises when, by his conduct in respect to trust, he has received a seeming advantage over beneficiary. Civ.Code, §§ *2224*, *2228*, *2231*, *2234*, *2235*.

8. Trusts 🔑179, 231(1)

Statutory provisions relating to the fiduciary duty owed by trustee to beneficiary of trust are broad enough to encompass not only individual transactions between trustee and beneficiary or misappropriations of trust property for trustee's own purposes, but also other forms of activity or patterns of behavior during stewardship of trust which bespeak an attitude adverse to beneficiary's interests. Civ.Code, §§ *2224, 2228, 2230, 2231, 2234, 2235.*

9. Trusts ⚷179

Where testamentary trust provided for a gift over, should life beneficiary fail to exercise her power of appointment, to those entitled to succeed to life beneficiary's estate in accordance with laws of intestate's succession, thus creating in beneficiary's husband a contingent remainder interest, the trustee and trustee's executive officer occupied a fiduciary relation to the husband, as well as to the life beneficiary.

10. Pleading ⚷214(2)

On demurrers, all well-pleaded allegations must be taken as true.

11. Trusts ⚷261, 262

Where complaint alleged that plaintiff's decedent, as husband of life beneficiary of testamentary trust, had a remainder interest in trust property contingent upon wife's failure to exercise her power of appointment, and charged that corporate trustee and its executive officer undermined his rights as contingent remainderman, induced wife to make the officer the principal beneficiary of her power of appointment, and thus diverted to such officer the principal part of the trust corpus, such complaint set forth a prima facie case of overreaching, conflict of interest, and subordination of the cestui's interest to their own by those occupying a trustee position, and brought into play the presumption of fraud implied by law. Civ.Code, § *2235.*

12. Banks and Banking ⚷315(2)

A corporate trustee must accept responsibility for acts of its officers done in course of administration of a trust.

13. Banks and Banking ⚷314

Executive officer of corporate trustee, though not personally a trustee of the trust, was subject to same disabilities as to wrongful use of his trustee influence as the trustee for whom he acted in administration of trust.

14. Trusts ⚷250, 359(1)

Where trustees have acquired property by virtue of a breach of their fiduciary duty of loyalty to a beneficiary, the beneficiary may proceed against them personally to recover damages for the fraud or may charge them as constructive trustees of the property for his own benefit as rightful owner. Civ.Code, §§ *2224, 2234.*

15. Trusts ⚷261

Where complaint alleged that plaintiff's decedent, as husband of life beneficiary of testamentary trust, had a remainder interest in trust property contingent upon wife's failure to exercise her power of appointment, and charged that corporate trustee, and its executive officer, undermined his rights as contingent remainderman and diverted to such officer the principal part of the trust corpus, such complaint stated cause of action against trustee and its officer for damages based on fraud arising from violation of their fiduciary obligation to plaintiff's decedent.

16. Trusts ⚷371(2)

Where complaint alleged that plaintiff's decedent, as husband of life beneficiary of testamentary trust, had a remainder interest in trust property contingent upon wife's failure to exercise her power of appointment, and charged that corporate trustee, and its executive officer, undermined his right as contingent remainderman, induced beneficiary to make such officer the principal beneficiary of power of appointment under trust, and thus diverted to such officer the principal part of trust corpus, complaint stated facts sufficient to constitute the officer a constructive trustee of assets received from trust as distributee under beneficiary's will, and to establish chargeability of trustee to extent that it might still hold undistributed assets of the trust.

17. Wills ⚷155(1)

Mere persuasion or advice or the influence of affection is not an improper influence in securing execution of a will, but influence which justifies the setting aside of a will must be such as deprives testator of his free agency, destroys freedom of his purpose, and renders the testamentary instrument an expression of the will of another rather than his own, and it must operate at time will is made.

18. Wills 🔑163(2)

The mere existence of a confidential relationship between a testator and a beneficiary under will, without more, does not raise a presumption of undue influence or shift to beneficiary the burden of proving that the will was not executed by undue influence on his part.

19. Trusts 🔑262

Where a fiduciary uses the influence flowing from his trust position to secure an advantage over a cestui que trust, it is unnecessary to show that the trustee overmastered the will of the cestui and substituted his own, but the relationship having been established and the advantage shown, the law raises the presumption of fraud and requires the fiduciary to satisfactorily explain his conduct in order to overcome the presumption.

20. Trusts 🔑262

If officer of corporate trustee used the influence of his trust position for purpose of ultimately acquiring for himself the bulk of the trust estate by creating a situation by which he profited at expense of contingent remainderman under trust, the presumption of undue influence and fraud which flowed from his fiduciary relationship to the contingent remainderman came into being, and fact that such influence would not be deemed undue in a will contest was immaterial.

21. Trusts 🔑331

The final order settling and approving final accounting in testamentary trust, coupled with the distribution of entire trust corpus by trustee pursuant to such order, did not constitute a conclusive adjudication that there was no act committed by trustee which was a breach of its duty as such, or which resulted in damage, such as would preclude, under doctrine of res judicata, suit for damages based on fraud arising from alleged violation of trustee's fiduciary obligation to a contingent remainderman under trust.

22. Powers 🔑25

The title which an appointee acquires from the donee of a power of appointment derives from the original donor of the power, the donee being merely a conduit through which the title passes.

23. Executors and Administrators 🔑315(5)

A decree of distribution of the estate of the original donor to the appointees under donee's valid exercise of power of appointment operates merely to confirm such title as was vested in them at the donee's death.

24. Trusts 🔑61(3)

Where life beneficiary of testamentary trust exercised in her will her power of appointment under the trust, beneficiary's husband, whose remainder interest was contingent on failure of beneficiary to exercise her power of appointment, became a stranger to the estate at time of beneficiary's death, and relationship between husband and trustee, as beneficiary and trustee under trust, was terminated.

25. Courts 🔑200½
Trusts 🔑298

Court, in settling final accounts of testamentary trustees and decreeing distribution of trust in accordance with power of appointment exercised in life beneficiary's will, was engaged in exercise of its special and limited probate jurisdiction, and court was without jurisdiction, in such proceeding, to try question of title to disputed property between representative or beneficiary of the estate and a stranger to the estate, or to grant a personal judgment against the trustees.

26. Estoppel 🔑91(1), 92(1)
Motions 🔑64

Where recovery was sought from corporate trustee and its executive officer for their breach of fiduciary duty to contingent remainderman under testamentary trust, which breach was reflected in provisions of a valid will made by life beneficiary whereby she exercised her power of appointment under trust so as to prefer the officer over the remainderman, who was beneficiary's husband, and relief was not sought either under will or because of its invalidity, previous order of probate court instructing remainderman's guardian not to contest such will, and his acquiescence therein, did not estop remainderman's representative from maintaining his action, nor was such representative estopped by fact that remainderman accepted benefits under the will.

27. Abatement and Revival ⟹55(3)

Where causes of action for recovery of damages and imposition of a constructive trust, asserted against corporate trustee and its officer by representative of contingent remainderman under testamentary trust, stemmed from defendants' fraudulent invasion of remainderman's interest in trust, a right in property, such causes of action survived death of contingent remainderman.

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Milo V. Olson, Walter L. Nossaman, Joseph L. Wyatt, Jr., Los Angeles, for appellant.

Cosgrove, Cramer, Diether & Rindge, John N. Cramer, Samuel H. Rindge, Los Angeles, for respondent bank.

Belcher, Kearney & Fargo, Los Angeles, for respondent Ivey.

FOX, Justice.

Defendants' demurrers to plaintiff's first amended complaint were sustained without leave to amend. Plaintiff appeals from the ensuing judgment.

George W. Walker had a daughter, Ethelwyn, who married William N. Jarnagin (hereinafter referred to as William), in November, 1927. This marriage relationship continued until the death of Ethelwyn, on January 2, 1951. Mr. Walker passed away in May, 1943. His will was admitted to probate, and defendant bank, Robert W. Kenney and Ethelwyn were appointed co-executors in accordance with its direction. The will created a trust naming as co-trustees the same parties who were named and appointed co-executors. In November, 1946, puruant to a decree of partial distribution, assets valued in excess of $1,150,000 were distributed to these trustees. The bank thereafter acted as the managing trustee during the entire period of administration of the testamentary trust and defendant Ivey, as executive vice president of the bank, was actively in charge of all matters relating thereto.

Ethelwyn was not only a co-trustee of this trust but she was also a life beneficiary. After payment of a small annuity to one Minnie Van Ness, who passed away in November, 1947, the balance of the income (but not less than $40,000 per year, even if recourse to the corpus were necessary) went to Ethelwyn. Additionally, Ethelwyn was given a power of appointment to be exercised "by will or instrument in the nature of a will" over the residue of the trust. In default of her exercise of the power of appointment, Mr. Walker's will provided that the trustees should distribute such residue to the person or persons entitled to succeed to Ethelwyn's estate "in accordance with the laws of intestate succession of the place of her residence as of the date of her death, and in effect as of that date."

During the period of the administration of the Walker trust and until the death of Ethelwyn it is alleged that the Bank and Ivey, as its executive vice president, "in their capacity as trustee for William N. Jarnagin" under the Walker trust, "used their position to obtain an advantage from William N. Jarnagin, their beneficiary, in that by reason of their position as trustee and executive vice president of said Bank, and the influence that resulted therefrom, they pursued a course of conduct of ingratiating themselves with Ethelwyn Gertrude Jarnagin to such an extent that defendant Ivey became her confidential, financial and business advisor and confident, and advised and directed her with relation to all business matters that pertained in any way" to the Walker trust and any other business affairs of her own; and that "at the suggestion, advice and under the direction, dictation and control of said defendants, and as a result of the influence defendants' trustee position under the Walker trust gave them," Ethelwyn signed an holographic will, in December, 1947, by which she gave her husband, William, $3,500 a month "during his lifetime only," provided for other annuities, made a gift of $10,000 to her friend Sarah

Kenny, and gave the residue of her own estate and her father's estate over which she had power of appointment to defendant Ivey. A trust was created, with the bank as trustee, to take care of the annuities, and the Bank and Ivey were named as executors.

In February, 1948, Ivey borrowed $72,500 from Ethelwyn without interest. In the following March defendants, it is alleged, "advised, and by persuasion and the influence given them by their trustee position under the Walker trust, caused" Ethelwyn to execute a more elaborate, witnessed will. This will was filed for probate in January, 1951, and admitted to probate the following February. By its terms Ethelwyn made a specific bequest of a sapphire ring to Sarah Kenny, devised her home to Ivey and forgave any indebtedness owing by him to her at her death which, it is alleged, aggregated $83,500 without interest. The will made bequests to 20 friends, relatives and employees in the aggregate sum of $184,500, and bequests to 16 charities totaling $294,000. The residue of her estate, including the property in the Walker trust over which she had power of appointment, Ethelwyn bequeathed to the Bank and Ivey, in trust, to pay the income to her husband but not to exceed $40,000 per year, unless the trustees determined that a sum in excess of that amount was necessary for William's welfare. If the income from the trust were insufficient, the trustees were directed to make up the difference from the corpus. The trustees were directed to pay Ivey the balance of the income and, in the event it was less than $30,000 in any calendar year they were authorized and directed to take recourse to the principal of the trust for the deficiency. Upon the death of William the trust terminated and the trustees were directed to distribute the corpus thereof to Ivey, or, if he were dead, to his daughter, or, if she were dead, to her issue. The will also provided that if any heir or beneficiary thereunder challenged the will or any provision thereof such person would be cut off with $1 and the share or interest that would have gone to such person went to Ivey. The Bank and Ivey were named as executors.

During all the period of the administration of the Walker trust, William was crippled by arthritis, and was a bed-ridden patient in a sanitarium and not living at the family home. The Bank and Ivey knew of this situation, and, it is alleged, "took advantage of it" and "were thus enabled to ingratiate themselves" with Ethelwyn. William and plaintiff learned of this conduct of the defendants when Ethelwyn's witnessed will was filed for probate in January, 1951.

Ethelwyn was a resident of California when she passed away, and under the laws of this state, her husband, William, was her sole heir. The assets of the Walker trust as to which Ethelwyn had power of appointment then had an appraised value in excess of $2,200,000 and her own estate was valued at approximately $2,150,000. Plaintiff alleges that upon Ethelwyn's death William would have inherited both of these estates had she not executed either of these wills.

In February, 1952, the remaining assets of the Walker trust were distributed to the Bank and Ivey as the executors of Ethelwyn's will pursuant to the power of appointment which she exercised therein.

William passed away in February, 1953, and plaintiff was appointed executor of his will. He thus survived his wife by a little more than two years. During that period he received $84,300 pursuant to the provisions of her will. No portion of this amount has been repaid or tendered to her estate.

In June, 1951, following Ethelwyn's demise the previous January, a petition was filed seeking an appointment of a guardian for William. Defendants, "as friends of the court," objected to such appointment. A guardian was, nevertheless, appointed. The guardian then brought on for hearing in July, which was within six months after the admission of Ethelwyn's will to probate, a petition for instructions as to whether he should, on behalf of William, take steps to revoke the probate of her will. At this hearing defendants objected to the court's giving the guardian any instructions to file a petition to revoke the probate of Ethelwyn's will. Defendants urged, according to the amended complaint, that because of

William's sick and destitute condition, and because the litigation would be prolonged and Ivey would not loan or advance William any funds pending such litigation, and even though William won the contest of the witnessed will he would still have to contest the holographic will, and because of the forfeiture clause in the witnessed will, he could not afford to petition for the revocation of its probate. The court thereupon instructed the guardian not to file such petition. Thereafter the Bank and Ivey "sponsored the distribution of the Walker trust * * * assets" to themselves as executors under Ethelwyn's probated will.

The Pleadings

The amended complaint contains six alleged causes of action. The first, third and fifth relate only to the Walker trust estate. The second, fourth and sixth also include Ethelwyn's estate. Plaintiff now concedes that the demurrers to counts three and four are well taken.

In count one, plaintiff seeks damages for breach of a fiduciary duty alleged to have been owed William by the defendants in relation to the Walker trust. In the second count damages are sought upon the same grounds but Ethelwyn's estate is also included. The fifth count seeks to impose a trust upon all the property that came into the possession of defendants from the Walker estate. Count six seeks to impose a trust on the property obtained from Ethelwyn's estate.

The basic theory of plaintiff's complaint is that the Bank, as trustee, and Ivey, as its executive vice president in charge of the administration of the Walker trust, used the influence which their position as trustee gave them with Ethelwyn—a life beneficiary with power of appointment—to obtain an advantage over William—also a beneficiary under the trust. To put it another way, plaintiff charges defendants with a violation of their fiduciary duty to William in their conduct and dealings with Ethelwyn, with whom they were also in a fiduciary relation. In this connection it should be pointed out that during the course of this appeal plaintiff has conceded the validity of Ethelwyn's will.

Counts Two and Six

[1] We shall first consider counts two and six which relate to Ethelwyn's own property (i. e., exclusive of the Walker trust assets). With respect to this property there was no fiduciary relationship between defendants and William; consequently there could be no breach of a fiduciary duty. Furthermore, since it is now admitted that her will is valid, and hence a contest would have been futile, no cause of action based on extrinsic fraud, insofar as this property is concerned, could arise from the alleged adverse pressure in the guardianship hearing wherein William's guardian sought instructions relative to filing a petition to revoke the probate of Ethelwyn's will. Therefore, as to Ethelwyn's property, William is simply in the position of a disappointed heir and not entitled to any relief, either legal or equitable.

Counts One and Five

The first and fifth causes of action, which grow out of the Walker trust, present problems of a different character. In this connection, the fundamental and decisive question presented relates to William's status under the Walker trust. For if the interest of a remainderman was thereby created in him, William would obviously occupy the position of a *cestui que trust,* or one having a beneficial interest in the trust *res.* So far as it is here pertinent, the Walker trust provided that upon Ethelwyn's death the trustees should convey, pay over and distribute "the entire remainder of the residue trust" to the persons appointed by Ethelwyn by will or instrument in the nature of a will; and in the event of her default in exercising the power of appointment, then "to the person or persons entitled to succeed to the estate of Ethelwyn Gertrude Jarnagin in accordance with the laws of intestate succession of the place of her residence as of the date of her death, and in effect as of that date."

William a Contingent Beneficiary

Defendants assert that they owed no fiduciary duty to William, since he was not a beneficiary of the Walker trust. For this proposition they rely on Bixby v. California

Trust Co., 33 Cal.2d 495, 202 P.2d 1018. There is no merit to their argument and the Bixby case does not apply. In that decision the plaintiff was the settlor of an irrevocable spendthrift trust, with the income payable to himself for life, and providing that upon his death, the remainder of the trust estate should be distributed to his "heirs at law in accordance with the laws of succession of the state of California then in effect." The settlor brought an action to terminate the trust. The trustee opposed the action on the ground that a remainder had been created in the heirs, and the trust could not be revoked since said heirs were not before the court. In deciding that termination of the trust should be ordered, the Supreme Court held that the trust instrument disclosed an intent not to create remainder interests in the heirs, thus making the settlor the sole beneficiary, and retaining in himself a reversionary interest in the corpus. An analysis of the holding in the case plainly establishes that the court was applying the rule of construction in support of the policy favoring the free alienability of property, which presumes, absent a showing to the contrary, that the settlor of a trust who reserves a life interest in himself and provides that on his death the corpus should go to his own heirs, does not intend to create remainder interests in his own heirs. This is patent from the following language, 33 Cal.2d at page 498, 202 P.2d at page 1019: "It is said that where a person creates a life estate in himself with a gift over to his heirs he ordinarily intends the same thing as if he had given the property to his estate; that he does not intend to make a gift to any particular person but indicates only that upon his death the residue of the trust property shall be distributed according to the general laws governing succession; and that he does not intend to create in any persons an interest which would prevent him from exercising control over the beneficial interest." The decision in the Bixby case is in harmony with the view prevailing in the majority of American courts which, under the rule of construction known as the "worthier title doctrine," hold that unless an intent to the contrary appears, no remainder interests are deemed created by a trust under which the trustor reserves for himself a life estate and provides that on his death the corpus should go to his own heirs. Note, 22 So.Calif.L.Rev. 497, 498–9; 47 Mich.L.Rev. 1022, 1023. But the rationale of the Bixby case, where the purported "remainder" to the heirs of the settlor-life-beneficiary of the trust was declared to be a nullity, is not germane with respect to an ascertainment of the interest created in William under the Walker trust. For under the terms of this trust, it was not the settlor but his daughter, Ethelwyn, who was the life beneficiary, as well as the donee of a general power of appointment. Furthermore, and of controlling significance in the present context, Mr. Walker provided for a gift over in default of the exercise of the power of appointment to the person or persons entitled to succeed to Ethelwyn's estate in accordance with the laws of intestate succession in effect at the place of her residence at the date of her death.

[2–5] It is immediately apparent that this terminology is the equivalent of a gift over to Ethelwyn's "heirs at law" should she fail to exercise her power of appointment. The cardinal rule of construction with respect to a will or decree embodying a testamentary instrument is that it is to be construed according to the expressed intention of the testator, and this intention must be given effect as far as possible. In re Estate of Lawrence, 17 Cal.2d 1, 6, 108 P.2d 893. It thus unmistakably appears that it was Mr. Walker's intention to provide for a future interest in those persons who would qualify as Ethelwyn's "heirs at law" at the time and place indicated should she fail to exercise her power of appointment. The interest so created in the heirs at law of the life tenant is a remainder. Akley v. Bassett, 68 Cal.App. 270, 282–283, 228 P. 1057; County of Los Angeles v. Winans, 13 Cal.App. 234, 243, 109 P. 640; Roberts v. Michigan Trust Co., 273 Mich. 91, 262 N.W. 744, 748; 2 Rest. of Law of Real Property, sec. 157. As Ethelwyn's husband, William, one of her possible heirs at law, was clearly embraced within the class or category of persons described as having such a remainder interest. In re Shoemake, 211 Cal. 457, 295 P. 830; In re Estate of

Washburn, 11 Cal.App. 735, 106 P. 415; Hall v. Wright, 17 Cal.App. 502, 506, 120 P. 429. Such a remainder, of course, was rendered contingent by the uncertainty as to whether the *right* to its enjoyment would vest in William. In re Estate of Lawrence, supra; County of Los Angeles v. Winans, supra. It is settled that the interest of a contingent remainderman is not a mere possibility, such as the expectancy of an heir apparent, but an estate in the property. Akley v. Bassett, supra; County of Los Angeles v. Winans, 13 Cal.App. 257, 260, 109 P. 650; Hall v. Wright, supra. So substantial is the equitable interest of the contingent remainderman of a trust, that many jurisdictions allow the maintenance of various types of actions and proceedings by a contingent beneficiary against a trustee, for good cause shown, in order to have his possible eventual interest properly secured and protected. Roberts v. Michigan Trust Co., 273 Mich. 91, 262 N.W. 744, 748; Northwestern Nat. Bank & Trust Co. v. Pirich, 215 Minn. 313, 9 N.W.2d 773; In re Clarke's Will, 198 Md. 266, 81 A.2d 640, 643; Haldeman v. Openheimer, Tex.Civ. App., 119 S.W. 1158, 1162; Mudd v. Lanier, 247 Ala. 363, 24 So.2d 550, 561; Cannon v. Barry, 59 Miss. 289, 302–305; Hall v. M. B. O'Reilly Realty & Investment Co., 306 Mo. 182, 267 S.W. 407, 411; Johnson v. Superior Court, 68 Ariz. 68, 199 P.2d 827, 829; Grodsky v. Sipe, D.C., 30 F.Supp. 656, 662; 2 Scott on Trusts, sec. 200. This rule is stated as follows: "'And generally a *cestui que trust*, who can allege an existing interest, however minute or remote, may, upon reasonable cause shown, apply to the court to have his interest properly secured.'" Roberts v. Michigan Trust Co., supra [273 Mich. 91, 262 N.W. 749]; Johnson v. Superior Court, supra; Lewin, Trusts (13th ed.) p. 874.

[6] From what has been said respecting the nature of the interest of a contingent beneficiary of a trust, the rule logically follows, as stated in Shaw v. Weisz, 339 Ill. App. 630, 91 N.E.2d 81, 87, "that a trustee owes the same fiduciary duty to a contingent beneficiary as to one with a vested interest in so far as necessary for the protection of the contingent beneficiary's rights in the trust property. Restatement of the Law of Trusts, sec. 214(1) and comment a; Grodsky v. Sipe, D.C., 30 F.Supp. 656." The duty so cast upon the trustee with relation to the beneficiary is that of *uberrima fides*, or utmost fidelity. It received classic expression by Judge Cardozo in Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546, 62 A.L.R. 1: "Many forms of conduct, permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate * * *. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd." The exacting standard of probity and invincible loyalty to the interests of the *cestui que trust* which is required of the trustee throughout the administration of the trust, and his obligation to abstain from the exploration of opportunities for selfish gain engendered by his trust position, arise from "the well-known inability of human beings to serve two masters at once or to act satisfactorily when faced with conflicting interests." 2 Bogert, Trusts & Trustees, sec. 543.

[7, 8] These fundamental precepts have been accorded legislative recognition by their embodiment in the Civil Code. Section 2228 requires that "* * * a trustee is bound to act in the highest good faith toward his beneficiary". Section 2231 reads: "A trustee may not *use the influence* which his position gives him to obtain *any* advantage from his beneficiary." (Italics added.) Section 2234 states that every violation of the preceding sections "is a fraud against the beneficiary of a trust." Section 2235 provides: "All transactions between a trustee and his beneficiary during the existence of the trust, or while the influence acquired by the trustee remains, by which he obtains any advantage from his beneficiary, are presumed to be entered into by the latter without sufficient consideration, and under undue influence." Section 2224 states: "One

who gains a thing by *fraud,* accident, mistake, undue influence, *the violation of a trust, or other wrongful act,* is, unless he has some other and better right thereto, *an involuntary trustee of the thing gained,* for the benefit of the person who would otherwise have had it." (Italics added.) These sections disclose a comprehensive legislative design to inhibit the temptation of a trustee to use his fiduciary position for personal gain and to protect the beneficiary from any unwholesome influence the trustee might wield to obtain an advantage over him. Their practical effect is to place upon a fiduciary the burden of overcoming the presumption of fraud and undue influence which arises by operation of law when, by his conduct in connection with the fulfillment of his trust obligations, he has received a seeming advantage over a beneficiary of the trust. Civ.Code, sec. 2235; Highland Park Inv. Co. v. List, 27 Cal.App. 761, 763, 151 P. 162; 12 Cal.Jur., sec. 71, pp. 818–9. The explicit language, as well as the underlying purpose, of these sections is broad enough to encompass not only individual transactions between a trustee and beneficiary or misappropriations of the trust property for the trustee's own purposes, but also other forms of activity or patterns of behavior during the stewardship of the trust which bespeak an attitude adverse to the beneficiary's interests. Civ.Code, secs. 2230, 2231, 2235; McClure v. Donovan, 82 Cal.App.2d 664, 666, 186 P.2d 718.

[9, 10] Mindful of these basic principles (it having been established that the Bank and Ivey, its executive officer, occupied a fiduciary relation to William as well as to Ethelwyn), and bound by the rule that all well-pleaded allegations must be taken as true, we come to a consideration of the averments of the first and fifth causes of action insofar as they purport to plead a violation of a fiduciary duty. It is here alleged that from the time of Mr. Walker's death in 1943 until Ethelwyn's death in 1951, a period coextensive with the administration of the Walker trust, the Bank and Ivey used the influence of their trustee position to obtain an advantage over William, whom they knew to be crippled by arthritis and a bedridden patient in a sanitarium. Using their trustee status and the influence naturally arising therefrom they pursued a course of conduct which ingratiated them with Ethelwyn to such an extent that Ivey became her "confidential, financial and business advisor and confidant, and advised and directed her with relation to all business matters that pertained in any way to the * * * Walker trust." Ivey called frequently at Ethelwyn's home, and so cemented his relationship with her, that the attorneys for the Walker trust forwarded all communications, checks and other documents for Ivey's approval before they were received by Ethelwyn. It is alleged that defendants "advised, and by persuasion and the influence given them by their trustee position under the Walker trust, caused Ethelwyn * * * to execute a more formal will" than her holographic will. Ethelwyn, on March 19, 1948, executed such a will, duly witnessed, which was admitted to probate as the last will and testament of Ethelwyn.

The complaint recites that Ivey used his position to persuade Ethelwyn to loan him $72,500 without interest. Later, Ivey borrowed an additional $30,000 without interest, and was indebted to Ethelwyn in the sum of $83,500 when she died. By the terms of Ethelwyn's formal will any indebtedness owned by Ivey to her at the date of her death was cancelled. In addition to the cancellation of Ivey's debts to Ethelwyn the will which was admitted to probate provided that in the event William were alive at Ethelwyn's death and should survive distribution, all of the residue of her estate, including that over which she had a power of appointment, was to go to defendant Bank and Ivey in trust. After making provision for William during his lifetime, the will provided that Ivey was to receive at least $30,000 per year from this trust. Upon William's death, the entire corpus of the trust was to be immediately distributed to Ivey as his sole property, or should Ivey predecease William, then to Ivey's daughter, if living, or to her issue.

Plaintiff asserts that Ethelwyn would not have executed either her holographic will or the will admitted to probate had it not been for the influence which the Bank and Ivey commanded by reason of their trustee position, and which they used continuously until Ethelwyn's death to William's disadvantage. Plaintiff alleges that had the said wills not been executed, all of the assets of the Walker trust would have been distributed by the trustees thereof to William, instead of to Ivey and the Bank as co-executors of Ethelwyn's will. The appraised value of these assets on January 2, 1951, was $2,203,046.69. Part of these assets consisted of approximately 9211 shares of stock of defendant Bank, which are alleged to "represent a substantial balance of power in keeping voting control for the management of defendant Bank. Defendant Bank and defendant Ivey at all times here involved were anxious to keep such control and further to obtain the ownership and control of such stock," and were thus motivated in obtaining the execution of the aforesaid wills. Plaintiff alleges that as a National Banking Association, defendant Bank, in transferring the assets of the Walker trust to itself and Ivey, acted in violation of Regulation "F" of the Board of Governors of the Federal Reserve System which provides in section 11(b) that trust assets shall not be transferred "to the national bank, to its *directors, officers, or employees*, or their interests."

[11] Plaintiff's first cause of action is for damages based on fraud arising from a violation of defendants' fiduciary obligation to William. The fifth cause of action, which incorporates the allegations above summarized and also includes the allegations of the events occurring subsequent to Ethelwyn's death to which we have previously alluded, seeks to hold defendants as constructive trustees of the assets of the Walker trust. According to the allegations of the amended complaint defendants have violated the fundamental obligation of their trusteeship—the inexorable requirement that a trustee may not obtain any advantage over his *cestui que trust*. Blair v. Mahon, 104 Cal.App.2d 44, 50, 230 P.2d 832. The facts pleaded show that Ivey acted without regard to the elemental principles of equity and engaged in conduct incompatible with his status as a fiduciary in using his trustee influence to insinuate himself into Ethelwyn's confidence in order to obtain for himself an advantage over William.

The Damage to William

Accepting, as we must, the truth of the allegations, we are confronted with a situation wherein a trustee, animated by cupidity, betrayed the trust imposed upon him by embarking on a course of dealing with Ethelwyn calculated to undermine William's rights as a contingent remainderman under the trust and to divert to himself the principal part of the trust corpus. That the fruition of this conduct resulted in gain to defendants and detriment to William is strikingly evident. It need only be pointed up that Ivey became the principal beneficiary of Ethelwyn's power of appointment under the Walker trust, while the Bank, in addition to becoming a co-trustee of the proceeds from the Walker trust, was able to retain for its management voting control of the Bank stock. The consequent hurt to William as a contingent remainderman needs no further elaboration; the details of the complaint which we have set forth amply reveal the extent of the injury to him. Suffice it to say that a prima facie case of overreaching, conflict of interest, and subordination of the cestui's interest to their own by those occupying a trustee position is sufficiently pleaded in the complaint to bring into play the presumption of fraud which the law implies. Civ.Code, sec. 2235; Blair v. Mahon, 104 Cal.App.2d 44, 50, 230 P.2d 832; Highland Park Inv. Co. v. List, 27 Cal.App. 761, 151 P. 162; In re Estate of Kromrey, 98 Cal.App.2d 639, 646, 220 P.2d 805.

The Trustee's Duty

[12-16] Undivided loyalty is the very essence of the trust relationship. The code of behavior which governs the conduct of a trustee with those to whom he is bound by fiduciary ties is stricter than that of the market place. "Not honesty alone" is its measure, "but the punctilio of an honor the most sensitive." Measured by these stand-

ards, defendants were derelict in their duty. Defendant Bank cannot shield itself on the ground that it is not responsible for Ivey's acts, since a corporate trustee must accept responsibility for the acts of its officers done in the course of the administration of a trust. French v. Orange County Inv. Corp., 125 Cal.App. 587, 592, 13 P.2d 1046; Rest. of Trusts, sec. 225, comment (b), p. 640. And Ivey, though not personally a trustee of the Walker trust, was subject to the same disabilities as to wrongful use of his trustee influence as the Bank of which he was the executive officer and for whom he acted in the administration of the trust. Crenshaw v. Roy C. Seeley Co., 129 Cal.App. 627, 632, 19 P.2d 50. See In re Filardo, 221 Wis. 589, 267 N.W. 312, 105 A.L.R. 438; In re Lewisohn, 294 N.Y. 596, 63 N.E.2d 589. Where trustees have acquired property by virtue of a breach of their fiduciary duty of loyalty to a beneficiary, the latter may proceed against them personally to recover damages for the fraud or may charge them as constructive trustees of the property for his own benefit as rightful owner. Civ.Code, secs. 2234, 2224; McElroy v. McElroy, 32 Cal.2d 828, 831, 198 P.2d 683; Fields v. Michael, 91 Cal.App.2d 443, 448, 205 P.2d 402. Under the first cause of action, the allegations are sufficient to state a cause of action for damages against defendants. The fifth cause of action states facts sufficient to constitute Ivey a constructive trustee of the assets he received from the Walker trust as distributee under Ethelwyn's will; the Bank is likewise so chargeable to the extent it may still hold undistributed assets of the Walker trust.

[17–20] Defendants assert that if any influence by which a trustee gains an advantage over a beneficiary is "undue influence," then plaintiff's case must be defeated by the fact that the order admitting Ethelwyn's will to probate is an adjudication that no undue influence has been exerted, used or exercised. This proposition might have some merit if the showing of undue influence required to invalidate a will were of the same order as the influence which the law deems to be undue when exercised by a trustee to obtain an advantage over one to whom he owes the loyalty of a fiduciary. But that is not so. "'What constitutes undue influence is a question depending upon the circumstances of each particular case. It is a species of constructive fraud which the courts will not undertake to define by any fixed principles, lest the very definition itself furnish a finger-board pointing out the path by which it may be evaded.'" Longmire v. Kruger, 80 Cal.App. 230, 239, 251 P. 692, 696. Mere persuasion or advice or the influence of affection is not an improper influence in securing the execution of a will. In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25; In re Estate of Tribbey, 58 Cal.App.2d 100, 135 P.2d 603. The influence which justifies the setting aside of a will must be such as deprives the testator of his free agency, destroys the freedom of his purpose, and renders the testamentary instrument an expression of the will of another rather than his own; and it must operate at the time the will is made. In re Estate of Higgins, 156 Cal. 257, 262, 104 P. 6; In re Estate of Arnold, supra. Advice or persuasion will not vitiate a will freely and understandingly made. In re Estate of Doty, 89 Cal.App.2d 747, 755, 201 P.2d 823; In re Estate of Carson, 74 Cal. App. 48, 239 P. 364. The mere existence of a confidential relationship between a testator and a beneficiary under the will, without more, does not raise a presumption of undue influence or shift to the beneficiary the burden of proving that the will was not executed by undue influence on his part. In re Estate of Wellauer, 107 Cal.App.2d 268, 272, 236 P.2d 906; In re Estate of Carson, supra, 74 Cal.App. at page 61, 239 P. at page 370. A different situation prevails where a fiduciary uses the influence flowing from his trust position to secure an advantage over a *cestui que trust*. It is unnecessary to show that the trustee overmastered the will of the cestui and substituted his own. The relationship having been established and the advantage shown, the law raises the presumption of fraud and requires the fiduciary to satisfactorily explain his conduct in order to overcome the presumption. Copeland v. Rabing, 110 Cal.App.2d 631, 637, 243 P.2d 119; In re

Estate of Kromrey, supra, 98 Cal.App.2d at page 646, 220 P.2d at page 810. This distinction is clearly expressed in Longmire v. Kruger, supra, where the court set aside an *inter vivos* gift between persons standing in a confidential relation. In language appropriate to the present discussion, the court stated: " 'In equity, persons standing in certain relations to one another * * * are subject to certain presumptions when transactions between them are brought in question; and if a gift or contract made in favor of him who holds the position of influence is impeached by him who is subject to that influence, the courts of equity cast upon the former the burden of proving that transaction was fairly conducted as though between strangers, * * *.

" 'The influence which is undue in the case of gifts *inter vivos*, is very different from that which is required to set aside a will. In the case of gifts *inter vivos*, it is considered by the courts of equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts brought about by it are therefore set aside, unless the party benefited can show affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment. The law regarding wills is very different.' " Similarly, it may be fully conceded that Ivey's ingratiating conduct toward and influence upon Ethelwyn could not be deemed undue influence in a contest over Ethelwyn's will. Nonetheless, when Ivey used the influence of his trust position for the purpose of ultimately acquiring for himself the bulk of the trust estate by creating a situation by which he profited at William's expense, the presumption of undue influence and fraud which flows from his fiduciary relationship to William came into being.

The cases cited by defendants, O'Brien v. Markham, 37 Cal.App.2d 381, 99 P.2d 583, and Tracy v. Muir, 151 Cal. 363, 90 P. 832, are of no assistance. In those cases it was held that a disappointed heir could not collaterally attack a decree admitting a will to probate when there was no showing that a contest of the will had been prevented by extrinsic fraud. The vital difference here is that William is not a disappointed heir, but a defrauded beneficiary under the Walker trust; the gravamen of the present action against defendants is breach of an independent duty to him arising from a fiduciary relation, see Tracy v. Muir, supra, 151 Cal. at page 371, 90 P. at pages 834, 835, rather than a collateral attack upon a probate decree. See Aldrich v. Barton, 138 Cal. 220, 71 P. 169; Silva v. Santos, 138 Cal. 536, 71 P. 703; Sohler v. Sohler, 135 Cal. 323, 67 P. 282.

Res Judicata Inapplicable

[21–25] There is likewise no merit in defendants' contention that the final order of the probate court settling and approving the fifth and final accounting in the Walker testamentary trust coupled with the distribution of the entire corpus by the trustees pursuant to such order constituted a conclusive adjudication that there was no act committed by the trustee which was a breach of its duties as a trustee or which resulted in any damage for which the relief plaintiff seeks may be given. Neither that proceeding nor that forum was appropriate for the determination of the issues here presented. See Sears v. Rule, 27 Cal.2d 131, 139–140, 163 P.2d 443; In re Estate of Morelli, 102 Cal.App.2d 39, 42–43, 226 P.2d 716. Immediately upon the death of Ethelwyn on January 2, 1951, title to the corpus of the Walker trust vested in her appointees, the Bank and Ivey, and William's contingent interest as a remainderman was extinguished. In re Estate of Lefranc, 38 Cal.2d 289, 297, 239 P.2d 617; Mears v. Jeffry, 80 Cal.App.2d 610, 617, 182 P.2d 294. The title which an appointee acquires from the donee of a power of appointment derives from the original donor of the power, the donee being merely a conduit through whom the title passes. Oglesby v. Springfield Marine Bank, 385 Ill. 414, 52 N.E.2d 1000, 1007; Wyeth v. Safe Deposit & Trust Co. of Baltimore, 176 Md. 369, 4 A.2d 753, 756; Com. v. Davis' Estate, 345 Pa. 284, 26 A.2d 915, 917; In re Morgan's Will, 227 Wis. 288, 277 N.W. 650, 652, 278 N.W. 859. A decree of distribution of the estate of the original donor to the appointees under a valid exercise of the power operates merely to confirm such title as was vested in them at the donee's death. In re Estate of Lefranc, supra; Mears v. Jeffry, supra. Thus at the time of Ethelwyn's death, the relationship between William and the Bank as trustee and beneficiary under the Walker trust was terminated and William henceforth became a stranger to that estate. In settling the final accounts of the testamentary trustees and decreeing distribution of the Walker estate in accordance with Ethelwyn's will in the proceeding of February 7, 1952, the court was engaged in the exercise of its special and limited probate jurisdiction. In re Estate of McLellan, 8 Cal.2d 49, 55–56, 63 P.2d 120; Texas Co. v. Bank of America, etc., Ass'n, 5 Cal.2d 35, 53 P.2d 127. Although section 1120 of the Probate Code[1] undoubtedly confers an enlarged jurisdiction upon the probate court in the resolution of controversies relating to testamentary trusts, it still remains without jurisdiction to try the question of title to disputed property between a representative or beneficiary of the estate and a stranger to the estate. See Wilkerson v. Seib, 20 Cal.2d 556, 562–563, 127 P.2d 904; In re Haas' Estate, 97 Cal. 232, 31 P. 893, 32 P. 327. It is also without power to grant a personal judgment against the trustees. In re Estate of McLellan, supra; Costa v. Superior Court, 137 Cal. 79, 69 P. 840. The theory of plaintiff's action is based fundamentally on the breach of an alleged fiduciary relationship existing between William and Ivey and the Bank for which he is entitled to damages or the impressment of a constructive trust on the property distributed to defendants under the Walker trust. It should be borne in mind that plaintiff is not seeking to challenge the accuracy of the accounts, nor does he claim that the executor or trustee should be charged with property belonging to the estate which was being wrongfully withheld, see Bauer v. Bauer, 201 Cal. 267, 256 P. 820; In re Estate of Roach, 208 Cal. 394, 281 P. 607, nor is this a controversy between trustee and beneficiary "where the method of operation or the good and sound judgment of the trustee" in the administration of the estate is involved, In re Estate of De la Montanya, 83 Cal. App.2d 322, 328, 188 P.2d 494, 498, nor one in which the conflicting claims of rival beneficiaries under a testamentary trust is to be determined. It is an action by a stranger to the final accounting and decree of distribution in the Walker estate to seek redress for a fraud upon him personally, and it is independent of the will and probate proceedings. The issues raised in such a situation are not within the jurisdiction of the probate court, but must be enforced in a separate proceeding in equity without any attack on the probate proceedings. See Sears v. Rule, 27 Cal.2d 131, 139–140, 163 P.2d 443; In re Estate of Morelli, 102 Cal. App.2d 39, 41, 42–43, 226 P.2d 716; In re Sharp's Estate, 17 Cal.App. 634, 120 P. 1079; In re Estate of Cecala, 104 Cal.App. 2d 526, 535, 232 P.2d 48. The final accounting being in order and ready for settlement, and the admission of Ethelwyn's will to probate having determined the manner of distribution of the remaining assets of the Walker trust, William could not have resisted the distribution proceedings in the Walker estate, to which he was a stranger. His proper course of action for the vindication of his rights was the institution of the present suit. The doctrine of *res judicata,* therefore, has no application here.

Defendant Ivey relies on Willson v. Security-First Nat. Bank, 21 Cal.2d 705, 134 P.2d 800, and Keyston v. Keyston, 96 Cal. App.2d 550, 215 P.2d 754, in support of his argument that plaintiff is estopped and barred by *res judicata* from maintaining this action. Neither of these cases presents problems analogous to the situation here involved. In the Willson case, the bank, as trustee of a testamentary trust, sold trust property for $10,000 which it invested in a participation certificate issued by it without securing a permit from the commissioner of corporations. Plaintiff, who was the sole beneficiary of the trust, challenged the transaction in an independent suit on the ground that the participation certificate was void and valueless and that she was therefore entitled to recover the amount paid therefor. In the meantime, the purchase of this certificate had been reported by the trustee in its account to the probate court. Subsequent accounts listed the certificate as an asset of the trust. No objection to these acocunts was filed by the beneficiary. Obviously the "liability of the trustee by reason of that transaction * * * was involved in and concluded by the accounting decree" since "the purchase of the participation certificate * * was a trust transaction." 21 Cal.2d at page 713, 134 P.2d at page 805. Consequently, the beneficiary was not entitled to maintain an independent action based on that same transaction. Here, however, the problem is not one relating to the handling of a particular item of the trust estate and therefore "a trust transaction" which was reported to and approved by the probate court. Rather, its relates to Ivey's alleged violation of his fiduciary duty to William, outside of the administration of the trust, which was not reported to and approved by the probate court.

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[1] Section 1120, Probate Code, reads in part: "When a trust created by a will continues after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction for the purpose of determining to whom the property shall pass and be delivered upon final or partial termination of the trust, to the extent that such determination is not concluded by the decree of distribution, of settling the accounts and passing upon the acts of the trustee and for the other purposes hereinafter set forth. * * *"

In the Keyston case, supra, there was a controversy between the beneficiaries and the trustee as to the proper management of the trust estate. Clearly this was a matter for the probate court to adjudicate on a petition "for instructions or to construe" the trust. No comparable situation is here presented.

No Estoppel

[26] Defendants assert an estoppel against plaintiff upon two grounds: (1) The order of the probate court instructing William's guardian not to contest Ethelwyn's will, and his acquiescence therein; and (2) the acceptance of benefits under her will. There is no merit in either of these contentions. The answer to the first is that the instruction pertained to bringing a will contest; or, more specifically, a petition to revoke the probate of the will which had been admitted to probate less than six months previously. Neither plaintiff's first nor fifth causes of action asserts any ground for invalidating Ethelwyn's will. They proceed upon the theory that its execution represented a free and voluntary act on her part. Plaintiff is not seeking relief either under her will or because of its invalidity. Rather, he seeks to recover from the defendants for their breach of the fiduciary duty to William which was reflected in the provisions of a valid will made by Ethelwyn whereby she exercised her power of appointment in the Walker trust so as to prefer Ivey over her husband.

The second ground for estoppel is based on the theory that by accepting benefits under Ethelwyn's will William elected to take under the will and therefore he cannot now take a position adverse to it. The answer to this proposition is that William's representative is not attacking Ethelwyn's will in counts one and five with which we are here solely concerned. He asserts its validity. He seeks no relief against her estate. His action is against the defendants because of their alleged violation of a fiduciary duty which they owed William, resulting in their gain and William's loss.

Defendants also argue that plaintiff is barred from maintaining this action because he has neither returned nor tendered the $84,300 which William received under his wife's will. The answer to this argument is simple. The $84,300 paid to William was rightfully paid him pursuant to the terms of his wife's will which, by judicial decree, is a valid testamentary document. Since plaintiff is neither attacking the validity of Ethelwyn's will nor the probate thereof and is not suing the estate, there is no reason whatever for the return of this money, which was not only legally paid to him, or for his benefit, but the ownership of which is not here in dispute.

[27] There is no merit in defendants' claim that plaintiff's causes of action were personal to William and abated with the latter's death. The first and fifth causes

of action for the recovery of damages and the imposition of a constructive trust, stem from defendants' fraudulent invasion of William's interest in the Walker trust, a right in property, and survive his death. Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959; Auslen v. Thompson, 38 Cal.App.2d 204, 214, 101 P.2d 136.

In their numerous briefs and the supplements thereto the parties have argued some additional questions. In view of our conclusions, it is unnecessary, however, for us to pass upon them.

The judgment is reversed with instructions to overrule the demurrers to the first and fifth causes of action in the amended complaint and allow the defendants a reasonable time within which to file their respective answers. In other respects the judgment is affirmed.

MOORE, P. J., concurs.

McCOMB, J., dissenting in part.

I concur in the foregoing order and opinion insofar as it affirms the judgment of the trial court. I dissent from the portion thereof reversing the order of the trial court which sustained the demurrer to the first and fifth causes of action. As to such causes of action I would affirm the trial judge's ruling.

Rehearing denied; McCOMB, J., dissenting.

BURNS et al.
v.
AMERICAN CAS. CO. et al.*

No. 15850.

District Court of Appeal, First District, Division 1, California.

April 30, 1954.

Rehearing Granted May 28, 1954.

See 270 P.2d 890.

Taxpayers' suit against certain insurance companies to recover the amount of premiums paid by the County of Santa Clara for policies insuring the county and the members of its Board of Supervisors against liability for injuries because of malpractice, error, mistake or negligence in treatment of patients at the county hospital. From a summary judgment of the Superior Court, Santa Clara County, Byrl R. Salsman, J., dismissing the action without prejudice as against all but four defendants, plaintiffs appealed. The District Court of Appeal, Bray, J., held that the policies covered the county's liability under the Government Code for injuries resulting from dangerous or defective condition of hospital property.

Judgment reversed.

1. Counties 🔑144

A county or its board of supervisors is not liable for injury to patient in county hospital because of malpractice.

2. Insurance 🔑435

The words "mistake", "error" and "negligence" in policies insuring county and members of its Board of Supervisors against liability for injuries to county hospital patients because of malpractice, error, mistake or negligence mean more than "malpractice", which is failure of one charged therewith to exercise ordinary diligence, care and skill of members of his profession, as a physician or hospital may err or make mistake without necessarily being guilty of malpractice.

See publication Words and Phrases, for other judicial constructions and definitions of "Error", "Malpractice", "Mistake" and "Negligence".

3. Insurance 🔑146(1)

When reasonably possible, meaning must be given to every sentence, clause and word of insurance contract, so as to avoid rendering portions thereof inoperative.

4. Insurance 🔑146(3)

Any doubt or ambiguity respecting the meaning of phraseology in insurance policy must be resolved in insured's favor and against insurer, which prepared and issued policy and collected premium therefor.

5. Insurance 🔑435

Policies insuring county and members of its Board of Supervisors against liability for injuries to county hospital patients because of malpractice, error, mistake or negligence covered liability under Government Code for injuries caused by defective and dangerous condition of hospital property. Government Code, § 53051.

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* Subsequent opinion 273 P.2d 605.

6. Insurance ⚷198(1)

A county insured against liability for injuries to county hospital patients by policies covering risks for which county can be held liable, as well as those for which it cannot be held liable, should be refunded portion of premiums based on liability for risk for which it cannot be held liable, though it sues insurers for return of entire amount of premiums paid.

7. Insurance ⚷198(6)

In county taxpayers' suit for amount of premiums paid by county for insurance policies covering both risks for which county can be held liable and those for which it cannot be held liable, burden is on defendants to plead and prove that premiums are divisible between legal and illegal considerations, and, if so, proportions thereof attributable to legal considerations, and if they fail to do so, county is entitled to return of all premiums paid.

◆

Edward A. Friend, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondents.

BRAY, Justice.

In a taxpayers' suit for recovery of insurance premiums paid by the County of Santa Clara, plaintiffs appeal from a summary judgment in favor of defendants.

Principal Questions Presented.

1. Do insurance policies covering a county hospital's liability for malpractice, mistake, error or negligence, cover liability under section 53051, Government Code?

2. Was a summary judgment proper where premiums paid by the county were for insurance policies covering hazards for which the county could be liable as well as those for which it could not be liable?

Record.

The action was dismissed without prejudice as against all defendants except four: American Casualty Company, Fireman's Fund Indemnity Company, and two groups of subscribing Underwriters at Lloyd's London. The complaint in the first count alleges that plaintiffs as taxpayers sue on behalf of themselves and all other taxpayers of the county. It alleges the procurement by the board of supervisors of certain policies of "malpractice insurance" covering the Santa Clara County Hospital, as follows: from defendant American Casualty Company for the period August 26, 1946, to August 26, 1949; from defendant Fireman's Fund for the period August 26, 1949, to December 22, 1949; from one group of Underwriters at Lloyd's for the period December 22, 1949, to December 22, 1950, and from the other group two policies for the period December 22, 1950, to December 22, 1951. The amounts paid for these policies are set forth. It is alleged that these policies "to the extent that they insure the Santa Clara County Hospital against malpractice constitute an illegal expenditure of public funds * * * for the reason that under the law of California the Santa Clara County Hospital is not and cannot be held liable for malpractice." Demand was made upon the district attorney to institute this suit. He refused to do so. Judgment is asked against the respective defendants for the premiums paid each respectively, "or such part of that sum as paid for insuring the Santa Clara County Hospital * * *." The second count incorporates the entire first count and then alleges that doubt exists as to whether the American Casualty and Fireman's Fund policies cover staff physicians and other employees of the hospital, and as to what portion of the premiums of all policies is attributable to the hospital and what portion to the staff physicians and other employees of the hospital. The prayer asks that the court resolve this doubt.

Defendants answered, attaching photostatic copies of the policies involved and alleging that the policies afforded the county substantial and valuable protection against liability. All parties moved for judgment on the pleadings.

Contentions.

Plaintiffs contend that public funds spent as insurance premiums may be recovered if the liability so insured is nonexistent, citing Opinion No. 2995, I Opinions of the Attorney General of Ohio, 303 (1931); Board of Education of Raleigh County v. Commercial Casualty Ins. Co., 116 W.Va. 503, 182 S.E. 87; Adkins v. Western & Southern Indemnity Co., 117 W.Va. 541, 186 S.E. 302. Defendants do not challenge the existence or extent of the rule as stated by plaintiffs. Defendants do not claim that in this case, at the time the insurance was purchased, there existed a reasonable doubt as to liability of a county for malpractice, but assume that the county was not then liable for such tort. For these reasons we do not pass on the scope of the stated rule, but will, as do the parties, assume its application to the facts of this case. Plaintiffs then contend that the policies in question covered the county for malpractice only by the hospital and that as the county cannot be held liable for such malpractice, the premiums must be refunded. It is the theory of the defendants that by their terms the policies covered more than hospital malpractice and gave the county a substantial protection against liability, particularly for liability under section 53051, Government Code, for dangerous or defective condition of property. That there can be such liability, see concurring opinion in Madison v. City and County of San Francisco, 106 Cal.App.2d 232, 252, 234 P.2d 995, 236 P.2d 141; Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 108 P.2d 989.

What Do Policies Cover?

[1] It has been held frequently that a county or its board of supervisors is not liable for injury incurred by any patient in a county hospital due to malpractice. Latham v. Santa Clara County Hospital, 104 Cal.App.2d 336, 231 P.2d 513; Madison v. City and County of San Francisco, supra, 106 Cal.App.2d 232, 234 P.2d 995, 236 P.2d 141; Talley v. Northern San Diego County Hospital Dist., 41 Cal.2d 33, 257 P.2d 22. This brings us to a study of the policies themselves. They are all made in favor of the county and the members of its board of supervisors.

The insuring clauses follow:

American Casualty Company:

"Bodily injury, shock or mental anguish, including death at any time resulting therefrom, sustained during the policy period by any person or persons (a) while being treated at the premises and arising out of malpractice, error or mistake, including personal restraint, committed in connection with such treatment or (b) because of the performance of an autopsy at the premises. Premises as used herein shall mean the premises described in the declarations on the reverse side hereof. Medical or surgical treatment rendered in connection with ambulance service and Public Health Service shall be deemed to occur 'at the premises.'"

Fireman's Fund Indemnity Company:

"Liability for Malpractice, Error or Mistake

"To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of malpractice, error or mistake, committed during the policy period in the treatment of patients of the Insured at the premises or in the performance of autopsies at the premises."

Underwriters at Lloyd's London:

" * * * to pay or make good to the Assured to the extent hereinafter mentioned such damages as may be awarded against the Assured in respect of:

"Professional services rendered, or which should have been rendered by the Assured to any person while receiving treatment in the within mentioned Hospital or its out patient department or in an ambulance maintained by the Hospital (but the Underwriters shall not be liable for negligence in the operation or maintenance of the ambulance itself), provided such claim or claims for damages are solely based upon malpractice, error, negligence or mistake, breach of implied contract, loss of services, property damage, autopsies, inquests, personal restraint, the dispensing of drugs or medicine, assault, slander, libel, undue familiarity, anesthesia, hallucination, malicious prosecution, replevin of property or arising from any counterclaims in suits brought by the Assured for the collection of fees—all the foregoing being hereinafter known as 'malpractice.'" These certificates also covered physicians, dentists, internes, etc.

[2–5] Summarizing the American Casualty and Fireman's Fund policies, they cover "malpractice, error or mistake." Summarizing the Lloyd's policies they cover "malpractice, error, negligence or mistake" plus damages from breach of contract, assault, slander, libel, malicious prosecution.

Plaintiffs contend that "malpractice, error or mistake" constitute an "oratorical triad" meaning "malpractice" as that term is commonly understood. In Sutherland v. Fidelity & Casualty Co. of New York, 103 Wash. 583, 175 P. 187, the court said: "The words 'malpractice,' 'error,' and 'mistake,' as used in this indemnity policy, do not mean necessarily the same thing. If they were so intended, it was an idle thing to insert more than the word 'malpractice.' A physician may err or make a mistake, without being guilty of malpractice. This policy covers malpractice. It covers error and it covers mistake in the practice of appellant's profession; and if liability flows from either, and he is required to pay damages on that account, we think it is plain that the policy here undertook to insure against such mistake or such error, as well as against malpractice." That case points out that "malpractice" has a somewhat narrow meaning, namely the failure of the one charged with malpractice to exercise diligence, care and skill, such as ordinarily possessed by the members of his profession. Thus a physician may err or make a mistake without necessarily being guilty of malpractice. The same qualification would apply to a hospital. In Ford Hospital v. Fidelity & Casualty Co., 106 Neb. 311, 183 N.W. 656, a hospital nurse, while bathing a child "made a 'mistake' within the meaning of the insurance policy when she allowed the hand of the helpless child to come in contact with a hot appliance." 183 N.W. at page 658. There the policy covered, as in our case, the hospital for liability "'in consequence of any malpractice, error, or mistake * * *.'" 183 N.W. at page 658. The court in holding that the policy was applicable placed its emphasis on the nurse's "mistake" and did not even mention "malpractice." In our case, the words "mistake, error" and also "negligence" in the policies necessarily mean more than "malpractice." "* * * when reasonably possible, meaning must be given to every sentence, clause and word of a contract of insurance so as to avoid rendering portions of it inoperative. 1 Couch on Insurance, sec. 180, p. 367." United Service Automobile Ass'n v. Miles, 139 Tex. 138, 161 S.W.2d 1048, 1050. But the county's sovereign immunity from liability in the operation of its hospital applies to liability from not only "malpractice" but also from "mistake, error or negligence" unless these terms, or any of them, cover the type of liability expressly provided by section 53051, Government Code, namely, liability resulting from dangerous or defective condition of public property. This brings us to the crux of the case, namely, do the terms "mistake, error or negligence" as used in the policies, include defective and dangerous condition of hospital property? This question is partially answered by American Policyholders Ins. Co. v. Michota, 1952, 156 Ohio St. 578, 103 N.E.2d 817. There a chiropodist held an insurance policy in which the insurer agreed to defend him in any action brought to enforce the liability imposed by law for an injury "'arising out of the practice of the insured's profession'" and to pay any sums he might be obligated to pay "'because of injury resulting from professional services rendered or which should have been rendered.'" 103 N.E.2d at page 818. The patient had gone to the doctor for treatment of a foot ailment. He instructed her to sit in a metal hydraulic chair designed for the occupancy of patients. Due to the failure of the doctor to "lock" the chair before directing the patient to sit in it, it suddenly rotated as she was attempting to get into it, throwing her to the floor and injuring her. In a declaratory relief action brought by the insurer to determine if it was liable to the doctor for the amount of a judgment obtained against him by the patient, the insurer contended that the policy was strictly limited to those injuries which might arise out of the actual rendition of professional services, and that injury due to the condition of the chair was not covered. Pointing out, 103 N.E.2d at page 819, "that, in conformity with the well established and universally recognized rule, any doubt or ambiguity with respect to the meaning of the phraseology employed in the policy must be resolved in favor of the insured and against the insurer, which prepared and issued the policy and collected a premium therefor," the court held that nowhere in the policy was the liability of the insurer limited to "malpractice" nor to the failure of the doctor to use that standard of professional skill in the treatment of patients prescribed by law. It further held that the patient's injury was "due to the negligence of the doctor in failing to maintain apparatus employed by him in his practice of chiropody *in a safe condition*" (emphasis added) and that "Maintaining the treatment chair in a *proper and safe condition* for the accommodation of patients *was a service or duty directly connected with the practice * * * of his profession * * *.*" 103 N.E.2d at page 819. (Emphasis added.) Thus maintaining its hospital property in a nondangerous and nondefective condition was a service or duty of the Santa Clara County Hospital directly connected with its operation and its treatment of and service to its patients. See Madison v. City and County of San Francisco, supra, 106 Cal.App.2d 232, 252, 234 P.2d 995, 236 P.2d 141. Therefore, its failure to do so would be due either to mistake, error or negligence, and hence included in those terms in the policy. While, because of sovereign immunity, a patient would not have a cause of action based on mistake, error or negligence, he would have one based on dangerous or defective condition of hospital property, even though that condition was caused by mistake, error or negligence.

Was Summary Judgment Proper?

[6] As we have determined, the policies covered risks for which the county could be held liable as well as those for which it could not. Obviously, the premiums were based upon both. The county should be refunded the portion of the premiums based upon liability for risks for which it could not be held liable. While the action is for a return of the entire premium, the greater includes the lesser and the defendants would be liable to return to the county the proportion of the premium charged for improper coverage.

[7] Plaintiffs having, therefore, pleaded such a cause of action, the judgment will have to be reversed. As the facts are peculiarly within the knowledge of defendants, the burden will be theirs to plead and prove that the premiums are divisible between the legal and illegal considerations, and, if so, the proportions attributable to the legal considerations. In the event of their failure to do so, the county would be entitled to a return of all premiums.

Statute of Limitations.

Defendants raise the bar of the statute of limitations. Although the complaint states the dates of coverage of the various policies, it does not state the dates of the payments of the premiums. If these dates correspond with the dates of the beginning of the coverage periods, it would appear that recovery on one or more, although not all, of the premiums would be barred. The trial court, of course, will consider this question.

The judgment is reversed.

PETERS, P. J., and FRED B. WOOD, J., concur.

124 Cal.App.2d 831

GEDSTAD v. ELLICHMAN et al.

Civ. No. 15708.

District Court of Appeal, First District,
Division 2, California.
April 29, 1954.

Suit for rescission of property settlement agreement entered into in anticipation of divorce which followed. The Superior Court, County of Alameda, A. J. Woolsey, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that plaintiff who sought rescission of property settlement agreement with former husband, executed nearly three years prior to filing of complaint, which in turn followed knowledge of defects in the agreement by more than one and one-half years, was guilty of laches, in absence of any showing of excuse for the delay, precluding plaintiff from obtaining rescission.

Judgment affirmed.

1. Divorce 🔑254, 255

Normally determination in divorce decree in accordance with allegations of complaint that there is no community property is conclusive on defendant who has defaulted, but if defendant was deprived of fair opportunity to fully present his case because his adversary had concealed essential facts, equitable relief from such a judgment may be granted.

2. Husband and Wife 🔑279(2)

Letter from plaintiff to her former husband with whom plaintiff had negotiated a property settlement agreement prior to divorce, reciting that plaintiff did not consider the division of property fair, and that wife was going to see an attorney and get that which was rightfully hers, showed such knowledge by plaintiff of possible defects as to place her on inquiry and to require her to act diligently to protect her rights, as a condition of her right to rescind the agreement. Civ.Code, § 1691.

3. Husband and Wife 🔑279(2)

In a suit to rescind an agreement, such as a property settlement agreement in anticipation of divorce, prompt action by the plaintiff is a condition of right to rescind and, unlike other actions where laches is an affirmative defense, plaintiff must show diligence or explain delay as a prerequisite to relief. Civ.Code, § 1691.

4. Contracts 🔑270(1)

A delay of more than one month in serving notice of rescission is such a delay as requires explanation by the party seeking rescission. Civ.Code, § 1691.

5. Contracts 🔑270(1)

The diligence required of a person seeking to rescind an agreement, is required throughout and it applies as well to time a person will be held aware of his right to rescind as to time he will be held to have discovered the facts on which that right is based. Civ.Code, § 1691.

6. Contracts 🔑270(1)

To bar an action for rescission on ground of laches it is unnecessary to show that the defendants were prejudiced by the delay of plaintiff. Civ.Code, § 1691.

7. Husband and Wife 🔑279(2)

Plaintiff who sought rescission of property settlement agreement with former husband, executed nearly three years prior to filing of complaint, which followed knowledge of defects in the agreement by more than one and one-half years, was guilty of laches, in absence of any showing of excuse for the delay, precluding plaintiff from obtaining rescission. Civ.Code, § 1691.

8. Husband and Wife 🔑278(1)

Plaintiff who had for more than one and one-half years been put on inquiry as to defects in property settlement agreement with her former husband could, by her inaction, be considered as having elected to affirm the agreement and to waive the fraud, if any, of her former husband. Civ. Code, § 1588.

9. Appeal and Error 🔑949

The question of laches or unreasonable delay in seeking rescission of an agreement must be determined upon the basis of facts, and in absence of palpable abuse of discretion the trial court's finding upon the issue will not be disturbed on appeal, regardless of whether he finds for or against laches.

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Young, Ryan & Whitton, Albert K. Whitton, Oakland, for appellant.

John L. McVey, Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff, the former wife of defendant Joe Ellichman, sued to void a property settlement agreement signed by the parties in anticipation of a divorce suit and for an accounting of their community property. In the agreement, dated August 13, 1948, she declared to have received complete settlement of all property rights including community property and to waive maintenance and support in consideration of $1000 previously paid and $1000 to be paid within six months. Her action was based on alleged fraud and concealment of defendant in inducing her to accept as her share a small portion of the total community property while representing it to be a fair division; two counts relating to mistake in entering into the agreement were added by amendment on stipulation.

The court found in substance that the defendant presented the above agreement to the plaintiff at her request, that she signed it with knowledge of the properties owned as community property and of the legal effect of the agreement and without any misrepresentation or concealment on the part of defendant; that defendant did not make representations as to the amount or division of the community property under mistake, and that plaintiff did not rely on these representations under mistake, or was mistaken as to her community rights or the need of independent counsel; that the parties divided their property and that plaintiff received from defendant more than $1800 after the signing of the agreement and had received $1000 prior thereto; that plaintiff at her own choice and volition did not seek independent advice before executing the agreement; that defendant husband secured a decree of divorce by default in which it was duly adjudged that at the time of the filing of the complaint therein there was no community property of the parties, which judgment is res adjudicata in this action; that plaintiff on January 7, 1950, demanded that defendant account for the former community property of the parties, at which time she was familiar with its character and value but that she failed to bring action until July 9, 1951, and that she thereby was guilty of laches; that on June 14, 1951, plaintiff commenced a municipal court action against defendant for $1000 plus interest, allegedly due her under the property settlement agreement, and had attachment levied against his property and a keeper placed in charge of his business, which action and conduct constituted an election of remedies as to the property settlement agreement. The conclusions of law base the denial of relief to plaintiff on res adjudicata and election of remedies. Plaintiff appeals from the adverse judgment entered accordingly.

[1] The decision of the question as to res adjudicata depends in this case on the merits, to wit, whether the findings of the trial court against fraud or concealment are supported by the evidence. Normally the determination in a divorce decree in accordance with the allegations of the complaint that there is no community property of the parties is conclusive on a defendant who defaulted after service of such complaint and summons and the subject cannot be relitigated, compare Brown v. Brown, 170 Cal. 1, 147 P. 1168; Lindley v. Hinch, 57 Cal.App.2d 717, 135 P.2d 421; Maxwell v. Maxwell, 66 Cal.App.2d 549, 152 P.2d 530, but if the defendant was deprived of a fair opportunity fully to present his case because his adversary in violation of a confidential relationship had concealed from him facts essential to the protection of his rights, specifically when, as alleged in this case, community assets have been concealed by a husband from his wife in connection with the negotiating of a property settlement agreement, equitable relief from such a judgment may be granted. Jorgensen v. Jorgensen, 32 Cal.2d 13, 19 et seq., 193 P.2d 728. However, we need not go into said question involving the merits because the judgment must at any rate be sustained on another ground.

[2] The trial court held that appellant was precluded from claiming that the agreement was void and found the circumstances on which to base this conclusion, to wit, the demand in January, 1950, and the institution of the action on the contract with attachment in June, 1951. The demand was contained in a letter of appellant to her former husband dated January 6, 1950, and received in evidence, which contained among other things the following language: "You did not do right by me and you was very selfish when it come to dividing the money and you know it. You know that home we sold in Oroville you got 9500.00 for it also you made a profit on the duplex on Brookdale. * * * But I am going to work and then I am going to get an attorney and see if I can do anything about it. I have all the papers here and I have my bank book that was dated a year before you divorced me. So I shall find out all about it then watch out. I am not asking for anything only what rightfully belongs to me because it is mine not all yours." This letter shows such knowledge of the possible defects of the agreement as to put appellant on inquiry and to require her to act diligently to protect her rights.

[3–7] Section 1691, Civil Code, requires the party who wishes to rescind an agreement to use reasonable diligence to rescind promptly when aware of his right and free from undue influence or disability. In such a suit acting promptly is a condition of his right to rescind, Victor Oil Co. v. Drum, 184 Cal. 226, 243, 193 P. 243; Neff v. Engler, 205 Cal. 484, 488, 271 P. 744, and therefore diligence must be shown by the actor whereas in other actions laches is an affirmative defense to be alleged by the defending party. Absence of explanation of delay may even cause a complaint for rescission to be demurrable. Bancroft v. Woodward, 183 Cal. 99, 109, 190 P. 445. A delay of more than one month in serving notice of rescission requires explanation. Campbell v. Title Guarantee Etc. Co., 121 Cal.App. 374, 377, 9 P.2d 264. The diligence is required throughout and it applies as well to the time a person will be held aware of his right to rescind as to the time he will be held to have discovered the facts on which that right is based. Bancroft v. Woodward, supra, 183 Cal. 99, 108, 190 P. 445; First Nat. Bk. v. Thompson, 212 Cal. 388, 401, 298 P. 808. "To bar an action for rescission on the ground of laches it is unnecessary to show that the defendants were prejudiced by the delay." Fabian v. Alphonzo E. Bell Corp., 55 Cal.App.2d 413, 415, 130 P.2d 779, 781. In this case the complaint dated and filed July 9, 1951, alleges that plaintiff disavows and rescinds the agreement "hereby" which causes the rescission to be nearly three years after the agreement and more than one and one-half years after she had shown by her letter to have been put on inquiry.

[8, 9] Moreover the fact that on June 14, 1951, appellant commenced an action on the contract and levied an attachment is highly relevant. This fact in itself may show that appellant did not promptly institute an action for *rescission.* Estrada v. Alvarez, 38 Cal.2d 386, 390, 240 P.2d 278. As appellant had then for one and one-half years been put on inquiry it can also be considered as an election to affirm the contract and to waive the fraud. § 1588 Civil Code; Ruhl v. Mott, 120 Cal. 668, 677, 53 P. 304; Montgomery v. McLaury, 143 Cal. 83, 88, 76 P. 964; LeClercq v. Michael, 88 Cal.App.2d 700, 702, 199 P.2d 343. The obtaining of an attachment in pursuance of the action on the contract to her own advantage and to the detriment of respondent may also have estopped her from pursuing an action for rescission, Steiner v. Rowley, 35 Cal.2d. 713, 720, 221 P.2d 9; Estrada v. Alvarez, supra, 38 Cal.2d 386, 391, 240 P.2d 278. Even if the defenses of affirmance, waiver and estoppel would not be available to respondent because he did not plead them, the question of unreasonable delay would remain decisive. The question of laches or unreasonable delay must in each case be determined upon the basis of its fact, and in the absence of a palpable abuse of discretion the trial court's finding upon the issue will not be disturbed on appeal, both when he finds for or against laches. Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372; Fabian v. Alphonzo E. Bell Corp., supra, 55 Cal.App.2d at page 415, 130 P.2d 779. Accordingly in this case we are bound

by the trial court's finding of laches because if appellant can be said to have made any showing of excuse of delay at all, said showing was certainly not such that it proves as a matter of law that she had not forfeited her right to attack the validity of the property settlement agreement.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 1

MEROLA
v.
SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 16111.

District Court of Appeal, First District, Division 1, California.

April 30, 1954.

As Modified on Denial of Rehearing May 28, 1954.

Hearing Denied June 23, 1954.

Proceedings to review order of Superior Court, sitting in probate, issued in proceedings brought by executor for examination of testator's widow concerning property of estate allegedly in her possession. The District Court of Appeal, Fred B. Wood, J., held that Superior Court, sitting in probate, was without jurisdiction to try question of title to property which decedent's widow claimed as her sole property.

Order annulled in part and affirmed in part.

1. Courts 🔑200½

A superior court sitting in probate is without jurisdiction to try question of title to property as between a representative of the estate and a stranger to the estate. Probate Code, §§ 613–615.

2. Courts 🔑200½

Superior Court, sitting in probate, was without jurisdiction to try, in executor's discovery proceedings, question of title to property which decedent's widow claimed as her sole property. Probate Code, §§ 613–615.

3. Executors and Administrators 🔑85(4)

The remedial powers of probate court in discovery and accounting proceedings under the Probate Code are limited to remedial powers conferred by section 614, and court in such proceeding cannot determine dispute between person cited and representative of estate as to title to property or amount claimed to be due as result of accounting nor order disposition of property or punish for contempt for failure to obey any order so made. Probate Code, §§ 613–615.

Lucille F. Athearn, San Francisco, Robert E. Hatch, San Francisco, for petitioner.

Edgar C. Levey, Douglas A. Pease, San Francisco, for real party in interest.

FRED B. WOOD, Justice.

In a proceeding under sections 613–615 of the Probate Code, brought by the executor of the will of Gaetano Merola for examination of the widow, Gladyce C. Merola, concerning property of the estate allegedly in her possession, the court sitting in probate made an order (1) directing that the widow forthwith deliver to the executor cash in the sum of $4,000 and bonds of the face value of $16,000, found and declared to be the property of the estate, and (2) enjoining the widow, the executor, and the Hibernia Savings and Loan Society from withdrawing moneys from or in any way changing the status quo of a certain savings account.

Later, upon the hearing of a motion by the widow to vacate this order, the court amended the order by deletion of the finding that the cash and the bonds belonged to the estate and by addition of a statement that "nothing herein shall be deemed prejudicial to the rights" of the widow "to determine the question of title to said property in an appropriate action."

The widow then instituted this proceeding to review the order, claiming it void for asserted lack of jurisdiction to make it. Save as to three $1,000 bonds standing in the sole name of the decedent, which the widow admits belong to the estate and alleges have been delivered to the executor, the order is void. Except as to those three bonds, the order should be annulled.

The rest of the bonds, the cash, and the savings account she claimed at the hearing, and still claims, as her sole property.

Two $1,000 government bonds stood in the name of the decedent and the widow ("Gaetano Merola or Mrs. Gladyce Merola"), which she claims were held in joint tenancy and upon his death became her sole property. Seven bonds payable to bearer, of the total face value of $11,000, she claimed he gave her in his lifetime and that they have been in her possession ever since. The $4,000 cash item consisted of a deposit of that amount in her name in the Bank of America, which she testified represented a withdrawal in that amount from a joint account of theirs in another bank, a withdrawal which she made at his suggestion, prompted by his desire that it be and become her sole property. The savings account with the Hibernia Savings and Loan Society stood in the names "Gaetano Merola or Gladyce C. Merola." She claims it was held in joint tenancy and that she, as survivor, is now its sole owner.

A proceeding such as this, under authority of sections 613–615 of the Probate Code, is for the purpose of discovery. It pertains to a person "suspected of having embezzled, concealed, smuggled or fraudulently disposed of any property of the decedent" or who allegedly "has in his possession or has knowledge of any deed, conveyance, bond, contract or other writing, which contains evidence of or tends to disclose the right, title, interest or claim of the decedent to any real or personal property, or any claim or demand, or any lost will". The court may cite such a person "and may examine him on oath upon the matter of such complaint." § 613. If upon the examination it appears that he has done any of the things of which he is suspected or has knowledge of any of the papers or documents mentioned in section 613 the court "may make an order requiring him to disclose his knowledge thereof". § 614. Also, upon complaint of an executor, the court may cite a person "who has been entrusted with any part of the estate * * * and require him to render a full account, on oath, of any moneys, accounts, or other property or papers belonging to the estate, which have come to his possession, and of his proceedings thereon". § 615.

In this case, the widow appeared in court as required, took the witness stand, answered all questions, and through her attorney supplied the executor's attorney with a list of assets that had come into her hands and exhibited those assets to him. Thus, she appears to have fully complied with the requirements of sections 613–615 of the Probate Code.

We perceive no basis for the questioned order except as it relates to the bonds which the widow concedes belong to the estate.

[1] The basic principle is that the superior court sitting in probate is without jurisdiction to try the question of title to property as between a representative of the estate and a stranger to the estate. Bauer v. Bauer, 201 Cal. 267, 271, 256 P. 820; In re Estate and Guardianship of Vucinich, 3 Cal.2d 235, 243, 44 P.2d 567; Wilkerson v. Seib, 20 Cal.2d 556, 562–563, 127 P.2d 904; In re Estate of Kurt, 83 Cal.App.2d 681, 683–684, 189 P.2d 528; Laing v. Superior Court, 88 Cal.App.2d 641, 199 P.2d 373; Wilson v. Superior Court, 101 Cal.App.2d 592, 225 P.2d 1002.

[2] Here the contest is clearly between the executor and a stranger to the estate. The widow claims that the property involved is her sole property; i. e., that some of it was given to her by the decedent during his lifetime and that the rest of it upon his death became her sole property as the surviving joint tenant. She claims adversely to the estate, not in privity with it, and is not a personal representative of the estate claiming title in her individual capacity. The contest, therefore, is between the estate and a stranger to the estate and the principle that the probate court may not try title applies.

[3] The provisions of sections 613–615 of the Probate Code create no exception to that principle. The power which they grant to the probate court "ends with the discov-

ery of the property and the enforcement of the remedial powers of the statute, and does not extend beyond that; and that where a dispute arises between the person cited and the representative of the estate as to the title to property, or the amount claimed to be due as the result of the accounting, the probate court cannot in such proceeding determine the issue, nor order property delivered up to the executor or administrator, or to be deposited as the court may order; nor under such circumstances does it have the power to imprison the person for contempt for failure to obey any order so made." McCarthy v. Superior Court, 64 Cal.App.2d 468, 472, 149 P.2d 55, 57. See, also, cases there cited.

The executor, in his memorandum first filed herein, claimed that the order in question was based upon and supported by a stipulation of the executor and the widow. In a supplemental memorandum later filed the executor says "We do not contend that a specific stipulation was entered into by the parties for the delivery of specific assets to the executor" but that the widow "stipulated as to the character of the specific assets in respect to their status as either separate or community property," and "the proceedings taken were in direct response to the direction and request of the court that the parties disclose all properties to one another and agree insofar as possible as to what belonged in the estate and what was the separate property of petitioner." It clearly appears from the record that there was no stipulation. During the course of the hearing the widow repeatedly asserted her claim of ownership to all the property listed except the three bonds which she conceded belonged to the estate and which in her petition herein she alleges have since been delivered to the executor. In the absence of a stipulation it is unnecessary to consider whether a stipulation could furnish a jurisdictional basis for such an order.

The order is annulled, except as to the three bonds which petitioner concedes belong to the estate and as to those bonds it is affirmed; petitioner to recover costs, which are assessed against Lorne Stanley, as executor, the real party in interest.

PETERS, P. J., and BRAY, J., concur.

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124 Cal.App.2d 867

KUEHN v. LOWTHIAN et al.

JAMES v. LOWTHIAN et al.

Civ. 15682.

District Court of Appeal, First District, Division 1, California.

April 30, 1954.

Rehearing Denied May 28, 1954.

Hearing Denied June 23, 1954.

In consolidated actions by automobile passenger and driver of automobile which, while overtaking truck in multi-lane highway, collided with rear end of truck as it was making left turn from outside lane, for injuries sustained in such collision, the Superior Court, Monterey County, Anthony Brazil, J., entered judgment on verdict for defendants, and plaintiffs appealed. The District Court of Appeals, Finley, J. pro tem., held, inter alia, that evidence supported jury's implied finding that truck driver had not been guilty of negligence.

Affirmed.

1. Appeal and Error ⚷110

Appeal would not lie from order denying motion for new trial. Code Civ.Proc. § 963.

2. Appeal and Error ⚷870(6)

Order denying motion for new trial was reviewable upon appeal from judgment. Code Civ.Proc. § 963.

3. Automobiles ⚷247

Where asserted contributory negligence of automobile driver was not imputable to passenger and verdicts in consolidated automobile cases were against automobile driver and automobile passenger, and for owner and driver of truck which collided with the automobile, verdicts were founded upon freedom from negligence on part of truck driver.

4. Appeal and Error ⚷996, 1001(1)

Judgment founded upon verdict will not be reversed on ground of insufficiency of evidence unless it can be held as matter of law that, aided by every favorable inference, presumption and intendment, evidence is patently inadequate to support verdict.

5. Appeal and Error ⚿237(3), 238(2)

Asserted fact that truck driver was negligent as matter of law should have been raised by motion for directed verdict or by motion for judgment notwithstanding verdict, not on appeal on ground that evidence was insufficient to support verdict for truck driver.

6. Automobiles ⚿244(12)

In consolidated actions by automobile passenger and driver of automobile which, while overtaking truck in multi-lane highway, collided with rear end of truck as it was making left turn from outside lane, for injuries sustained in such collision, evidence supported jury's implied finding that truck driver had not been guilty of negligence.

7. Negligence ⚿121(1)

An act which is performed in violation of ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that act was justifiable or excusable under the circumstances, but the fact which will excuse the violation must be one resulting from causes or things beyond control of person charged with the violation.

8. Negligence ⚿136(9, 25)

Whether violation of statute resulted from causes or things beyond control of person charged with violation, and, therefore, was justifiable or excusable, is question of fact for jury, except in case where court would be impelled to say that reasonable men could draw only the inference that such person had been negligent.

9. Trial ⚿255(1)

Trial court need not of its own motion give special instructions, in absence of request therefor by counsel.

10. Trial ⚿242

A court should not give an instruction which, although technically a correct statement of law, is worded so as to be confusing or misleading, or which, by construction or implication, may appear to indicate that given rule of law applies only to one of the parties, when it, in fact, applies equally to both.

11. Appeal and Error ⚿882(12)

Plaintiffs in negligence case invited error by submitting two instructions, neither of which was proper in view of the evidence, and could not complain because modification of one of the instructions by trial court was not in as much detail or as specific as plaintiffs might have desired, where instruction, as modified, did not amount to misstatement of the law.

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Malovos, Mager, Newcomer & Chasuk, Kenneth R. Malovos and Herman J. Mager, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, San Jose, W. R. Dunn, Burlingame, for respondents.

FINLEY, Justice pro tem.

[1, 2] These cases were consolidated for trial. The appeal is by both plaintiffs from judgments entered upon jury verdicts in favor of defendants. The notices of appeal also state that appeal is taken from the order made denying plaintiffs' motion for a new trial. There is no appeal from an order *denying* a motion for a new trial. Section 963, Code Civ.Proc. The order denying the motion is, however, reviewable upon appeal from the judgments. The appeals from this order are therefore dismissed.

The action grows out of a collision between an automobile driven by appellant Audrey James in which appellant Kathryn Kuehn was a passenger, and a truck and dolly loaded with long poles and driven by respondent Robert Lowthian. The collision took place on State Highway 1, near the point where it is intersected by East Garrison Road at Ford Ord. At that point State Highway 1 is four lanes in width with a dividing strip between the southbound and northbound lanes. Respondent Robert Lowthian was driving the truck and dolly, owned by respondent Harry Lowthian, in the outside or westerly lane, headed south. Following him was a similar truck and load. The Buick automobile driven by appellant Audrey James had followed the trucks for some distance prior to the widening of the highway from two to four lanes.

She had passed the rear truck and was preparing to pass the one in front when it made, or started to make, a left-hand turn, preparatory to crossing the highway for entry into East Garrison Road, which intersected on the opposite side. A collision took place between the left front of the automobile and the rear end of the dolly at about the dividing line between the southbound lanes.

Two points are raised here by appellants. They are:

> "1. The evidence is wholly insufficient to sustain the verdict of the jury and is contrary to law."
>
> "2. Grave prejudicial error resulted from the action of the trial court in its instructions to the jury."

[3] Since appellant Kathryn Kuehn was riding as a passenger in the automobile driven by appellant Audrey James, and since the verdicts were in favor of respondents and against appellant Kuehn as a passenger, as well as against appellant James as the driver, it is obvious that the verdicts were founded upon freedom from negligence on the part of respondent Robert Lowthian, and not upon a finding of contributory negligence on the part of appellant James.

In order for appellants' point No. 1 above and their argument to be well taken, it would necessarily mean that there is no substantial evidence in the record of lack of negligence on the part of respondents. It would mean, on the other hand, that the evidence not only indicates but actually establishes negligence on the part of respondent Robert Lowthian. It would mean that at the close of the evidence appellants were each entitled to a directed verdict or, after verdict by the jury to the contrary, they were entitled to judgment in their favor, notwithstanding the verdict.

[4, 5] A judgment founded upon the verdict of the jury will not be reversed on the ground of insufficiency of the evidence unless it can be held as a matter of law that, aided by every favorable inference, presumption and intendment, the evidence is patently inadequate to support the verdict. Huston v. Schohr, 63 Cal.App.2d 267, 146 P.2d 730; Freeman v. Nickerson, 77 Cal.App.2d 40, 174 P.2d 688; De Rosier v. Vierra, 109 Cal.App.2d 291, 240 P.2d 660; Dodds v. Stellar, 77 Cal.App.2d 411, 175 P.2d 607. If this point is now sound it should have been raised by a motion for a directed verdict or a motion for judgment notwithstanding the verdict. No such motions were made.

[6] No useful purpose would be served by reviewing the evidence with particularity. Suffice it to say that we have read the record. In reviewing that record we find no support for appellants' contention that respondents' version of the collision is physically impossible. There is in the record ample evidence of a credible nature to support the verdicts of the jury.

Under appellants' point No. 2 the objection and argument are directed to the giving of one instruction only, which reads as follows:

> "If you find from the evidence that any driver conducted himself in violation of any of the Motor Vehicle Acts just read to you, you are instructed that such conduct constituted negligence as a matter of law *unless justified or excusable.* However, in this action, a violation of law is of no consequence unless it was a proximate cause of an injury found by you to have been suffered by plaintiff." (Emphasis added.)

This instruction was proposed by appellants and modified by the trial judge by adding the italicized words, to wit: "unless justified or excusable."

On this point appellants also submitted the following instruction:

> "A violation of a Motor Vehicle Code provision governing the operation of motor vehicles upon the highways of this State (except certain speed statutes) constitutes negligence in and of itself, and as a matter of law, unless excusable or justifiable by circumstances beyond the control of the person violating such provisions of the Vehicle Code. Thus, if you find that the defendant, Robert L. Lowthian, violated any one or more of the provi-

> sions of the Vehicle Code (excepting certain speed statutes) and that such conduct on his part, if any, was neither justifiable nor excusable by circumstances beyond his control; and if you further find such violation or violations of the Vehicle Code, if any, were the direct and proximate cause of injuries to plaintiffs Kuehn and James, then you must find and conclude that defendant, Robert L. Lowthian, was guilty of negligence."

Appellants' complaint is that their instruction, modified and given by the court, omits the words, "by circumstances beyond the control of the person violating," after the words, "excusable or justifiable." Appellants argue that this omission left the jury without instruction as to the standard or type of evidence necessary to rebut the presumption of negligence arising from violation of a statute. That,—"It in substance left to the determination of the jury the type of evidence which would constitute 'excusable or justified' conduct without providing the yardstick for measurement."

[7, 8] This very question, that of violation of a provision of the Vehicle Code, was involved in Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279. As the issue was there stated in the opinion, 29 Cal.2d at page 583, 177 P.2d at page 280: "The principal points relied upon as grounds for a reversal of the judgment * * * concern two jury instructions stating the legal effect of violation of the Vehicle Code in fixing liability for the accident." The applicable rule is stated, 29 Cal.2d on page 589, 177 P.2d on page 283, as follows: "'* * * An act which is performed in violation of an ordinance or statute is presumptively an act of negligence, but the presumption is not conclusive and may be rebutted by showing that the act was justifiable or excusable under the circumstances. Until so rebutted, it is conclusive. [Citing cases.]' However, the fact which will excuse the violation of a statute has been defined by the court as one resulting 'from causes or things beyond the control of the person charged with the violation.'" Citing Gallichotte v. California Mutual etc. Ass'n, 4 Cal.App.2d 503, at page 506, 41 P.2d 349, at page 351, and other cases. Whether the violation resulted from causes or things beyond the control of the person charged with the violation, and therefore justifiable or excusable, is a question of fact for the jury, excepting in a case where the court would be impelled to say that from the facts reasonable men could draw but one inference, and that an inference pointing unerringly to the negligence of the violator of the statute. Hart v. Briskman, 110 Cal.App.2d 194, 242 P.2d 341; Scalf v. Eicher, 11 Cal.App.2d 44, 53 P.2d 368; Satterlee v. Orange Glenn School Dist., supra, 29 Cal.2d 581, 177 P.2d 279.

In Ornales v. Wigger, 35 Cal.2d 474, 218 P.2d 531, after discussing the Satterlee case and noting the rule as it is quoted above, the court has this to say, 35 Cal.2d at page 478, 218 P.2d at page 534: "Ordinarily, before an appellant may complain of the lack of an instruction, he must have made a request that the charge be made more specific, or ask for qualifying instructions. This general rule is apparently qualified by the rule that an appellant may complain, in the absence of such request, where the instruction given erroneously states the applicable law and prejudice is suffered thereby"; and further on in the opinion, 35 Cal.2d at page 479, 218 P.2d at page 535, the court quotes with approval this language from Baldridge v. Cunningham, 31 Cal.App.2d 128, 132, 87 P.2d 369: "'If defendant Cunningham desired a further elaboration upon the instruction relative to the *quantum* of evidence necessary to establish justification or excuse, and thereby rebut the presumption of negligence arising from a violation of the California Vehicle Code, it was her duty to propose the further instruction which she desired and request the court to give it. This she did not do. [Citing cases.]'"

It seems then that the rule is now settled under which negligence imputed by the violation of a statutory provision will not be held actionable and that justification or excuse can result only from causes or things beyond the control of the person charged with the violation. The rule is not thus stated in Tossman v. Newman, 37 Cal.2d 522, on page 525, 233 P.2d 1, for there it is stated merely that the presumption of negligence can be rebutted by evidence of justification or excuse. But following this statement of the rule, Ornales v. Wigger, supra, 35 Cal.2d 474, 218 P.2d 531, is cited in support, which certainly indicates no disapproval of the qualifying language, to wit: the justification or excuse must result from causes or things beyond the control of the person charged with the violation.

It is apparent that the instruction appearing above and of which appellants complain, left out that part of the rule just quoted. The question now is what is the legal effect of this omission under the circumstance that, as submitted by appellants, the instruction fell even shorter of stating the full rule. Appellants in their supplemental brief concede that an excuse instruction was justified by the evidence. This being so, it would have been error to have given the instruction as submitted by appellants without modification. Hart v. Briskman, supra, 110 Cal.App.2d 194, 242 P.2d 341. Appellants submitted an instruction in which the rule was fully stated, but in it were also incorporated other features which rendered it objectionable, and it was not given.

We have then the situation where appellants submitted an instruction which correctly stated the law as far as it went but which here would have been improper without an excuse provision. The court amplified it by adding such a provision in general terms and, as modified, it still stated the law correctly as far as it went. Appellants now complain and charge the court with error in stopping where it did and in not qualifying the general excuse provision as set forth in the modification. Appellants do not claim that the words added by the court change their proffered instruction from a correct statement to a misstatement of the law. Their position apparently is that so long as the court undertook to modify the instruction at all, it was duty bound to leave nothing concerning its application unsaid.

[9, 10] Granting that the court might well have made its modification more specific, does this situation not fall squarely within the rule quoted above from Baldridge v. Cunningham, 31 Cal.App.2d 128, 87 P.2d 369, thus making it the duty of appellants to propose a further instruction if desired and "request the court to give it"? As stated in Ornales v. Wigger, supra, 35 Cal.2d 474, at page 479, 218 P.2d 531, at page 534: "The trial court need not of its own motion give special instructions in the absence of a request therefor by counsel. [Citing cases.]" True, it may be said here that such an instruction was requested. But the one proposed, which did correctly state the full rule, was, as stated above, confusing and objectionable for other reasons under the circumstances of this case, and the court was under no duty to change it. Tossman v. Newman, 37 Cal.2d 522, 233 P.2d 1. A court is under no duty and indeed should not give an instruction which, although technically a correct statement of the law, is so worded as to be confusing or misleading, or which by construction or implication may appear to indicate that a given rule of law applies only to one of the parties when it in fact applies equally to both.

[11] Appellants here invited error by submitting two instructions on the law pertaining to the violation of a statute, neither of which was a proper instruction in view of the evidence. They cannot complain then because a modification of one of them by the trial court was not in as much detail or as specific as appellants might have desired but where, as modified, it did not amount to a misstatement of the law.

The appeals from the order denying the motion for a new trial are dismissed; the judgments are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

124 Cal.App.2d 836

SULLIVAN et al. v. WRIGHT et al.

Civ. 15730.

District Court of Appeal, First District,
Division 2, California.

April 29, 1954.

Action for personal injuries and property damage resulting from automobile accident wherein plaintiffs, more than one year after accident, substituted and served amended complaint on owner of automobile, driven by other defendant, designating him as the fictitious defendant sued in original complaint. The Superior Court, Marin County, Thomas F. Keating, J., granted owner's motion to strike amended portion of complaint, and entered judgment against driver and owner for property damage and against driver for personal injuries. Plaintiffs appealed. The District Court of Appeal, Nourse, P. J., held that where original complaint did not state cause of action against fictitious defendant, real party defendant could not be substituted in amended complaint after statute of limitations had run.

Judgment affirmed.

1. Limitation of Actions ⟹180(7)

In action for personal injuries and property damage resulting from automobile collision, wherein defendant attacked amended complaint by demurrer, answer and motion to strike on ground that it was barred by one year statute of limitations, issue of statute of limitation was properly raised and was properly disposed of by granting motion to strike. Code Civ. Proc. § 340.

2. Limitation of Actions ⟹125

Where original complaint in action against driver and fictitious defendant for personal injuries arising out of automobile collision did not state cause of action against fictitious defendant, real party defendant could not be substituted therefor in amended complaint after one year statute of limitation had run. Code Civ. Proc. § 340.

3. Limitation of Actions ⟹34(1)

The liability of automobile owner for injury caused by negligence of another, operating automobile with owner's permission, is not a liability created by statute within three year statute of limitation. Vehicle Code, § 402; Code Civ.Proc. § 338.

◆

Phil F. Garvey, San Francisco, George Olshausen, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent Herman James Cox.

NOURSE, Presiding Justice.

Plaintiffs sued for personal injuries and property damage against Russell Wright and several fictitious defendants. More than a year after the accident plaintiffs substituted and served an amended complaint on Herman J. Cox (known as Crazy Cox) designating him as the John Doe sued in the original complaint. The trial court granted Cox's motion to strike this portion of the complaint. Judgment was thereupon entered in favor of William J. Sullivan against both Wright and Cox for the damages to plaintiff's car, in favor of Michael J. Sullivan for personal injuries against defendant Wright alone in the sum of $6,500 and against defendant Wright alone for costs of suit.

Briefly the facts are that William J. Sullivan was operating an automobile when the defendant Wright crashed into the rear of his car at a traffic stop signal, injuring the father, Michael J. Sullivan, riding in the car with William. The two plaintiffs joined in their complaint the two causes of action for personal injuries and for property damage. More than a year after the accident plaintiffs filed an amended complaint substituting Cox for John Doe as a party defendant. By demurrer, answer and by motion to strike, the defendant Cox attacked the amended complaint on the ground that it was barred by the one year statute of limitations. The motion to strike was granted.

Three primary questions are raised on the appeal:

[1] (1) Is the defendant Crazy Cox to be deemed to have waived the plea of

the one year statute of limitations, Code Civ.Proc. § 340, by failure to demur or answer on that ground?

The question proposed by the plaintiff is not properly stated. Following the filing of the amended complaint joining for the first time Cox as a party defendant, he filed a demurrer, an answer and a motion to strike, all three pleading the bar of the statute of limitations. The demurrer and the motion to strike were heard at the same time and no objection was then made as to the manner in which the plea was made.

Appellant argues that the plea of the statute of limitations cannot be raised by motion to strike. No authorities are cited as so holding. The practice was followed without comment in Gates v. Wendling Nathan Co., 27 Cal.App.2d 307, 81 P.2d 173; McKnight v. Gilzean, 29 Cal.App.2d 218, 84 P.2d 213; and Day v. Western Loan & Building Co., 42 Cal.App.2d 226, 108 P.2d 702.

But the point does not impress us as having substantial merit. If the order striking the complaint were reversed the demurrer would then be left pending and, in view of the authorities here cited, the trial court could do nothing but sustain the demurrer and enter judgment for defendant Cox on his plea of the statute of limitations.

[2] (2) Does the joinder of a "John Doe" defendant in the original complaint within the statutory period permit the substitution of the real party defendant after the statutory period has expired?

The answer to this question must be in the negative since the original complaint did not state a cause of action against "John Doe" or any fictitious defendant. Hence, so far as Crazy Cox is concerned, the amended complaint states a new cause of action against Crazy Cox where none was attempted in the original complaint. The necessary form of pleading to bar the statute is clearly stated in Day v. Western Loan & Building Co., 42 Cal.App.2d 226, 108 P.2d 702, supra. There the original complaint sought recovery against the operator of the car and against the owner and the one who controlled it. It alleged that these parties were unknown to the plaintiff, and were joined as fictitious parties. The amendment merely substituted the true name of the owner for the fictitious name used in the original complaint. Here no cause of action was stated against any fictitious defendant—merely the allegation that the true name was unknown to plaintiff.

[3] (3) Does the liability of the defendant Cox rest upon section 402 of the Vehicle Code and as such become a liability created by statute, the period for enforcement of which is three years under section 338 of the Code of Civil Procedure?

The answer must be in the negative. The precise question was before us in Franceschi v. Scott, 7 Cal.App.2d 494, 495, 46 P.2d 764, where we said: "The owner's liability under section 1714¼ of the Civil Code is a liability for imputed negligence arising from his permission to another, express or implied, to operate the car causing the injury. The cause of action is strictly and solely one in tort for injuries arising out of the negligence of the operator; hence, the cause accrues at the time of the negligent act. And no matter what form of language we use, the cause of action is one 'for the injury to * * * one caused by the wrongful act or neglect of another' within the express terms of subdivision 3 of section 340."

The case was cited with approval in Aetna Cas. Etc. Co. v. Pacific Gas & Elec. Co., 41 Cal.2d 785, 787, 264 P.2d 5.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

124 Cal.App.2d 822

PEOPLE v. GARCIA.

Cr. 959.

District Court of Appeal, Fourth District, California.

April 28, 1954.

Hearing Denied May 27, 1954.

Defendant was convicted by a jury of unlawfully possessing a narcotic. The Superior Court, Riverside County, John G. Gabbert, J., denied defendant's motion for a new trial and entered judgment of conviction from which defendant appealed. The District Court of Appeal, Griffin, J., held that although jury panel was in courtroom when defendant's case was called and defendant was, at that time, dressed in a blue denim shirt and trousers with county jail marked on each, where it did not affirmatively appear which if any of such jurors noticed writing on defendant's clothes, that any of jurors had been influenced by such writing, or that defendant had exhausted his peremptory challenges, and defendant had accepted jurors after examination for cause, no prejudicial error was shown.

Affirmed.

1. Criminal Law 🔑1166½(1)

Although jury panel was in courtroom when defendant's case was called and defendant was, at that time, dressed in a blue denim shirt and trousers with county jail marked on each, where it did not affirmatively appear which, if any, of such jurors noticed writing on defendant's clothes, that any juror had been influenced by such writing, or that defendant had exhausted his peremptory challenges, and defendant had accepted the jurors after examination for cause, no prejudicial error was shown. Health and Safety Code, § 11500.

2. Criminal Law 🔑406(3)

It is not necessary to show that a statement, which is an admission and which does not amount to a confession, was made freely and voluntarily before it may be related.

3. Criminal Law 🔑412(2)

Where extra judicial statements of defendant were not offered as a confession and defendant made no motion to strike them or request for further opportunity to examine witnesses as to foundational questions and as to whether the statements were freely and voluntarily made to witnesses, State, in prosecution for unlawful possession of a narcotic, could introduce testimony as to defendant's statements without a showing that they were freely and voluntarily made. Health and Safety Code, § 11500.

4. Criminal Law 🔑1169(12)

Even if defendant's extra-judicial statements were confessions of guilt, where court was, in good faith, informed by district attorney that they did not amount to confessions and defendant did not, at the conclusion of the testimony, call court's attention to the fact that they might be confessions of guilt, no prejudicial error resulted.

5. Poisons 🔑9

In prosecution for the unlawful possession of a narcotic, question of whether powdered substance found on defendant at time of his arrest was a narcotic was, under the evidence, one for the jury. Health and Safety Code, § 11500.

6. Criminal Law 🔑829(3)

In prosecution for the unlawful possession of a narcotic, court's refusal to give certain instructions offered by defendant on the subject of defendant's knowledge that he had possession of a narcotic was not prejudicial, where the instruction given sufficiently covered the subject. Health and Safety Code, § 11500.

7. Criminal Law 🔑814(8)

In prosecution for the unlawful possession of a narcotic, court's refusal to give requested instructions to the effect that when a person commits an act through misfortune, accident, or while unconscious, he commits no crime, was proper, since they had no application to the evidence produced. Health and Safety Code, § 11500.

8. Criminal Law 🔑656(8)

Where defendant did not testify and there was no contradiction of expert's testimony that powdered substance found on defendant was heroin, trial judge's statement of his opinion as to what facts stood out in his mind on question of whether defendant knew he had a narcotic in his possession, while instructing jury in prosecution for the unlawful possession of a narcotic, was not beyond the bounds of legal propriety. Health and Safety Code, § 11500; Const. art. 6, § 19.

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Morris Lavine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Dep. Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was convicted by a jury of violating section 11500 of the Health and Safety Code in that he unlawfully possessed a narcotic commonly known as heroin. He admitted a prior conviction of burglary and violation of the Dyer Act, and that he had served terms of imprisonment therefor.

About 3 p. m. on July 30, 1953, defendant was apprehended while driving his car near Banning. When he was searched there was found in his left front trousers pocket two rubber containers filled with a powder substance. When asked by the officers where he obtained the "stuff" he said he had picked it up in Palm Springs and was taking it to Los Angeles because he was "hard pressed for money".

The narcotics agent delivered the containers to the Los Angeles Police Department crime laboratory for examination. A City police officer assigned to that division as chemist, after stating his qualifications, testified that each contained approximately 90 grams of powder-like substance; that he made an analysis therefrom by means of several tests known as the Marquis, Meches, nitric acid, and microcrystalline with mercuric chloride tests, and concluded therefrom that the material in each container contained a narcotic known as heroin.

The narcotics inspector testified that according to the narcotics jargon the word "stuff" meant narcotics, and that these rubber stalls were used on many occasions for the purpose of carrying narcotics.

[1] Defendant did not testify in his own behalf. On this appeal from the judgment of conviction and motion denying his new trial he contends that he was denied a fair trial by being brought into court in jail clothes instead of in an ordinary suit of clothes, and that a prisoner is entitled to make his appearance before the jury free from all bonds and shackles, citing such cases as People v. Harrington, 42 Cal. 165; and Matthews v. State, 9 Tenn. 128, 42 Am. Rep. 667.

From the evidence it appears that while the jury panel was in the courtroom defendant's case was called and defendant was, at that time, dressed in a blue denim shirt and trousers; that there was some writing on each, marked "County Jail"; that counsel, out of the presence of the jurors, asked the trial judge to discharge the entire panel because of the prejudice that resulted in the minds of the jurors in general, and because of their knowledge that defendant was then confined in jail. This request was denied. However, the court ordered that thereafter the defendant be dressed in an ordinary suit of clothes. This order was followed throughout the rest of the trial.

It does not appear that defendant was brought into court shackled or in bonds, in any manner. It appears that the jury might well have known, other than by the writings on the clothing, that defendant was, at the time, in the custody of the sheriff. Apparently, no former request was made to have defendant appear in ordinary clothing. No authority is cited that holds that if the jury is informed that defendant is in the custody of the sheriff or in jail at the time of trial, it would be prejudicial error to order defendant to trial under those conditions. The jurors were subsequently examined by counsel for defendant and it does not appear which, if any, of such jurors noticed the writing on the clothing or that any juror was influenced or challenged by reason of that fact or that defendant exhausted his peremptory challenges. Defendant accepted the jurors after examination for cause, and it does not affirmatively appear that a fair and impartial trial could not be had by the jurors called. No prejudicial error resulted. People v. Stonecifer, 6 Cal. 405, 411; People v. Deveny, 112 Cal.App.2d 767, 247 P.2d 128; People v. Cross, 64 Cal. App. 443, 221 P. 684.

[2, 3] Defendant next contends that certain extrajudicial statements of his which were testified to by the police officers were confessions, and that the court erred in overruling his objection that it had not been shown that they were freely and voluntarily made, and in allowing them to be introduced without such preliminary showing. In respect to the alleged admissions or confessions the evidence shows, in questioning the officers, that certain questions were propounded and certain answers were given after showing the time, place and parties present. The officers were asked generally to give the conversation they had with defendant. Counsel for defendant objected because no sufficient foundation had been laid in regard to its being freely and voluntarily made. The court inquired of the prosecutor if the testimony was being offered as a confession and the prosecutor replied that it was not. The objection was overruled and the witness then related that the defendant, when asked "where he got the stuff" and "he had picked it up in Palm Springs and was taking it to Los Angeles"; that a picture of defendant and some woman was shown to the defendant and he was asked if he recognized the woman and he said he did; that he asked defendant if he realized "that this (the container) does not belong to you", and that it was wrong to take narcotics from one town to another, and defendant said that he did realize such fact; that defendant was then asked why he did it and he said: "I was hard pressed for money"; that he picked it up from a woman (Mexican girl) in Palm Springs and was taking it to Los Angeles; that he was then asked who he was taking it to and defendant refused to answer any further questions until he talked with his attorney; that defendant then stated he had been waiting in Palm Springs for about three days to receive the merchandise; and that he then asked defendant how the people would know he was "the one to receive the narcotics" and he answered "by his clothing, by his dress".

After these conversations were recited counsel for defendant made no motion to strike them nor did he request further opportunity to examine the witness as to foundational questions and whether the statements were made freely and voluntarily. It does appear that many of the statements attributed to defendant amounted only to admissions of fact or declarations, or of guilty conduct, and could not be characterized as a confession or acknowledgment of guilt of the offense charged. Under such circumstances it is not necessary to show that a statement which is an admission and does not amount to a confession was made freely and voluntarily before it may be related. People v. Cummings, 7 Cal.App.2d 406, 408, 46 P.2d 778; People v. Connelly, 195 Cal. 584, 597, 234 P. 374.

[4] Some of the statements made, when considered with other evidence established, do amount to a consciousness of guilt or may even be considered as a confession of guilt. Apparently the court was, in good faith, informed by the district attorney that they did not amount to a confession and accordingly it properly ruled at that time as to their admissibility. If counsel for defendant, after hearing the testimony, had any different belief in this respect, it was his duty to call the court's attention to this fact and the court no doubt would have given counsel the opportunity to determine whether such claimed confession was or was not obtained freely and voluntarily. Under the circumstances, no prejudicial error resulted. People v. Long, 43 Cal. 444; People v. Kamaunu, 110 Cal. 609, 42 P. 1090.

[5] It is next argued that the evidence is insufficient to support the verdict in that there is no proof of guilty knowledge that the substance was a narcotic. From the

evidence produced and the claimed statements of defendant in this respect there appears to be little merit to this contention. People v. Foster, 115 Cal.App.2d 866, 868, 253 P.2d 50; People v. Torres, 98 Cal.App.2d 189, 219 P.2d 480; People v. Gin Hauk Jue, 93 Cal.App.2d 72, 208 P.2d 717.

In this connection it is claimed, since no quantitative analysis of the two grams of powdered substance was made and since the expert did not determine what portion was quinine and what portion was heroin, and since the evidence shows the portion found to be heroin was so infinitesmal it constituted no substantial amount, that accordingly the evidence did not support the finding of the jury in this respect. It appears from the evidence that several other recognized tests, other than the quantitative analysis were made, and that the sample of powdered substance examined did contain sufficient heroin to be detected by those tests. The expert testified that he could not say whether there was or was not other material in the substance besides heroin but did state that there was a chance that it also contained quinine. The question of the sufficiency of the evidence was properly left to the jury to determine. People v. Hyden, 118 Cal.App.2d 744, 258 P.2d 1018.

[6] The next complaint is that the court erred in refusing to give certain instructions offered by defendant on the subject of knowledge, which instructions defendant contends were taken from the language of People v. Gory, 28 Cal.2d 450, 170 P.2d 433. They were to the effect that before the jury could convict the defendant it must be established beyond a reasonable doubt that defendant had knowledge of the presence of heroin in the substance found; that he knowingly had such heroin in his possession; that mere possession of the objects introduced in evidence without proof, beyond a reasonable doubt, of knowledge as to its contents would not constitute proof of defendant's guilt, and that the meaning of the word "possession" includes the exercise of dominion and control over the thing possessed.

The nature of the charge was read to the jury, i. e., that he did willfully and unlawfully have in his possession a narcotic commonly known as heroin. The court instructed the jury that before defendant could be convicted it was necessary to establish beyond a reasonable doubt the allegations of the information; that it was unlawful for any person to have in his possession a narcotic except upon written prescription of a physician, etc.; that the term "narcotic", as used in the instructions, meant heroin; and that one element of the claimed offense which respective counsel discussed before the jury was the question of knowledge or lack of knowledge of possession of a narcotic by the defendant. In this connection the court instructed the jury that "To constitute unlawful possession, as I have indicated in these instructions, the defendant must have possession knowingly, since there can be no criminal possession of an article without knowledge of its existence and presence. There need not, however, be any specific knowledge on the part of the defendant of the *nature* of the drug possessed. You must determine whether the defendant knowingly had possession of this substance"; and that "Within the meaning of the law, a person is in possession of a narcotic when it is under his dominion and control, and, to his knowledge, either is carried on his person or is in his presence and custody, or, if not on his person or in his presence, the possession thereof is immediate, accessible, and exclusive to him". And that "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him."

The Gory case, supra [28 Cal.2d 450, 170 P.2d 436], relied upon by defendant, holds that in such an offense the matter of knowledge in relation to defendant's awareness of the presence of the object is a basic element, and such knowledge must precede the intent to exercise physical control, but that an instruction requiring the jury to find "guilty intent" and "guilty knowledge" was not proper; that an instruction requiring that the accused should have been aware of his possession of the prescribed narcotic was proper and necessary under the evidence there produced;

and that the "distinction which must be drawn * * * is the distinction between (1) *knowledge of the character of the object and the unlawfulness of possession thereof* as embraced within the concept of a specific intent to violate the law, and (2) *knowledge of the presence of the object* as embraced within the concept of 'physical control with the intent to exercise such control,' which constitutes the 'possession' denounced by the statute. It is 'knowledge' in the first sense which is mentioned in the authorities as being immaterial but 'knowledge' in the second sense is the essence of the offense." Under this authority and the authorities therein cited, the instructions given sufficiently covered the subject matter, and the court did not prejudicially err in refusing to give the proffered instructions.

[7] The refusal to give proffered instructions to the effect that when a person commits an act through misfortune, accident, or while unconscious, he commits no crime, was proper since they had no application to the evidence produced. People v. Black, 103 Cal.App.2d 69, 79, 229 P.2d 61; People v. Sameniego, 118 Cal. App. 165, 173, 4 P.2d 809, 5 P.2d 653.

[8] The last objection, to the effect that the trial judge overstepped the bounds of legal propriety, under Article VI, § 19, Constitution of California, in reference to his right to comment on the evidence, is also untenable. Near the close of the trial the judge stated that under the constitutional provision he was authorized to comment generally, within proper bounds, in respect to his opinion as to the credibility of any witness and in aid of determining the facts, and to make certain comments concerning the evidence in the case. He then thoroughly cautioned the jury that the ultimate questions presented were for the jurors to determine and that they were the exclusive and ultimate judges in weighing the evidence as well as weighing the opinion of the trial judge made in connection therewith. He then remarked:

> "If we analyze the evidence, it appears to me that certain things stand out:
>
> "First, it seems to me that there is no question that the two items mentioned as Exhibits 2 and 3 were found in the pocket of the defendant.
>
> "Second, it is my opinion that this substance contained heroin.
>
> "Third, heroin is a narcotic within the meaning of the Code section which the defendant is accused of violating.
>
> "The element as to which there has been some discussion in the argument of counsel is as to the knowledge or lack of knowledge of possession of a narcotic by the defendant."

Then followed the instruction above mentioned as to what constituted unlawful possession, and the law as therein related pertaining to the element of knowledge. He then remarked:

> "You must determine whether the defendant knowingly had possession of this substance.
>
> "It would appear to me to be a reasonable inference to be drawn from the evidence that the defendant knew of its placement in his pocket. The physical facts existing at the time of the arrest might so indicate to a reasonable mind.
>
> "I want to impress upon you, as jurors, that you are—and I am not—the final determiner of the facts and credibility of witnesses. You are in no way bound by my opinion as it is expressed here. You, as a jury, must determine the guilt or innocence of the defendant."

The claim is that by the judge's remarks he told the jury that, as a matter of fact, defendant was possessed of a narcotic and that he, in substance, told the jury that defendant had "guilty knowledge" thereof and that, under these circumstances, the jury could hardly have escaped bringing in a verdict of guilty. Citing People v. Talkington, 8 Cal.App.2d 75, 95, 47 P.2d 368, as limiting the court's rights in this respect. It was there held that under the provisions of the section of the Constitution involved the court had the right to comment on the evidence, the testimony and credibility of any witness, but that it did not admit of an argument being made by the court to the jury under the appellation of "comments". There the trial judge went much farther than the judge did in the instant case. He adopted the argument of the prosecutor which, in effect, told the jury that the evidence showed that the defendant deliberately murdered the deceased and asked that a verdict of murder in the first degree be returned by the jury. The comments here made were clearly stated by the trial judge to be his opinion as to what facts stood out in his mind; that in his opinion the evidence showed that the substance found on defendant contained heroin, but that there was some question as to the knowledge or lack of knowledge of possession of a narcotic by defendant. On this latter question he expressed no opinion. Defendant did not take the witness stand and accordingly no evidence was produced by him to contradict the testimony of the expert who analyzed the substance. Defendant did not testify that he had no knowledge that the substance found in his possession was a narcotic. Accordingly, it does not appear that the comments made by the trial judge were acts of advocacy or that they were intemperate or emotional. He did not state that, in his opinion, the defendant was guilty of the offense charged. He did not go outside the record in his comments. They were only expressions of his opinion that from the evidence certain things had been shown. The judge was not called upon to review any testimony offered in favor of the defendant. The crucial questions involved were properly left to the determination of the jury under the instructions given. Defendant was not erroneously prejudiced by the comments. People v. Gosden, 6 Cal.2d 14, 28, 56 P.2d 211; People v. De Moss, 4 Cal.2d 469, 476, 50 P.2d 1031; People v. King, 30 Cal.App.2d 185, 205, 85 P.2d 928; People v. Robinson, 73 Cal.App.2d 233, 236, 166 P.2d 17.

These same questions were presented on a motion for new trial, which was denied.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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124 Cal.App.2d 769

SHEEHAN et al.

v.

CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15773.

District Court of Appeal, First District, Division 2, California.

April 27, 1954.

Hearing Denied June 23, 1954.

Class action by automobile machinists employed by City and County of San Francisco to recover pay. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for plaintiffs and defendants appealed. The District Court, of Appeal, Gibson, J. pro tem., held that where San Francisco charter required city to pay its machinists at same rate as private employees in city, and collective bargaining agreements entered into by private employers did not provide for any deduction in weekly pay of machinist because of employer's refusal to permit employee to work on any day, city could not observe local holidays not mentioned in collective bargaining agreement and not pay city employees for such days.

Affirmed.

1. Municipal Corporations ⚿220(2)

San Francisco Charter section providing that crafts employed by the municipality must be paid by the board of supervisors at the same rate of pay as might be established for such crafts by collective bargaining with private employers in San Francisco means that city employees who perform same services as private employees employed by the week are entitled to receive, before deductions, the same amount for a week's work as such private employees.

2. Labor Relations ⚿261

Where collective bargaining agreements provide that wages are fixed at so much per week, there is an implied contract that employees are employed by the week. Labor Code, § 3001.

3. Master and Servant ⚿73(2)

Where a complaining party to a contract of hire is prevented from working by the other party, the complaining party may sue on the contract and recover the agreed compensation although he has performed no service under the contract.

4. Municipal Corporations ⚿217(1)

The relationship between a government and its employees under an employment contract is governed solely by the local law under which the employment exists and not by the law of contracts.

5. Constitutional Law ⚿70(1)

The duty of the District Court of Appeal begins and ends with declaring what the law is in its present form, and any change in such law must be made by the Legislature.

6. Municipal Corporations ⚿220(5)

Where San Francisco charter required city to pay its machinists at same rate as private employers in city, and collective bargaining agreements entered into by private employers did not provide for any deduction in weekly pay of machinist because of employer's refusal to permit employee to work on any day, city could not observe local holidays not mentioned in collective bargaining agreement and not pay city employees for such days. Labor Code, § 3001.

Dion R. Holm, City Atty. of City and County of San Francisco, William F. Bourne, Deputy City Atty., San Francisco, for appellants.

Milton Marks, Jr., San Francisco, for respondent.

GIBSON, Justice pro tem.

The respondents here (plaintiffs and petitioners in the Court below) are members of Automotive Machinists Lodge No. 1305, and are employed by the City and County of San Francisco in the civil service position of automotive machinists. They obtained a judgment and decree of mandamus, declaratory relief, and for compensation against the appellants (defendants in the lower Court) with respect to pay for which they claim to be entitled pursuant to Section 151.3 of the San Francisco charter, which makes it mandatory upon the City to pay its employees at the same rate of pay as is paid in private industry to the same groups and crafts in accordance with collective bargaining agreements.

The main basis of the complaint was that the respondents were entitled, as members of this organization, to a weekly rate of pay of $84.50 per week for the year 1948; $87.50 per week for the year 1949; and $94 per week for the year 1951. It was alleged that during the weeks in which Admission Day occurred in each of these years, to wit, September 9, 1948, September 9, 1949, and September 10, 1951, the appellants had refused to pay to respondents the full weekly rate of pay as set forth in private industry, and had divided the total weekly pay rate by the number of working days in the week (5) and had deducted ⅕ thereof from their paychecks. This, the respondents contended, and contend here, was unauthorized and illegal. On the other hand, appellants concede these deductions were made, but maintain such was fully authorized and proper, that such should be so declared, and the judgment herein reversed; which brings us to a consideration of the case on its merits. (Italics will be used from time to time herein for the purpose of clarity.)

Section 151.3 of the charter of San Francisco was enacted by a vote of the people in 1945, and soon thereafter approved by the Legislature, and so far as applicable here, reads as follows:

"Notwithstanding any of the provisions of section 151 or any other provisions of this charter, whenever any groups or crafts establish a rate of pay for such groups or crafts through collective bargaining agreements with employers employing such groups or crafts, and such rate is recognized and paid throughout the industry and the establishments employing such groups or crafts in San Francisco, and the civil service commission shall certify that such rate is generally prevailing for such groups or crafts in private employment in San Francisco pursuant to collective bargaining agreements, the board of supervisors shall have the power and it shall be its duty to fix such rate of pay as the compensations for such groups and crafts engaged in the City and County service * * *."

At this point is may be said that as automotive machinists (Civil Service Classification M54) respondents were, at all times involved herein, "groups and crafts" employees of the City, and as such their rate of pay was fixed in conformity with the formula expressed in the above quoted portion of said Section 151.3, at a rate identical with that set up in private employment in San Francisco by local bargaining agreements and in the amounts above set forth *per week.* The difficulty which confronts the parties to this action arises out of the following provision, which appears in each of such bargaining agreements:

"Employees shall have the following days off with pay: New Year's Day, Washington's Birthday, Memorial Day, 4th of July, Labor Day, Admission Day (when the celebration is held in San Francisco), Thanksgiving Day, Christmas Day. When any of the above holidays fall on Sunday, the day observed by the State or Nation shall be considered as the holiday. There shall be no deduction in pay for the above holidays."

Appellants contend the deductions were authorized because the collective bargaining agreement which determines the rate of pay does not require that Admission Day be treated as a paid holiday, except when said celebration is held in San Francisco, (it is agreed the celebration referred to is that sponsored by the Native Sons of the Golden West and that such celebration was held in San Francisco in 1950), and that the City may observe any holiday not mentioned in the collective bargaining agreement and need not pay respondents for those days. Respondents, on the other hand, interpret this provision to mean merely that *on the specified days* the employees concerned shall have the right to the day off with pay; and so far as *other holidays* are concerned they are not entitled to such days off and the employer may require them to work; but if the employer chooses not to provide work on any such unspecified day, thus preventing them from working, this will not relieve it of its obligation to pay the full weekly rate of wage under the said bargaining agreements and the City ordinances *which have been enacted pursuant thereto* and which have fixed the foregoing as *weekly rates of pay.*

The fact is, on the three dates involved, the City closed down its shops where respondents were employed, and they were told by the City not to appear for work. Thus it is seen the employees were prevented from working, by the City, for its own purposes, and not for the benefit or purposes of the employees.

The section of the charter involved here, Section 151.3 has recently been considered by the courts. In the case of Adams v. Wolff, 84 Cal.App.2d 435, 190 P.2d 665, 671, the plaintiffs were members of the same craft involved here. The City had refused to pay them for the holidays which the bargaining agreement said they were entitled to. They sought and obtained an adjudication that under said Section 151.3 they were entitled to receive rates of pay for their services identical with that received in that area in private employment by machinists and mechanics pursuant to collective bargaining agreements by such employees with their employers, including payment for such holidays, even though they did not work on those days. The appellate court affirmed, saying: "It is quite apparent that it was the intent of § 151.3 to give to the public employees of the type here involved the same take home pay received by private employees in the same industry. That means that * * * where a work week is interrupted by a holiday they [public employees] are to receive the same pay that private employees would receive for work similarly performed. It is quite obvious that * * * pay for holidays is a part of the 'basic' rate of pay, and is as much a part of the wage structure as the hourly wage itself. * * * The 'basic' 'rate of pay' is the take home pay of the employee. *The charter provision guarantees that the take home pay of public employees shall be the same as private employees.*" Here, of course, the court was considering only the question of payment for the holidays specifically mentioned in the agreements to which Section 151.3 refers, but the language used and herein referred to is significant, so far as its reference to "basic pay" and "take home pay" is concerned.

[1] In another and later case, Adams v. City and County of San Francisco, 94 Cal.App.2d 586, 211 P.2d 368, 212 P.2d 272, this section of the charter was again considered and again it was interpreted to mean that the "rate of pay" was synonymous with "take home pay". This latter phrase, of course, does not mean the amount of money such employees get home with on pay day. There may be deductions for income tax, social security, retirement, attachments and executions against their salaries which would affect the actual amount of money they, respectively, received to take home. It does mean the amount the employees are entitled to receive from their employers to take home as between themselves, the employer and employee, and before any deductions as required by third parties, are made. The section means that if the private employee under his bargaining agreement is entitled to receive before deductions the sum, for example, of $84.50 for a week's work, the city employee, performing the same services, is likewise entitled to receive the same amount for his week's work. The section and the foregoing decisions seem to be so clear on the point, no further discussion thereof appears to be appropriate.

Having seen then that the City employee must receive the same weekly rate of pay as the private employee, we now turn to the ascertainment of what such weekly rate of the latter was on the dates referred to, and when we do this we find they were as declared in the amended petition, to-wit, $84.50 per week for the year 1948, $87.50 per week for 1949, and $94 per week for 1951. These respondents were ready to work on those days but were prevented by the City from so doing and at the end of each of these weeks ⅕th of their weekly wage was not paid to them, through no fault of their own.

[2] We are forced to the conclusion such deductions were unauthorized. We are here concerned only with what Section 151.3, which the people of San Francisco have enacted into their law, directs shall be done. There is nothing in any of the bargaining agreements which provides for any deduction in the weekly pay of any employee by reason of the employer refusing to permit the employee to work on any day or days of the week. His wage is fixed, not at so much per hour, or per day, but at so much *per week*. "A servant is presumed to have been hired for such length of time as the parties adopt for the estimation of wages." Labor Code, § 3001.

Therefore, there is an implied contract of employment between the employers and employees in private industry in which automotive machinists are employed, that the employees are employed *by the week*, and their wages are fixed by this agreement *for that period*.

[3] "Where it appears that the complaining party to a contract of hire was prevented from working by the defendant * * * the party, though he has performed no service under it, may sue on the contract and recover the agreed compensation." Payne v. Pathe Studios, Inc., 6 Cal. App.2d 136, 141, 44 P.2d 598, 600.

This seems to be the rule throughout the country. Oil Fields Corporation v. Hess, 186 Ark. 241, 53 S.W.2d 444, 447; 56 C.J. S., Master and Servant, §§ 81, 84, 102, pages 511, 515, 533.

[4] But, say the appellants, the relationship between government and its employees, including the question of the employment rights and responsibilities of both the government and such employees, is governed solely by the local law under which the employment exists, and not by the law of contracts, which controls in the purely private employer-employee relationship. Which, of course, is the well-settled rule, and applicable here. From the foregoing discussion, we see the private employees are hired by the week, their rate of pay is fixed on a weekly basis, they are entitled to be paid by the week, and are so paid. And it is *by force of the local law,* to wit, Section 151.3 of the City Charter, that fixes this state of facts as being applicable to the City employees as well.

There is nothing in any law or any bargaining agreement we know of, that permitted a private or City employee to stay away from his work on any of the three days in question here. True it is, they were holidays, but there is no significance to be attached to that fact, so far as the matters being considered here are concerned. The law does not say no one shall work on Admission Day. It does say that certain institutions and public offices shall be closed on that day, but the places where these respondents worked were not of those. No doubt, many more people worked at their employment on those days than did not. More specifically, and indeed showing the interpretation put upon their bargaining agreements by private employees and their employers, and showing that "such rate" was "recognized and paid throughout the industry", the indisputed evidence in this case shows that those employees were required to and did work on each of those days. Thus, their weekly rate of pay *for those weeks,* their take home pay, was actually greater than was that of these respondents, which is clearly contrary to both the letter and spirit of Section 151.3.

It is finally urged by the appellants, however, that the case of Gowanlock v. Turner, recently decided by the Supreme Court, and reported in 42 Cal.2d 296, 267 P.2d 310, dictates a contrary holding. We do not so read the decision. It deals only with the problem of whether or not municipal railway employees were entitled under the charter to compensation for a minimum of 8 hours of work in each working day. It was therein held that neither Section 125 nor 151.3 of the charter so provided. In considering the latter section the Court did specifically say, 42 Cal.2d at page 309, 267 P.2d at page 317: "By the use of the word 'rate', the charter specifies a wage schedule made up by the measurement of one item on the basis of a unit or quantity of another. As applied to wages, it requires a computation of amount of compensation for a unit of work, in the case of municipal workers being an hourly wage." The Court, of course, was there considering only *municipal platform employees and bus operators* whose rate of pay was and is fixed by the hour, (for instance, see Salary Ordinance for 1948–1949, page 83, Defendants' Exhibit A; Salary Ordinance for 1949–1950, page 82, Defendants' Exhibit B; and Salary Ordinance for 1951–1952, page 80, Defendants' Exhibit C), and not automotive machinists, respondents here, whose rate of pay was and is fixed not by the *hour* but by the *week.* (See same salary ordinances as follows: 1948–1949, page 52; 1949–1950, page 50; 1951–1952, page 45; all following their bargaining agreements in private industry.)

While we thus see the facts of the Gowanlock case are so different from the facts in the case at bar as to be of little assistance to us here, nevertheless, it is interesting to note what the Supreme Court there had to say about the word "rate". It referred to the definition thereof found in Webster's Dictionary as follows, "quality, amount, or degree of a thing measured per unit of something else, * * * amount of payment or charge based on some other amount, as in money obligations, *as the rate of wages per week.*"

[5] It seems clear to us, that when the City employs these people and agrees to pay them at a stated rate *per week* it is bound to do just that, no matter how many days in the week it chooses to instruct them not to report for work, any more than it would have the right to pay an employee who had been hired at the rate of $4 per hour, $3 if he worked three-quarters of an hour, or $3.33⅓ if he worked only ⅚th of an hour. If it is thought this rule should be changed, obviously we are not the ones to do it; our duty begins and ends with declaring what the law is in its present form.

[6] We conclude, therefore, the matter involved here is not that of a holiday which the employees were entitled to take off and did by consequence thereof take off and are now demanding pay for; but the question to be answered is, where the employees were ready, able and willing to work, and were prevented from so doing by the employer for its own purposes, and it had theretofore agreed to pay them at so much per week, may a deduction be made from the employees' wages for the days they were prevented from so working? We conclude that under the ordinances and bargaining

agreements hereinabove referred to, the question must be answered in the negative, and the judgment of the lower court affirmed. It is so ordered.

NOURSE, P. J., and DOOLING, J., concur.

124 Cal.App.2d 839

PEOPLE v. SEARS et al.

Cr. 5048.

District Court of Appeal, Second District, Division 2, California.

April 29, 1954.

Hearing Denied May 27, 1954.

Information charging conspiracy to violate Corporate Securities Law, violation of such Law, and grand theft. The Superior Court, Los Angeles County, Clement D. Nye, J., entered order granting defendants' motion to set aside the information, and the People appealed. The District Court of Appeal, Moore, P. J., held that the evidence warranted commitment of defendants on such charges.

Reversed with instructions.

McComb, J., dissented.

Prior opinion 267 P.2d 856.

1. Indictment and Information 🔑144

The question for decision on motion to dismiss information on ground that there was no reasonable or probable cause for commitment of defendant is not whether defendant is guilty of crime charged, but only whether evidence received by committing magistrate was sufficient to establish reasonable cause to warrant filing of information. Pen.Code, § 995.

2. Criminal Law 🔑238

If proof heard at examining trial would lead man of ordinary caution or prudence to believe, and sincerely to entertain strong suspicion of guilt of defendant, even though there be some doubt, and that there is reasonable cause for committing defendant, information must be filed. Pen.Code, § 995.

3. Criminal Law 🔑238

Evidence as to alleged conspiracy to violate Corporate Securities Law warranted commitment of defendants. Corporations Code, §§ 25000 et seq., 25500, 25507.

4. Criminal Law 🔑238

Evidence as to alleged sales of corporate stock without permit warranted commitment of defendants for violation of Corporate Securities Law. Corporations Code, §§ 25000 et seq., 25009, 26100, 26104.

5. Licenses 🔑39.7

Every sale in violation of Corporate Securities Law is a fraud on the vendee. Corporations Code, §§ 25009, 26104.

6. Conspiracy 🔑40

Every corporate officer, who with one or more persons solicits another to buy shares or securities of the corporation without permit to do so, conspires to violate Corporate Securities Law. Corporations Code, §§ 25009, 26104.

7. Criminal Law 🔑238

In making proof before examining court of facts of violation of Corporate Securities Act, it is not required that venue be established beyond reasonable doubt, and guilt is not the issue before the committing magistrate. Corporations Code, §§ 25009, 26104.

8. Embezzlement 🔑1

False Pretenses 🔑1

Larceny 🔑14(1)

Obtaining money from others by false pretense, trick or artifice, or by appropriating it after it has been entrusted to defendant, is "theft." Pen.Code, § 484.

See publication Words and Phrases, for other judicial constructions and definitions of "Theft".

9. Criminal Law 🔑238

Evidence warranted commitment of defendants on charge of theft in taking money from citizens for stock of corporation which had no permit to sell or issue its securities. Pen.Code, § 484.

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Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy

Dist. Atty., Robert Wheeler, Deputy Dist. Atty., Los Angeles, for appellant.

Gendel & Raskoff, by Bernard Shapiro, Los Angeles, for respondents.

MOORE, Presiding Justice.

Respondents were accused of having violated the Corporate Securities Law as incorporated in sections 25009 and 26104 of the Corporations Code. The information contains 19 counts. The first count charges them with a criminal conspiracy under which twenty overt acts are declared. Each of counts II to XIII, inclusive except XII, charges respondents jointly with crimes of "Violation of Corporate Securities Law" in that respondents in Los Angeles County sold and issued to designated persons for specified sums of money, shares of stock in the Sierra Nevada Oil Company, a corporation organized under the laws of the State of Nevada for profit, without first having applied for and secured from the Commissioner of Corporations of California a permit so to do. By count XII and by each of counts XIV to XIX, respondent Sears is alleged to have committed the crime of Grand Theft in that, in Los Angeles County, California, on a date specified "said Louis A. Sears did * * * feloniously take" a designated sum of money from a party named. After respondents had been arraigned, they filed a motion under section 995 of the Penal Code to set aside the information on the ground that respondents had been committed without reasonable or probable cause. After a hearing on the motion, the trial court granted the demands of respondents and their bonds were exonerated. The matter is here on the appeal of The People.

[1, 2] The question for decision on a motion to dismiss an information under Penal Code section 995 is not whether the accused is guilty of the crime charged, but only whether the evidence received by the Committing Magistrate was sufficient to establish a reasonable cause to warrant the filing of the information. This means that if the proof heard at the examining trial would lead a man of ordinary caution or prudence to believe, and sincerely entertain a strong suspicion of the guilt of the defendant, even though there be some doubt, and that there is reasonable cause for committing him, the information must be filed. People v. Platt, 124 Cal.App.2d 123, 268 P.2d 529; Lorenson v. Superior Court, 35 Cal.2d 49, 56, 216 P.2d 859; People v. George, 95 Cal.App.2d 425, 429, 213 P.2d 33. In the light of the foregoing we turn to the record of the Committing Magistrate for a view of the proof made.

The Evidence

In proof of each overt act alleged under count I and of the remaining 18 counts of the indictment, it was proved by Deputy Corporation Commissioner Harshbarger and exhibits from the files of the office of the Commissioner of Corporations that after the Department had refused to grant an "open" permit to Western Research Laboratories, Inc., on the application of respondent Sears filed November 25, 1949, and the abandonment of the application on April 26, 1950, both respondents turned their attention to the Sierra Nevada Oil Company of Nevada, herein designated "oil company" or "the company." Its Articles of Incorporation were filed in Nevada on February 15, 1950 at the request of Louis A. Sears. The latter and his wife were two of the original directors. Respondent Sears whose home was at Altadena, California, was president on September 11, 1952, Victor C. Rose of Bellflower was vice-president, and Rex H. Kaylor of Long Beach, secretary. No mention of the oil company was made by anyone to Mr. Harshbarger prior to the abandonment of the application of Western Research Laboratories. But on March 23, 1951, the Corporation Commissioner of California issued a "Desist and Refrain Order" and forwarded a copy thereof to the oil company at Las Vegas, Nevada, and to the respondents. It forbade them and the oil company "to sell or offer for sale, negotiate for the sale of or deal in any of the shares or other securities of Sierra Nevada Oil Company, a Nevada Corporation, in the State of California, for the reason that the Sierra Nevada Oil Company * * * has no permit" etc. Forms of application for stock in the oil company had been printed and given by Sears to prospective buyers of shares. The witness Bremner saw them in Sears' home in Altadena between April and June 1950. At the foot of such form letter was the note: "Please note—the check is payable to Sierra Nevada Oil Co., and is being sent air-mail special. Please return stock certificates registered mail."

Despite the "desist order" neither the oil company nor either respondent ever obtained or applied for a permit to sell the company shares in California.

Also, respondents pursued their objective of selling the shares of the oil company. The witness Dr. Kaylor of Long Beach was invited to attend a meeting at Sears' home in 1950. He there met respondents for the first time. Subsequently on October 14, 1950, Dr. Kaylor forwarded from Long Beach a cashier's check in the sum of $800 to the oil company at Las Vegas, Nevada. In doing so, he used the form-letter, Exhibit H, supplied by Sears at his home. He received from the company its certificate 399–a for 800 shares signed by Louis A. Sears, president. It was made to Dr. Kaylor and his wife, and came by mail to his office. On the occasion of the doctor's visit to Sears' home, he met about fifty people, including the witnesses Van Laar and Jacobs. Respondents both made use of maps, talked about money and an oil company and its lands near Worland, Wyoming. On November 4, 1950, Dr. Kaylor forwarded a cashier's check for $300 with the application form letter, Exhibit H, to the oil company at Las Vegas, Nevada, and received through the mail a certificate for 300 shares of its stock. Again, on November 20 he forwarded a cashier's check for $500 to the oil company accompanied by an application for stock on the H form letter supplied to him by Sears. He received by mail the company's certificate for 500 shares. On a second visit to the Sears home he found respondents and the same group who had attended his first meeting; the conversations were about oil. But Dr. Kaylor did not confine his investments to purchases of stock. In April 1951 after a meeting at Vogel's home and telephone conversation with Sears in Worland, he purchased cashiers' checks for $9,000 and mailed them to Sears at Worland. Two months later he received at his home in Long Beach Sears' note for $9,000. He never received money or stock for the $9,000.

After meeting both respondents in Las Vegas, Mr. Rex Kaylor met with Kiers at the home of Mr. Vogel at Bellflower. He told Sears by telephone he would loan the oil company $10,000 and Sears said he would sign the note and promised "that at some future date when and if it became legal that we should receive stock dollar for dollar." Sears told the witness that the latter could not get stock immediately; it was not legal then to give stock. On the next day, April 16, Mr. Kaylor sent by mail to Sears at Worland a cashier's check for $10,000. It bears stamp of Security First National Bank in Altadena, April 23, 1951. While visiting Sears at Worland in May 1951, Mr. Kaylor agreed to loan a second $10,000 and on his return to Long Beach on June 2 he purchased a cashier's check for that amount payable to Louis A. Sears and mailed it to the payee at Worland. Sears promised Mr. Kaylor at Worland that on his return to Altadena, he would give Kaylor a note for the money. When he arrived home in late June he forwarded his promissory note to Kaylor, dated April 16, 1951, for $20,000. Immediately thereafter Kaylor was appointed treasurer of the company. On Sears' visit to the Kaylor home in June, he made another loan of $4,250 and received Sears' promissory note for that sum. He never received either stock or cash in payment of the notes. While the loans were to Sears, he told Kaylor it was to be used for the company.

The witness Van Laar from his home at Downey, California, forwarded by mail six separate cashier's checks or money orders to the oil company at Las Vegas and at his home received by mail six separate certificates for shares of the company's stock, made to Van Laar or to members of his family aggregating 1450 shares.

By use of the mail and by applications on the H-form letter, the witness Vogel from his home in Los Angeles County forwarded to the company at Las Vegas or Worland, seven applications for its shares and made two loans of $1,000 and $1,350. Also, by mail he received certificates for the total of 2050 shares of its stock and Sears' note for $2,350.

The witness Jacobs lived at South Gate, California. Early in 1950 Kiers told him of the oil company. He visited the drill site in Cajon Canyon. He purchased shares in June, July, August and September, a total of 2100. All was accomplished by sending cashier's checks to the office of the company at Las Vegas and receiving the shares by mail at South Gate. He attended eight meetings at Sears' home and a stockholders' meeting in Las Vegas. On February 17, 1951, he forwarded by mail from Lynwood, California, to the company at Las Vegas, a money order for $500 for its shares and received a certificate for 500 shares. When he attended a meeting at Sears' home about March 15, 1951, both respondents were present. At the meeting of April 1, 1951, Sears told him that the corporate funds were tied up; that he needed money to keep the field at Worland in operation; that he would execute his note for moneys loaned and give the money to the corporation. April 16, 1951, he mailed his check for $1,000 to Sears at Las Vegas and in return received Sears' promissory note for that sum properly signed and dated. Also, Jacobs forwarded from his home at Bellflower to Sears at Worland two checks for $3,000 and $1,000. He received a promissory note of Sears for each amount, but neither was ever paid with money or stock.

The witness Bremner purchased a total of 1050 shares in the oil company at $1 per share and received them by mail at his office in Alhambra, California. After his conversation with Sears, he forwarded by mail from San Gabriel and Alhambra to the company at Las Vegas, cashiers' checks in payment for his shares. Prior to his investments in the stock, Sears and Kiers assured Bremner there was no promotional stock, but Kiers admitted he drew ten per cent commission in stock on his own sales and received a remuneration of $50 per week. Bremner was honored by membership on an "advisory committee" whose primary activity was to sell the company's stock.

Kiers met the witness Christo in 1950 when the latter called at Kiers' laundromat with his "family wash." Kiers told him he looked like a right smart boy. He took Christo to Cajon Pass in San Bernardino County to see the company's well and there introduced him to Sears as the president. On his return home, after Kiers' promise that the "shares would be share and share alike," Christo and his wife purchased 500 shares. Kiers prepared the application for their signatures, Christo purchased a cashier's check for $500 payable to the oil company and gave it to Sears. In August, Christo received from George E. Marshall at Las Vegas two certificates of his shares in the company. Christo drove or was conveyed by others to Cajon Pass on subsequent occasions and always met Sears there. Christo attended the meeting at Sears' home March 10, 1951 for a mass meeting of about 75 investors.

The witness Bouma testified that he resides at Norwalk and is a dealer in dairy cattle; that about August 11, 1950, Kiers called at the witness' home. He was introduced by a Mr. Kraan as one selling stock. Kiers told him about the well in Cajon Pass; that they needed money to finish the well and invited Bouma to visit the well site. They drove to the well with Mr. Scoff. Sears arrived in the afternoon and was introduced by Kiers. On their way home, Kiers asked him to invest $1,000 in the company. He purchased a cashier's check August 21, 1950, for $250 payable to Albert Kiers. Subsequently at Norwalk he received a certificate for 500 shares from Las Vegas. Later he attended a meeting at Sears' home.

The witness Vogel operates a meat market at Bellflower. In May 1950 at Kiers' laundromat, Kiers told Vogel about the "oil venture" in Cajon Canyon; said Sears and Rose were officers. Rose came in and Kiers asked Vogel to visit the well. He did so at the end of May. Sears was there. About June 5, he sent his check for $750 to the company at Las Vegas. He was told by Victor Rose it could not be bought except by sending to Las Vegas for it. In

October 1950 he made a purchase of 200 shares; August 29, 1950, he purchased 250 shares; November 15 he purchased 50 shares; January 2, 1951, he purchased 500 shares; a week later he purchased 250 shares. In each instance he sent his money by check to Las Vegas and promptly received certificates for shares at $1 each. He visited Sears' home about April 4, 1951, met Kiers and heard Sears tell the parties present that the company was short of funds and no more stock was to be issued and to continue operations, he, Sears, could put in his own money and those present could "make a personal loan to him, which in turn would be put into the corporation for future developments * * * he would give us his personal note * * * Mr. and Mrs. Sears would both sign it * * * but if and when stock could be gotten, we could get stock in place of the money loaned." Vogel then told Sears he would loan Sears $1,000, and on his return home, he wrote a check on his personal bank account and, at Bellflower, mailed it to Sears at Worland, Wyoming. One week later Vogel wrote still another check, payable to Louis A. Sears for $1,350 and mailed it to the payee at Worland. It was deposited by Sears at his bank in Altadena on April 23, 1951. About the time Vogel forwarded his check to Worland, a meeting of the stockholders was assembled at his home. Kiers was present and made a telephone call to Sears at Worland. Vogel and other stockholders conversed with Sears over Vogel's telephone.

Harm Bensema was a witness for the People. His home was in Bellflower and he was manager of the United Dairymen's Association in Artesia. He first met Kiers in 1949 and in August 1950 in Artesia, Kiers engaged him in a discussion of an oil well venture; told him the stock could not be sold; they had no license, but that Bensema "could send for it"; that they were drilling a well in Cajon Pass. Bensema took his wife, Kiers and Mr. and Mrs. Christo to the well site in Cajon Pass where he met Sears. The latter told him the prospects for oil were good. After returning to his home, he wrote a check payable to A. Kiers for $500 for which he received certificates of stock for 500 shares. Bensema testified that on April 1, 1951, at Sears' home in Altadena in the presence of Kiers, Rex and Lawrence Kaylor, Jacobs, Vogel and others, Sears said no more stock could be issued; drilling would have to stop "if he did not have money to go on * * * I gave him $1000"; that a number of those present, at his request, gave him money to be turned over to the company.

Under count XIII it was proved that on December 16, 1950, the witness Griffin in his own office met Kiers at Bellflower. He presented some geodetical survey maps of oil-bearing lands near Worland, Wyoming. On invitation, Kiers returned several times and requested Griffin to accompany him on a visit to Sears' home. They made the visit and there met Sears who showed more maps and said the well was about to be brought in; that they had a Nevada corporation and had permission to operate in California. In a week Griffin drew a check for $2,500 payable to the Sierra Nevada Oil Company. He took the H-form for requesting shares in the company, filled it in, and sent it and his check to the company at Las Vegas and received a certificate for 2500 shares at his home in Los Angeles County.

Law Applied

[3] Under the Corporate Securities Act there is little room for doubting the existence of reasonable grounds for believing respondents should be tried for the crimes charged. They attempted to sell and sold securities, Corporation Code, § 25000; they sold the notes of Sears (ibid.). They had no permit as the law required. Corporations Code, §§ 25500 and 25507. They conspired to violate the Corporate Securities Law. All the acts of both respondents recited above show that their minds were working in unison in an attempt to gather in from the general public all available money by the sale and issuance of corporate shares or by accepting loans from persons zealous to make profitable investments. While so conspiring to sell, and while selling the stock of their corporation, they were continuously conscious that

they had not first gained the consent of the Division of Corporations, a written permit, to make such sales. They often reminded their investors they had none. No proof had been made to the Commissioner that the lands in Cajon Canyon or in Wyoming were in actual or potential "proven territory" or that the officers of the oil company were worthy of trust or knew anything of the art and industry of recovering petroleum products from the earth. Thus, a conspiracy was established. Corporations Code, § 26104; People v. Weitz, 42 Cal.2d 338, 267 P.2d 295; People v. Frankfort, 114 Cal.App.2d 680, 688, 251 P.2d 401; People v. Gordon, 71 Cal.App.2d 606, 626, 163 P.2d 110; People v. Chait, 69 Cal.App. 2d 503, 512, 159 P.2d 445; People v. Griffin, 98 Cal.App.2d 1, 42, 219 P.2d 519. They had attempted to exploit a former corporation, Western Research Laboratories. At that time they were reassured that unrestricted permits are not issued to "wild cat" corporations or to those exploring in "wild cat" territory.

The oil company had its domicile in Nevada. Sears and his wife were the controlling directors. Their home was in Los Angeles County. It was there that Sears told the witness Bremner that he had invested $50,000 of his own money in the oil venture. He met a number of his investors in Cajon Canyon, told them production was expected, to send their money to the Las Vegas office for stock. While in most instances he required the money to be sent to Nevada or Wyoming for the purchase of stock or for loans to himself, at times shown in the statement of evidence, he accepted checks in Los Angeles County. Kiers took $500 from Christo, $500 from Bensema. At every meeting at Sears' home, Kiers was present. Sears always presided at stockholders' meetings but Kiers was close by. Kiers told Bremner that Sears had agreed to pay him ten per cent commission on sales of stock and $50 as a weekly salary, but told Bensema he was getting neither salary nor commission. At the meetings in his home, Sears exhibited maps and explained about the company's lands in Wyoming and encouraged all stockholders to solicit people to buy stock.

It is a reasonable inference that when Sears told them he "was tied up" and needed money to bring in a well in Wyoming, it was not the purpose of inducing his hearers to make him loans. Proof of his purpose was complete when he accepted the money of his lenders. He always held out the promise that they could get stock when he obtained a permit. When the meeting was held at Vogel's home, Sears over the telephone and Kiers by direct contact told the stockholders money was needed to complete the well at Worland and requested loans with the promise that if Sears could get stock, the lenders would be entitled to the stock if they wished it. Sears told Jacobs the same and that there was no stock available. But Jacobs sent his money through the mail to the Las Vegas office and received shares or a Sears' note, for a total outlay of $10,800 in the Sierra Nevada Oil Company.

"Violations of the Act"

[4, 5] Evidence as to counts II to XIII (except XII) charging "violations of the Act", Corporations Code, §§ 25009 and 25104, is sufficient to warrant the commitment of respondents for those crimes. Not only does the statement of the proof, above recited, give rise to a grave suspicion of the guilt of respondents for all the violations alleged in eleven counts following the charge of conspiracy, but the testimony introduced (on count II) shows that Kiers invited Cornie Bouma to accompany him on a visit to the well in Cajon Canyon and there introduced him to Sears; requested Bouma to invest $1,000 and after the latter's refusal, offered him stock at two for one. He took $250 from Bouma "to finish drilling the well at Cajon Pass," and sent it to Nevada. For such sum Bouma at Norwalk, California, received 500 shares of the oil company by mail. Neither $250 nor any portion thereof was returned to Bouma. Such sale, without first having received a permit to sell the company's stock, was a violation of section 26104 of the Corporation Code which forbids any officer, agent or employee of a company to direct, or aid in, the sale of its securities, or in any respect, wilfully fail to comply with any pro-

vision of Division 1 of Title 4 of such Code, §§ 25000 to 26104. Not only does that Division require every corporation to obtain a permit to sell its securities, but it provides that every sale in violation of the statute is void, § 26100, and is a fraud on the vendee. McFaul v. Deck, 30 Cal.App. 2d 424, 427, 86 P.2d 890; Auslen v. Thompson, 38 Cal.App.2d 204, 210, 101 P.2d 136; Pickford Co. v. Bayly Bros., 12 Cal.2d 501, 525, 86 P.2d 102.

By similar process, respondents sold shares of the company to the witness Sidney Van Laar (count III) for $400.

By virtue of the sales made by respondents to witnesses Bouma, Van Laar, Vogel (count IV), Jacobs (count V), Bensema (count VI), Dr. Kaylor (counts VII, VIII and IX), Rex Kaylor (count X), Bensema (count XI), Griffin (count XIII) there was good reason for prosecuting respondents for violating the Corporate Securities Law. In each instance the sale was made in California, the money and application were forwarded to Nevada and the certificates were returned by mail to the vendees at their California homes. The shares issued were all signed by Sears as president. His conversations with investors preceded the issuance of the shares in practically every instance. But if not, Kiers, the undisputed agent of Sears, induced the investment. Every certificate referred to in the proof was issued after Kiers had "sold" the venture to his victim. Therefore, Sears and Kiers were guilty as principals. People v. Rubens, 11 Cal.App. 2d 576, 584, 54 P.2d 98, 1107; Corporations Code, § 26104.

While counts XII and XIV to XIX declare thefts, it is clear that they are also irregularities of the nature forbidden by the statute. The conduct of Sears in soliciting loans to be turned over to the oil company to be used in drilling and for which he would and did give his note, constituted a series of sales and violations of the statute. People v. Whelpton, 99 Cal. App.2d 828, 831, 222 P.2d 935; People v. Sidwell, 27 Cal.2d 121, 128, 162 P.2d 913; Rhode v. Bartholomew, 94 Cal.App.2d 272, 279, 210 P.2d 768.

[6, 7] In every case of the issue of shares, it was in violation of the Act. Every corporate officer who with one or more persons solicits another to buy the shares or securities of the corporation without a permit to do so, conspires to violate the statute. Corporations Code, § 26104(g). Because the shares were issued by a Nevada corporation, they were "securities of its own issue." Kiers is not to be exempted from prosecution because he was not an officer. He was in the vanguard of the forces campaigning for the sale of the stock. He conveyed prospects to the canyon to see the operations; told the needs of the company; often accompanied the people to Sears' home to attend meetings for the discussion of the stock; actually made sales and received the funds in payment therefor, knowing that no permit had been issued. In the case of every sale, it was made in Los Angeles County. The checks sent in payment were mailed there; the orders for the stock accompanied the checks payable to the oil company, and every certificate ordered was returned to that county. But in making proof before an examining court of the facts of a violation of the Corporate Securities Act, it is not required that venue be established beyond a reasonable doubt. Guilt is not the issue before the committing magistrate. Reasonable doubt is a doctrine for the guidance of the trier of fact. People v. Bargala, 81 Cal.App. 381, 386, 253 P. 938; People v. McGill, 10 Cal.App.2d 155, 159, 51 P.2d 433. But to hold respondents, sufficient proof was received showing that they made sales in California of the stock of a Nevada corporation, and got the money from the investors who were present in this state. People v. West, 34 Cal.App.2d 55, 59, 93 P.2d 153. In view of the evidence admitted before the magistrate, no court could be justified in declining to commit a defendant.

The Theft Charges

[8, 9] Accusing Sears of theft in taking the money of the witnesses Bensema, the Kaylors, Van Laar, and Jacobs is readily understood in the light of section 484 of the Penal Code. That statute makes one family of larceny, embezzlement,

fraudulent appropriation, false pretenses under one generic name of *theft*. People v. Hiden, 102 Cal.App.2d 655, 659, 228 P.2d 95. Sears took the moneys of the several victims under circumstances that spelled fraud. Every transaction was a fraud. He gave the lenders no title to the promissory notes in which they were named payees. He got their money by a false pretense, a trick or an artifice or by appropriating it after it was intrusted to him. Getting it by any of these methods is theft. They had no consideration for their money. What they delivered to him as loans was to be used for drilling by the corporation. That promise created a question that might give rise to contradictory inferences, one of which was that Sears had no intention of returning it. If it should be so found, his conviction for theft would follow. So far, no part of such funds have been repaid.

Why should not Sears be tried for his taking $3,000 from Jacobs on April 7, 1951? Sears had received the "desist and refrain order" by March 26. April 1 he complained that the "corporate funds were tied up." He promised that he and Mrs. Sears would both sign his personal note to Jacobs; to repay with stock or return the money. The lady never signed the note, and the money was never repaid and no stock was ever issued for it. Not only that, but on April 16, 1951, Jacobs gave Sears $1,000 as a loan on the latter's promise that his note for that sum signed by himself and wife would be delivered to Jacobs. The victim mailed the check to Worland, but it was deposited April 23 in Altadena, the note not received until September 6 and signed only by Sears. He had promised to use the money to continue drilling operations in *Wyoming*.

Sears made a similar deal with Bensema April 5, 1951 for $1,000. (Count XVIII.) The same promises were made and not fulfilled and no part of the money was ever repaid. He sent the check to Worland, it was deposited in Altadena. April 19 he sent $1,000 to Worland. From such facts, inferences that Sears never intended to pay the notes might be justifiably drawn. See People v. Staver, 115 Cal.App.2d 711, 718, 252 P.2d 700; People v. Wisecarver, 67 Cal.App.2d 203, 209, 153 P.2d 778. Also, a jury might infer that Sears' promises to have his wife sign the notes to Jacobs and Bensema were made without any present intention of performing them, a case of false pretense—theft. People v. Staver, supra; People v. Jones, 36 Cal.2d 373, 377, 224 P.2d 353. The inferences thus deducible are strengthened by the facts in evidence that Sears and his wife had a "Knoll Grove Estates" account with their local bank; that they there deposited $1,000 May 2, 1951 from bank No. 90–1410 (same number as Bensema's Bellflower bank). On May 18, 1951, $1,062.16 was deposited in this account. The ledger sheet shows transactions from February 5, 1951 to August 13, 1951.

The commercial checking account of L. A. or Gladys K. Sears in Altadena shows three deposit slips. The first was on April 13, 1951 covering seven items for a total of $12,200; the second on April 23, 1951, with five deposits totaling $15,700; the third on June 23, 1951 showing items, to wit, $200, $2,250, and $2,000. Pray, where was all this money from: deposited in the very period when Sears and Kiers were collecting money from their victims to drill for oil in Wyoming, and Sears was telling them his money was all gone and was asking the people to loan more money to the company?

But the story is not complete. Sears and his wife as president and secretary of Knoll Groves Estates made a deed August 23, 1951 conveying to Gladys Sears Lot 71, tract 2123, Los Angeles County. Inasmuch as Gladys did not sign the notes to Jacobs and Bensema prior to such transfer, and since Jacobs and Bensema had given their checks to Sears on his promise that Gladys would sign the notes for their money loaned to Sears, it would cause no court or jury anguish of soul to infer that Sears committed a false pretense in persuading those men to advance their moneys to him to be used by the company.

But the story of Knoll Grove Estates is not finished. By count XII Sears is accused of having taken $1,000 from Bensema on April 19, 1951. At the meeting at

Vogel's home on April 15, Sears told Bensema that such moneys as might be loaned to him would be used by the company for drilling. When he received Bensema's check, he endorsed it "for deposit only to the acct. of Knoll Grove Estates—by L. A. Sears" and deposited it to the account of the Knoll Grove Estates of which Sears was president. From the facts of such endorsement, the deposit slip and the ledger sheet showing the Knoll Grove Estates got Bensema's $1,000, the inference might reasonably be warranted that after he took Bensema's money, Sears appropriated it to his own use by putting it into the bank account of another venture of his own of which Bensema had never heard. At any rate, Bensema never received a note signed by Mrs. Sears; his money was presumptively never used by the oil company, but by Sears' real estate venture, People v. Weibert, 18 Cal.App.2d 457, 462, 64 P.2d 169, and Bensema never received stock for his second $1,000 and was never repaid any portion thereof. Whether Sears embezzled the money after holding it for a while or converted it to his own use promptly, from the facts proved, it could be inferred that he committed grand theft. If the trier of fact should draw hostile inferences, he could be convicted of theft by trick and device. People v. Waxman, 114 Cal.App.2d 399, 410, 250 P.2d 339; People v. Mason, 86 Cal.App.2d 445, 452, 195 P.2d 60.

Under count XVI facts were placed in evidence from which the ultimate fact alleged might be properly found, to wit, that Sears feloniously took $5,000 from Dr. Kaylor about April 3, 1951. The evidence was that Sears told the doctor at the meeting of April 1 that he would get stock for the $5,000 if it could be issued, or the money at the end of a year at six per cent interest on the loan and the note would be signed by Mrs. Sears. The note received was not signed by Gladys. Whether Sears' intent at the time of taking the $5,000 from Dr. Kaylor was felonious is a fact to be determined by the jury when the question submitted is as to the guilt of the accused. People v. Brown, 52 Cal.App.2d 428, 431, 126 P.2d 406.

By reason of the identity of Sears' representations and promises to Kaylor, Bensema, Jacobs and others with those made to Van Laar (count XVII), and by reason of the latters' loss of the moneys advanced to Sears and their not having been used by the company for drilling, a finding of his guilt might be warranted.

When the trial court is confronted with a motion to dismiss an action as in this proceeding, Penal Code, § 995, a granting of the motion to quash an information is not justified merely because the guilt of the defendant was not demonstrated to the examining court. The granting of such a motion is not necessary merely because a trial might be long and expensive. A trial is not inadequate because it is long and tedious. Bennett v. Superior Court, 218 Cal. 153, 156, 21 P.2d 946. The trial of serious charges alleged to have violated the peace and dignity of the State is the route constitutionally designed, unless the proof submitted is destitute of inculpatory facts. Such is not the case here. Respondents are shown to have taken thousands of dollars from good citizens of this state ostensibly for stock in a questionable enterprise which had no permit to sell or issue its securities. Their motives for their deeds should be ascertained by a jury of their peers. The purpose of the State in inquiring into intent of respondents is to protect the public and it is entitled to present its cause to the end that justice may be done. People v. Wisecarver, 67 Cal.App.2d 203, 209, 153 P.2d 778.

Subsequent to the order granting a rehearing, respondents filed their answer to the petition for rehearing. Attached to it is an "order on trustee's petition to compromise and settle the stockholders' proof of interest claims of Lawrence L. Kaylor, Elaine S. Kaylor, Rex Kaylor, Albert Kiers, Victor C. Rose, Anna M. Rose, Louis A. Sears, Gladys K. Sears, and money claims of Louis A. Sears." Such order was made by the United States District Court for the District of Nevada on February 3, 1953. The answer of respondents to the petition for rehearing moves that said order be filed herein, and that it be considered along with the record before the examining magistrate as additional proof of respondents' innocence. Such a request is justified by no known authority.

The motion is denied.

Judgment is reversed with instructions to deny the motion under section 995 of the Penal Code.

FOX, J., concurs.

McCOMB, Justice.

I dissent for the reason expressed in the former opinion of this court filed March 12, 1954, which read:

From an order granting defendants' motion to set aside an information charging (1) both defendants with violating the Corporate Securities Act, and (2) defendant Sears in seven counts with grand theft, the people appeal.

Viewing the evidence as we must in the light most favorable to supporting the action of the trier of fact, the rule being established that unless an appellate court "is able to say that a clear abuse of discretion is made to appear, it will not divest the trial court of the discretionary power reposed in it. It will rather be presumed in favor of the action of the court that its discretion was properly exercised, and the burden rests on the appellant to show an abuse." 4 Cal.Jur.2d (1952) Appeal and Error, sec. 592, p. 469.

The record discloses that on November 25, 1949, defendant Sears made an application to the Corporation Commissioner of the State of California to sell stock in Western Research Laboratories, Inc., of which said defendant was a director and chairman of the board. An amended application was also filed on December 13, 1949, with the California Corporation Commissioner. The commissioner proposed to issue what was known as a "closed permit," meaning that stock could not be sold to the general public but only to certain persons named in the permit, and on the conditions therein set forth. Before any permit was issued, however, the applicant requested that the application be withdrawn and an abandonment order was issued on April 26, 1950. On February 15, 1950, Articles of Incorporation of the Sierra Nevada Oil Company were filed in Nevada, defendants being the organizers thereof.

Thereafter the complaining witness and a representative of other persons living in and near Artesia, contacted defendants stating they desired to purchase stock in the Sierra Nevada Oil Company. They were each informed that defendants had no authority to sell such stock but that on the contrary it would be necessary for anyone desiring to invest money in the company to write directly to Nevada in order to obtain such certificates of stock.

As an example, Mr. Harm Bensema, the manager of the United Dairymens Association, located in Artesia, California stated that the fact oil was being drilled for was "common talk" in the community, and he approached defendant Kiers because he had heard so much about the drilling and wanted to tell Mr. Kiers he was willing to take some of the stock even though he knew Mr. Kiers could not sell it; that he went to the well site and at that time met defendant Sears, but to the best of his recollection did not speak to Mr. Sears about stock, but immediately upon returning home from the well site he purchased stock in the Nevada corporation; that he was too busy to write a personal letter, but asked defendant Kiers to "do the errand" for him.

There is no evidence that any representations were made to Mr. Bensema relative to the stock and so far as the record indicates he purchased the same under his own volition without discussing the matter with anyone, sending his check and order to Nevada.

After a period this same general situation obtained as to the other stock holders in the corporation.

Thereafter the various stock holders in California met on several occasions at the home of Mr. Vogel, one of the investors. These individuals had a long distance telephone conversation with defendant Sears at one of these meetings. Subsequently Mr. Vogel, Mr. Bensema and the other stock holders loaned sums of money to defendant Sears, receiving the latter's personal notes therefor, and with the knowledge that defendant Sears was to lend the money to the Sierra Nevada Oil Company and that no stock could be issued therefor, but that possibly in the future they might be able legally to obtain shares of stock in payment of the money they had advanced if they so desired. If at such time they did not want the stock, the money would be repaid. The money was loaned by defendant Sears to the Sierra Nevada Oil Company and used in the course of its business.

In June of 1951 the affairs of the company were brought under the jurisdiction of the United States District Court of Nevada, pursuant to Chapter X of the Bankruptcy Act 11 U.S.C.A. § 1 et seq., and all rights, claims and disputes were amicably adjusted by all the parties concerned with the help of the court and the representative of the Securities and Exchange Commission. Since then the affairs of the Sierra Nevada Oil Company have been supervised by the Reorganization Court in Nevada, and everyone interested has been represented before that court. Proceedings were long and complicated and a plan of reorganization has been approved and confirmed.

During this extended period all contentions were aired in open court before representatives of the various interests involved. The Security and Exchange Commission was at all times aware of and participated in the proceedings in Nevada and knew of the California Corporations Commissioner's activities. The complaining witnesses in the present case were represented, among others, before the United States District Court and participated in the proceedings. All of the loans involved in the present case were disposed of as direct obligations of the corporation debtor with the consent of everyone concerned.

Since from the foregoing evidence it is clear that all the investors knew that the Sierra Nevada Company could not sell stock in California and were so advised by defendants, the evidence sustains the finding that neither defendant solicited the sale of the stock of the Sierra Nevada Company in California. The trial court's finding that each defendant had been indicted without reasonable or probable cause to show a violation of the Corporate Securities Act is sustained by the evidence.

Turning to the counts charging defendant Sears with grand theft, the record discloses that defendant Sears informed the borrowers he could not sell stock in the Sierra Nevada Oil Company; that the money which they advanced to him was a personal loan and his wife would sign the notes. The record also discloses that Mrs. Sears did not sign the notes. So far as appears from the record this was a mere inadvertence and no witness at the preliminary examination seemed to attach any importance to her failure to do so. The reason is apparent. In the present case the notes, which would form the basis of the grand theft count as stated above, were recognized in the bankruptcy proceedings as obligations of the corporation because Mr. Sears had advanced the money to the corporation and each lender was found to be an unsecured creditor of the oil company.

A certified copy of the order of the United States District Court, acting as a reorganization court, that all of the lenders, including the complaining witnesses herein, would look to the debtor corporation Sierra Nevada Oil Company, for payment of the loans, was before the trial court on the motion from which an appeal has been taken. Clearly the trial court in the instant case was justified in holding that the evidence did not support a finding that there was reasonable or probable cause to believe that defendant Sears had committed grand theft.

B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 329 et seq., 210 P.2d 760, is in accord with the views expressed herein.

124 Cal.App.2d Supp. 902

PEOPLE v. MALCOLM.

Cr. A. 17.

Appellate Department, Superior Court,
San Bernardino County, California.

April 26, 1954.

Defendant was convicted of driving an automobile on a public highway at a rate of speed faster than was reasonable and endangering the safety of persons and property. From the judgment of the Justice Court of Crest Forest Judicial District, F. J. Cormack, J., defendant appealed. The Superior Court, Appellate Department, Mitchell, J., held that defendant was entitled to the benefit of an inference that an accident in which the automobile was involved was not the result of excessive speed, in view of evidence from which it was just as reasonable to infer that the accident was the result of his inattention, momentary distraction or drowsiness.

Judgment reversed.

1. Criminal Law ⚿308

When two inferences, one of which points to defendant's innocence and the other to his guilt of offense charged, may reasonably be drawn from evidence, inference pointing to his innocence must be adopted.

2. Automobiles ⚿353

In prosecution for driving automobile at rate of speed faster than was reasonable, defendant was entitled to benefit of inference that accident in which automobile was involved was not result of excessive speed, where there was evidence from which it was just as reasonable to infer that accident was result of his inattention, momentary distraction or drowsiness. Vehicle Code, § 510.

Theo. G. Krumm, San Bernadino, for appellant.

Lowell Lathrop, Dist. Atty., San Bernadino, for respondent.

MITCHELL, Judge.

Appellant was charged with a violation of Section 510 of the Vehicle Code in that he drove an automobile upon a public highway at a rate of speed faster than was reasonable and at a speed which endangered the safety of persons and property.

At the trial two officers told of arriving at the scene of an accident where an automobile had run off the road. A tree was sheered off and the defendant and his passenger appeared to have been injured.

The defendant testified that he was driving the automobile at a speed of thirty-five to forty miles per hour; that he felt a thump; the car went out of control, hit a tree and turned over.

It does not appear that brakes were ever applied.

Upon this testimony the trial court found the defendant guilty of driving his vehicle at a speed greater than reasonable or prudent.

It is argued that this finding is supported by the circumstantial evidence which relates to the damage to the automobile and to the tree.

While it might be inferred that the accident was caused by unreasonable speed, it is just as reasonable to infer that the accident may have been the result of inattention, momentary distraction or drowsiness.

[1] When two or more inferences reasonably may be drawn from the evidence, one of which points to the innocence of the defendant and the other to his guilt, the inference pointing to his innocence must be adopted.

[2] Since the evidence in this case is such that it is just as reasonable to infer that the accident was not the result of excessive speed as that it was, the defendant is entitled to the benefit of that inference.

The judgment is reversed.

MITCHELL, COUGHLIN, and HILLIARD, JJ., concur.

KENNEDY
v.
PACIFIC EMPLOYERS INS. CO.

Civ. A–16.

Appellate Department, Superior Court,
San Bernardino County, California.
April 30, 1954.

Action for medical payment under insurance policy. The Municipal Court of San Bernardino Judicial District, C. O. Thompson, J., rendered judgment for plaintiff, and defendant appealed. The Superior Court, Appellate Department, Mitchell, J., held that the evidence supported finding that insured's injury caused the malignancy which thereafter appeared.

Judgment affirmed.

1. Appeal and Error ⚿931(1)

On appeal from judgment for plaintiff, the evidence must be considered in the light most favorable to plaintiff.

2. Insurance ⚿665(5)

In action for medical payment under insurance policy, finding that insured's injury caused the malignancy which thereafter appeared was supported by the evidence.

Roland Maxwell and Paul H. Marston, Pasadena, for appellant.

Taylor F. Peterson, San Bernardino, for respondent.

MITCHELL, Judge.

The sole question involved here is this:

"Was there any evidence which supports the conclusion of the trial court that plaintiff's injury caused the malignancy which thereafter appeared?"

The transcript discloses that:

Dr. Hull testified as follows:

"Q. * * * have you ever had any experience with a breast cancer that was developed from a single blow or trauma? A. Yes sir."

Dr. Owen testified as follows:

"Q. Would you say that the history which I have given you was consistent with the development of the tumor following the blow? A. I would think so."

Dr. McDonald testified as follows:

"* * * it would be an utter impossibility for the described injury to have had any possible relationship to the breast cancer"

and

"* * * the statistic is that something over forty per cent of all women seen with proven cancer of the breast relate a history of injury in the immediate past".

[1, 2] Considering the testimony, as we must, in a light most favorable to respondent we may not say that the opinion of the trial court finds no support in the evidence.

Judgment affirmed.

COUGHLIN and HILLIARD, JJ., concur.

42 Cal.2d 762

FINNEGAN v. FINNEGAN.

L. A. 22394.

Supreme Court of California, in Bank.
May 4, 1954.

Post-decretal proceeding in separate maintenance suit. The Superior Court, Los Angeles County, Elmer D. Doyle and Mildred L. Lillie, JJ., denied wife increased allowance for her support but directed the husband to pay counsel fees and costs on appeal. Husband and wife prosecuted appeals from the respective orders. The Supreme Court, Traynor, J., held that judicially-approved property settlement agreement, requiring husband to make periodic payments in full satisfaction of wife's right to support and maintenance, deprived court approving agreement in separate maintenance proceeding of right subsequently to order increased payments for wife's support or to award costs and attorney's fees contrary to its terms, absent reconciliation, or rebuffed reconciliation offer, or any ground for abrogation of settlement, even though parties were still married.

Affirmed on wife's appeal and reversed on husband's appeal as to allowance of attorney's fees and costs.

Prior opinion 262 P.2d 49.

1. Husband and Wife 🔑39, 278(1)

A husband and wife may contract with respect to their property and, if they are living separate and apart, they may provide for support and maintenance of either of them and their children. Civ.Code, §§ 158, 159.

2. Divorce 🔑245(1)

Where provisions for support and maintenance have been made an integral or inseverable part of division of spouses' property under property settlement agreement, and court in divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both parties. Civ.Code, §§ 158, 159.

3. Husband and Wife 🔑278(5)

Property settlement agreement showed that husband's obligation for support of wife was an inseparable part of consideration for wife's obligations under agreements.

4. Husband and Wife 🔑299(3)

Judicially approved property settlement agreement, requiring husband to make periodic payments in full satisfaction of wife's right to support and maintenance, deprived court approving agreement in separate maintenance proceeding of right subsequently to order increased payments for wife's support or to award costs and attorney's fees contrary to its terms, absent a reconciliation, or rebuffed reconciliation offer, or any ground for abrogation, even though parties were still married.

◆

Jerry Giesler and Harold C. Holland, Beverly Hills, for appellant.

A. A. Goldstone, Los Angeles, for respondent.

TRAYNOR, Justice.

In 1943 plaintiff secured a decree of separate maintenance awarding her all of the community property and $100 per month for the support of the minor son of the parties. On defendant's appeal the decree was affirmed as to these provisions but reversed insofar as it ordered a sale of certain property by a receiver. Finnegan v. Finnegan, 64 Cal.App.2d 109, 148 P.2d 37. Thereafter the parties entered into a property settlement agreement, which by stipulation was adopted as the basis for a final judgment of separate maintenance. The stipulation provided that "the provisions of the property settlement agreement between the parties dated April 14, 1944, are intended to be and are in full and complete settlement of the property rights and obligations which are or could be litigated in the above entitled action. * * * [T]he parties have read and are familiar with the judgment attached hereto, are desirous that it be executed and consent that it be signed by any judge of the Superior Court for Los Angeles County. * * * [S]aid judgment when signed and filed shall be in complete satisfaction of the mutual rights and obligations of the parties hereto respecting all matters litigated in this action whether or not covered by or included in the judgment heretofore and on May 20, 1943 filed and entered herein." The judgment provided that plaintiff was entitled to live separate and apart from defendant, approved the property settlement agreement, and provided that in conformity with its terms "defendant be and he is hereby ordered to pay to said plaintiff the sums for alimony and support of herself and minor son as provided in Paragraph Five of said Agreement, said payments to be at the rate of Two Hundred Seventy Dollars ($270.00) per month commencing August 5th 1944, until said monthly sums are reduced as provided in said Agreement. * * *" The agreement, which was attached to the judgment and incorporated therein in its entirety by reference, recited that the parties were living separate and apart and that they had agreed "upon a mutual property settlement pertaining to all the property of every kind, nature and description, belonging to them, or either of them, and to be a complete and final settlement of their mutual rights and claims of every kind and nature whatsoever. * * *" The agreement then listed the property in which one or both of the parties asserted an interest and made detailed provisions for its division. Paragraph five provided for the payment of $270 per month for alimony and support for plaintiff and the minor son of the parties. These payments were to be reduced to $170 per month when the son either died, married, became of age, or became self-supporting, and were to terminate on the death or remarriage of plaintiff. It was also provided that if defendant sold certain patents, plaintiff should receive half of the amount realized, and if she received $25,000 from this source, the $170 per month alimony should terminate. If she received less than $25,000, the payments should be reduced pro tanto. Paragraph 13 provided that "The property received by each of the parties hereto, respectively, and the agreements herein contained are received and made by each of the parties hereto in full of all claims and rights of every kind, nature and description, which either party hereto may have or claim to have against the other now or hereafter, including any rights or relief with respect to property or maintenance which [plaintiff] might obtain in said action D-224,875, and in full for all claims and rights which either party hereto would have upon the estate of the other, and is in lieu of all rights which the law would give the other as husband or wife, or as a surviving husband or wife. * * *" The agreement also contained a waiver by plaintiff of court costs and attorney fees, and provided that after-acquired property should be the separate property of the party acquiring it. In 1950 plaintiff petitioned the court for an increase in the amount of the monthly payments for the support of herself and the minor son. The court awarded an additional $75 per month for the support of the son but denied any increase for plaintiff's support on the ground that the provision for monthly payments was an inseparable part of the property settlement agreement. Plaintiff appealed and secured an order for costs and attorney fees on appeal, and defendant appealed from the latter order.

[1-3] If the provision for monthly payments pursuant to the terms of the property settlement agreement had been entered by the court in a divorce action, it is clear that it could not now be modified. "A husband and wife may contract with respect to their property, Civil Code, § 158, and if they are living separate and apart they may provide for the support and maintenance of either of them and their children. Civil Code, § 159. Moreover, as between the husband and wife, if the provisions for support and maintenance have been made an integral or inseverable part of the division of their property, and the court in a divorce action has approved the agreement, its provisions cannot thereafter be modified without the consent of both of the parties." Dexter v. Dexter, 42 Cal.2d 36, 40, 265 P.2d 873, 876; see also, Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881. In this case, as in the Dexter and Fox cases, the parties made the provisions for support and maintenance of plaintiff an integral part of their property settlement agreement. They stated that they wished to settle all of their "mutual rights and claims of every kind and nature whatsoever," and provided that the "property received by each of the parties

hereto, respectively, and the agreements herein contained are received and made by each of the parties hereto in full of all claims and rights of every kind, nature and description * * * including any right or relief with respect to property or maintenance * * * and * * * in lieu of all rights which the law would give the other as husband or wife." Accordingly, plaintiff may not be awarded additional support and maintenance without changing the property settlement agreement of the parties.

[4] Plaintiff contends, however, in reliance on Monroe v. Superior Court, 28 Cal.2d 427, 170 P.2d 473, and Verdier v. Verdier, 36 Cal.2d 241, 223 P.2d 214, that while the parties remain married the court has continuing jurisdiction to modify the support and maintenance provisions of a separate maintenance decree, and that the parties cannot, by making the support provisions an integral part of a property settlement, prevent the court from exercising its power of modification. Neither of the cited cases supports this contention. In the Monroe case no property settlement agreement was involved, and it was held that the fact that support payments under a separate maintenance decree had terminated according to its terms did not prevent the court from modifying its decree to provide for additional payments in the future. In the Verdier case it was held that the existence of an unperformed separation agreement did not prevent the court from granting separate maintenance under section 137 of the Civil Code on the ground that the husband had wilfully failed to support his wife. In the present case, on the other hand, the parties while living separate and apart entered into a valid contract settling both their property and support rights and secured its approval and adoption by the court. Plaintiff has accepted the benefits of the agreement, and defendant has at all times performed his obligations thereunder. The situation has not been altered by an unaccepted offer of reconciliation, see, Cardinale v. Cardinale, 8 Cal.2d 762, 768, 68 P.2d 351, or by a reconciliation, see, In re Estate of Boeson, 201 Cal. 36, 42–43, 255 P. 800; 1 Armstrong, California Family Law, pp. 582–584; see also Barham v. Barham, 33 Cal.2d 416, 427–429, 202 P.2d 289, and neither of the parties has given the other grounds for abrogating the agreement. See, Verdier v. Verdier, 36 Cal.2d 241, 245–246, 223 P.2d 214. Thus, neither of the parties has done anything that would affect their status as spouses living separate and apart under the terms of their contract as approved and incorporated in the judgment. See, London Guarantee & Accident Co. v. Industrial Accident Comm., 181 Cal. 460, 466, 184 P. 864; Sargent v. Sargent, 106 Cal. 541, 545–546, 39 P. 931. Under these circumstances there is no reasonable basis for holding that their agreement is not binding upon them and the court. Accordingly, the court cannot modify the payments or award costs and attorney fees contrary to its terms.

The order denying modification of the judgment to increase the support and maintenance payments to plaintiff is affirmed. The order awarding costs and attorney fees is reversed. Each side shall bear its own costs on these appeals.

SHENK, EDMONDS and SPENCE, JJ., and BRAY, J. pro tem., concur.

CARTER, Justice.

I concur in the conclusion reached in the majority opinion but my reasons for this conclusion are expressed in my dissents in Monroe v. Superior Court, 28 Cal.2d 427, 432, 170 P.2d 473; Verdier v. Verdier, 36 Cal.2d 241, 249, 223 P.2d 214; Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881; Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865.

SCHAUER, Justice.

I concur in the judgment and generally in the holdings of the opinion. I expressly disavow, however, the implication, if any such be otherwise construable, that, a valid contract having been entered into, the validity or effect or enforceability of that contract could be in any wise altered by the unilateral act of either party.

42 Cal.2d 785

R. E. SPRIGGS, Inc., et al.
v.
INDUSTRIAL ACCIDENT COMMISSION et al.
L. A. 23061.

Supreme Court of California.
In Bank.
May 11, 1954.

Proceeding for workmen's compensation. The Industrial Accident Commission credited against award the amount employee had recovered by way of settlement from third party, less a sum representing a reasonable attorney's fee for such recovery, and employer and employer's insurance carrier brought writ of review. The Supreme Court, Edmonds, J., held that where injured employee, without consulting employer, made settlement with third party for injury, and subsequently obtained workmen's compensation award, full amount of employee's recovery from third party, without deduction for attorney's fee, should have been allowed as credit against workmen's compensation award.

Award annulled in part and affirmed in part.

Carter, J., dissented.

1. Workmen's Compensation ⚷1108

The purpose of amendment to statutes relating to amounts to be credited against workmen's compensation award for employee's recovery against third party for injury involved was to correct the statutory inequity which had allowed an employer reimbursement for attorney's fees expended in the prosecution of an independent action although the full amount of a judgment in favor of an employee, under converse circumstances, might be allowed as a credit against compensation. St.1949, p. 355; Labor Code, §§ 3854, 3856, 3861, 3863.

2. Workmen's Compensation ⚷1108

Amendments providing that where an employee recovers from a third party for a compensable injury, employee's attorney's fees in obtaining such recovery may be deducted from credit allowed against compensation award against employer apply only to employee's recovery in a judicial proceeding, not to recovery by settlement. St.1949, p. 355; Labor Code, §§ 3854, 3856, 3861, 3863.

3. Workmen's Compensation ⚷1108

Statutory provision that where an employee settles with a third party for a compensable injury, the entire amount of such settlement is subject to employer's full claim for reimbursement for his compensation expenditures and liability was not repealed by amendment to statute providing that employee's attorney's fees may be deducted from amount credited against compensation award by reason of employee's recovery from third party in a judicial proceeding. Labor Code, §§ 3854, 3856, 3860, 3861, 3863.

4. Workmen's Compensation ⚷1108

Where injured employee, without consultation with employer, made settlement with third party for injury and subsequently obtained workmen's compensation award, full amount of employee's recovery from third party, without deduction for his attorney's fees, would be allowed as credit against the award. St.1949, p. 355; Labor Code, §§ 3852–3854, 3856, 3860, 3861, 3863.

Kearney, Scott & Clopton, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, and Gordon W. Winbigler, Los Angeles, for respondents.

EDMONDS, Justice.

The Industrial Accident Commission credited against an award of compensation only $1,400 of the amount received by Augustus Chiarello in settlement of his claim against an asserted third party tort-feasor. His employer and its insurance carrier contend that they are entitled to the entire amount obtained by the settlement without deduction of attorney's fees.

Chiarello was employed by R. E. Spriggs, Inc. He claimed to have sustained injuries while he was delivering merchandise to the Panorama Market. Without filing suit or notifying either his employer or its insurer, he made a settlement with Panorama for $2,100 and executed a full release of all claims against it.

In the proceeding before the commission, after allowing a credit of $2,100, on its own motion the commission reopened the matter for reconsideration. By the new decision, the commission credited against the compensation award only $1,400, "being the amount recovered by the applicant * * after payment of attorney's fee of $700.00, which sum is found to constitute a reasonable attorney's fee for services rendered in effecting recovery for the benefit of the employer."

As grounds for annulling the award, the employer asserts that there is no statutory authority for the commission to withhold from a credit against an award of compensation the attorney's fees paid by an employee to effect a settlement. But even if that contention is incorrect, the argument continues, attorney's fees should be allowed only when fixed by a court or by an agreement between the employee's attorney and the employer or its insurer. Another contention is that in the present case there is no evidentiary support for a finding either that Chiarello paid out $700 for an attorney's fee or that such a fee is a reasonable one for the services rendered.

It is agreed by all of the parties that the decisive question in this proceeding is the effect of certain amendments to the Labor Code, made in 1949. Stats.1949, ch. 120, pp. 355–356. Prior to the amendments, the provisions of that code were construed in Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658. It was concluded that three remedies are available to an employer to recover, from a negligent third party, the expenses of compensation to which an injured employee is entitled. The employer may bring an independent suit against the third party, Labor Code, § 3852; he may consolidate his action with, or join with the employee in, an action against the third party, Labor Code, § 3853; or, if he has pursued neither of these remedies, he may claim in the employee's action a first lien in the amount of his expenditures for compensation "against the entire amount of any judgment for any damages recovered by the employee". Labor Code, § 3856.

In the Dodds case, the employee sued the third party and joined the employer and its insurer as defendants. The employer sought as a lien against the judgment in that action an amount equal to its costs of compensating the employee. Upon appeal, the employee contended that the trial court should have deducted from the amount payable by the judgment to the employer in satisfaction of its lien, the attorney's fees paid by the injured workman in prosecuting the action. This contention was rejected. It was pointed out that the statutory provisions relating to an employer's right of reimbursement define the rights of the parties and completely cover the field.

Although, under the statutes then in effect, provision was made for reimbursing an employer for its attorney's fees expended when prosecuting an action alone, Labor Code, § 3854, there was no similar provision for compensating an employee when he sued in an action which benefitted the employer. Both in cases where recovery was obtained as the result of a suit against the tort-feasor, Labor Code, § 3856, and where a settlement was effected, Labor Code, § 3860, the "entire amount" of such judgment or settlement was subject to the employer's full claim for reimbursement for his compensation expenditures and liability. Similar provisions were stated in section 3861, which deals with a proceeding before the commission instituted after a judgment or settlement has been obtained.

The 1949 amendments consist of changes to sections 3854, 3856, 3861, and the addition of section 3863. Only those amendments affecting sections 3856 and 3861 are pertinent to the present proceeding.[1] The

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[1] A clause was added to section 3854 to specify that the attorney's fees allowed an employer who prosecutes an independent action shall be based "solely upon the services rendered by the employer's attorney in effecting recovery for the benefit of the employee".

Section 3863 provides: "No provision of this chapter shall be deemed to impair the right of the employee and his attornew legislation, with the amended portions in italics, reads:

Section 3861: "The commission is empowered to and shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury, either by settlement or after judgment, as has not theretofore been applied to reimburse the employer, *or has not been applied to the payment of an attorney's fee to the employee's attorney, pursuant to the provisions of Section 3856 of this code.*"

Section 3856: "The court shall first apply, out of the entire amount of any judgment for any damage recovered by the employee, a sufficient amount to reimburse the employer for the amount of his expenditures for compensation. If the employer has not joined in the action or has not brought action, or if his action has not been consolidated, the court, on his application shall allow, as a first lien against the entire amount of any judgment for any damages recovered by the employee, the amount of the employer's expenditures for compensation; *provided, however, that where the employer has failed to join in said action and to be represented therein by his own attorney, or where the employer has not made arrangements with the employee's attorney to represent him in said action, the court shall fix a reasonable attorney's fee, which shall be fixed as a share of the amount actually received by the employer, to be paid to the employee's attorney on account of the services rendered by him in effecting recovery for the benefit of the employer, which said fee shall be deducted from any amounts due to the employer.*"

[1,2] As the employer points out, the purpose of these amendments was to correct the statutory inequity which allowed an employer reimbursement for attorney's fees expended in the prosecution of an independent action although the full amount of a judgment in favor of an employee, under converse circumstances, might be allowed as a credit against compensation. But when the third party's liability has been settled, either by the employee or the employer, there is no provision for reimbursement to either of them for his legal expense. A deduction for that expense is allowed by section 3861 only "pursuant to the provisions of Section 3856 of this code." Section 3856 applies only to a situation in which a lien is sought against a judgment, where the employer "has failed to join in said action" or has not arranged with the employee's attorney "to represent him in said action," in which case "the court shall fix a reasonable attorney's fee". It is clear from these provisions that a judicial proceeding is contemplated.

[3] On the other hand, section 3860, which deals with settlements before judgment or without suit, is unaffected by the statutory change. It continues to provide that "[t]he entire amount of such settlement, or of any settlement without suit, is subject to the employer's full claim for reimbursement for his compensation expenditures and liability."

The commission construes the amendments discussed as repealing section 3860 by implication, and in its order accompanying its decision upon rehearing states that a lack of an express provision for that purpose "would appear to be due to a failure to correlate and to amend all the applicable sections." The amendments show no legislative intention to alter the reimbursement provisions relating to settlements, and there is nothing in them to warrant a conclusion that a failure to amend the applicable sections was due to a legislative oversight.

[4] Several policy arguments have been advanced. It is suggested by the commission that a construction of the amendments denying it the power to fix a reasonable attorney's fee for affecting a settlement and to deduct that amount from the employer's credit against an award will tend to discourage settlements, a result which the law disfavors. The petitioners assert that such a construction will compel the employer and employee to work harmoniously in prosecut-

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ney to contract as between themselves for attorney's fees to be paid by the employee for prosecuting any action or claim against any person other than the employer."

ing the claim, whereas a contrary reading of the statute would invite the employee to effect an independent settlement contrary to the best interests of the employer.

There is a clear distinction between a suit to enforce the employee's cause of action against a third party, and a settlement which is made by the employee. The employee or employer who commences an action "shall forthwith give to the other written notice of the action, and of the name of the court in which the action is brought * * *." Labor Code, § 3853. In that manner, each of them is afforded an opportunity to exert some control over the prosecution of the action if he believes it to be desirable. The parties may make arrangements for the payment of attorney's fees; but if they do not do so, or if they refuse to cooperate in bringing the action, a reasonable attorney's fee for each may be fixed by the court. Labor Code, § 3856.

But the legislature has not made provision for either notice to the other party when a settlement is contemplated or for the determination of the amount of an attorney's fee when it is effected. The employee's purpose is to recover an amount in addition to his compensation award; the employer is interested primarily in the recovery below that amount. When the chances of recovery are most favorable, the amount of the settlement obtained generally will be larger and the expense of an attorney's fee less. Ordinarily the employee will have greater incentive to press for a favorable recovery. But when the claim is doubtful, the converse situation is presented. And there may be little incentive for the employee to press a claim whose proceeds would inure only to the benefit of the employer.

In short, to extend the provisions for recoupment of attorney's fees beyond their application to a judicial action would be to do so without the safeguards applicable to them. The clear and literal construction of the new amendments does not support such an extension, and, as stated in Dodds v. Stellar, supra, "[i]f there is to be any change in these statutory provisions defining the rights of the parties, the suggestion for such change should be addressed to the legislature rather than to the courts." 30 Cal.2d at page 506, 183 P.2d at page 664.

Other contentions are based upon the assumption that a deduction for attorney's fees may be allowed from a settlement and require no discussion.

That portion of the award which gives to California Compensation Insurance Company a credit of only $1,400 is annulled with directions to the commission to allow a credit of $2,100; in all other respects the award is affirmed.

SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro tem., concur.

CARTER, Justice.

I dissent.

The majority holding here is subject to all the objections pointed out in my dissent in Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658. See discussion 21 So.Cal.L.Rev. 298.

After the decision of this court in the Dodds case the Legislature amended the workmen's compensation act for the obvious purpose of rectifying the manifest inequities permitted by the Dodds case. Yet the majority here holds that the amendments do not embrace a case where, as here, a settlement of the claim against the tort-feasor has been consummated without suit, because the Legislature did not amend section 3860 of the Labor Code which provides, that a settlement with or without suit is subject to the employer's claim for the compensation paid by him. Manifestly that can refer only to such portion of the settlement as remains after the attorney's fee, for obtaining the settlement, has been paid. It is obvious that the provision authorizing the payment of attorney's fees is clearly applicable to a settlement consummated by the employee. Labor Code, § 3861, as amended Stats.1949, Ch. 120. That section authorizes the crediting to the employee of his attorney's fees whether the recovery is by *settlement* or judgment. It refers to the application of the settlement to the payment of attorney's fees pursuant to section 3856, and the latter section speaks of attorney's fees where there is a recovery in an action, but inasmuch as section 3861 includes a settlement without action, the words in section 3856, in referring to settlement after action, are not words of limitation to that situation. If they are, the language in section 3861 is rendered meaningless.

The effect of the majority holding is to make settlements with the tort-feasor an impossibility. The employee will not want to settle, at least until after he has commenced an action, because he will lose his attorney's fees. The employer will not wish to settle for the same reason. I am assuming, and it seems that the majority opinion holds, that the employer may not deduct attorney's fees in case of a settlement by him. If settlements before action are to be completely discouraged, either party may get around his inability to get attorney's fees by first bringing action and then settling. It is hard to believe the Legislature intended such an absurb situation to exist. Any reasonable construction would allow the deduction of attorney's fees by either employer or employee whether the settlement is made before or after the commencement of an action against the tort-feasor.

The majority seems to think that unfairness will result where there is a settlement by either one or the other and hence the rule favoring compromise is not applicable. This is based on the premise, assumed by the majority, that either the employer or employee may lawfully consummate a settlement without consent of the other. The statute provides otherwise. Labor Code, §§ 3853, 3859, 3860. The statute was held inapplicable as between the employee and the tort-feasor, Cilibrasi v. Reiter, 103 Cal. App.2d 397, 229 P.2d 394, but of course it still applies as between the employer and the employee. Here the employer is not objecting to the settlement consummated by the employee with the tort-feasor. He, in effect, has approved the settlement as he is seeking to benefit thereby. It is obvious that if the settlement had been consummated without his consent, he would not be bound by it and could sue the tort-feasor to recover all sums which he had expended on behalf of the employee for compensation and medical and hospital treatment as a result of the injury suffered by the employee for which the tort-feasor is liable. We then have this anomalous situation. An employee who has suffered an injury in the course of his employment as the result of the negligence of a third party, employs an attorney to handle his claim for damages against such third party. The attorney is able to consummate a settlement of the employee's claim which is satisfactory to both the employee and the employer, but after the settlement is consummated, the employer claims the entire amount of the settlement and refuses to allow any compensation to the attorney whose services were responsible for consummating the settlement and obtaining the money which appears to have been obtained solely for the benefit of the employer. As pointed out above if the employer had not consented to the settlement, he would not be bound by it and could sue the tort-feasor for the amount of any claim he may have. It seems to me that under any consideration of fairness and justice, as well as a reasonable interpretation of the statutory provisions applicable to such a situation, requires that the reasonable value of the services of the employee's attorney in obtaining the settlement should be paid before the employer's claim is satisfied in whole or in part.

Assuming the majority opinion is correct in stating "when the third party's liability has been settled, either by the employee or the employer, there is no provision for reimbursement to either of them for his legal expense", we then have a situation in which the statutes do not cover the subject of attorney's fees where there is a settlement, and, therefore, we must turn to the "* * well-established doctrine of equity jurisprudence that where a common fund exists to which a number of persons are entitled and in their interest successful litigation is maintained for its preservation and protection, an allowance of counsel fees may properly be made from such fund. By this means *all* of the beneficiaries of the fund pay their share of the expense necessary to make it available to them. 14 Am.Jur. § 74, p. 47; Trustees of Int. Imp. Fund v. Greenough, 105 U.S. 527, 26 L.Ed. 1157;

In re Estate of Marre, 18 Cal.2d 191, 114 P.2d 591; see, also, notes 49 A.L.R. 1149; 107 A.L.R. 749." Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 277, 153 P. 2d 714, 715. And at page 283 of 25 Cal.2d, at page 719 of 153 P.2d: "[The] long prevailing rule in equity * * * allows such charge as a proper means of securing contribution from those entitled to participate in the benefits of the litigation. And such counsel fees are customarily made senior to other claims against the fund. Scott v. Superior Court, 208 Cal. 303, 281 P. 55. * * * Where a lawyer has rendered such valuable service as to make available a fund for a class, *even though he appeared for only one claimant,* it is equitable that his compensation and expenses should come from the entire fund saved for all classes concerned before it is distributed. Sprague v. Ticonic Nat. Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. Counsel's right to compensation under such circumstances arises from the benefit conferred upon those who would have suffered loss but for his timely intervention, and not by reason of an agreement to pay his fees. * * * As is stated in Re Estate of Marre, 18 Cal.2d 191, 192, 114 P.2d 591, 592: 'Plaintiffs who have succeeded in protecting, preserving or increasing a fund for the benefit of themselves and others may be awarded compensation from the fund for the services of their attorneys.' This principle is derived from the equitable concept that where one of a group has borne the cost of litigation resulting in benefit to the entire group, the latter should contribute to such expenses. Nolte v. Hudson Nav. Co., 2 Cir., 47 F.2d 166; O'Hara v. Oakland County, 6 Cir., 136 F.2d 152.

"Not only is it established that the litigant is entitled to be compensated for the expense he has incurred in the prosecution of such an action, but *there is created in favor of the attorney who renders the service an equitable lien against the fund so preserved.* Central Railroad & Banking Co. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915; Colley v. Wolcott, 8 Cir., 187 F. 595, 109 C.C.A. 425; Muskegon Boiler Works v. Tennessee Valley Iron & R. Co., D. C., 274 F. 836.

"These equitable considerations sustain appellant's position as to the *priority* of his claim against the trust fund. * * * Nor on equitable considerations should the claim of the federal government for income taxes accrued *before* the commencement of this action stand on a distinguishable level in relation to appellant's allowance for counsel fees for preservation of the fund. *The latter,* viewed as an expense of judicial administration in making the trust assets available for distribution to claimants should properly *take priority.*" Emphasis added; Winslow v. Harold G. Ferguson Corp., supra; see, also Rest. Rest. § 105.

I can see no reason why the rule announced in the authorities above cited should not be applicable to a situation such as that presented in the case at bar. Certainly all of the elements necessary to bring such rule into operation are present here and I can see no reason why it should not be invoked in the interests of justice.

For the foregoing reasons I would affirm the award.

42 Cal.2d 879

INDUSTRIAL INDEMNITY COMPANY (a corporation) Petitioner, v. INDUSTRIAL ACCIDENT COMMISSION of the State of California and Doyle Wyatt, Respondents.

L. A. 23082.

Supreme Court of California.
In Bank.
May 11, 1954.

Leonard, Hanna & Brophy and Edmund D. Leonard, San Francisco, for petitioner.

Everett A. Corten, San Francisco, Gordon W. Winbigler, Los Angeles, and T. Groezinger, San Francisco, for respondents.

EDMONDS, Justice.

The question presented in this proceeding to review an award of the Industrial Accident Commission is the same as that in Spriggs v. Industrial Accident Commission, Cal.Sup., 269 P.2d 876.

Doyle Wyatt, a farm laborer in the employ of Norman Potter, doing business as Potter Nursery, sustained a compensable injury as a result of the assertedly negligent operation of an automobile by a third party. Wyatt settled his claim for damages against the third party for $1,000. Of that amount, $215.93 was paid to the employer's insurer in satisfaction of a lien for previous compensation expenditures. Wyatt's attorney received $357.50 for attorney's fees. The Industrial Accident Commission deducted from the credit allowed the employer's insurer the amount paid by Wyatt as an attorney's fee, allowing only $426.57 plus a credit of $112.64 for prior disability payments.

For the reasons stated in the Spriggs case, that portion of the award crediting Industrial Indemnity Company with only $539.21 is annulled, with directions to the commission to increase the amount to $896.71; in all other respects, the award is affirmed.

SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro tem., concur.

CARTER, Justice.

I dissent for the same reasons stated by me in Spriggs v. Industrial Accident Comm., Cal.Sup., 269 P.2d 876. In addition, however, this case squarely presents the wholly unjust situation mentioned by me in my dissent in Dodds v. Stellar, 30 Cal.2d 496, 183 P.2d 658. I there said that as a result of denying the employee the right to deduct counsel fees incurred in recovering from the tort-feasor, the employee might well receive less than the workmen's compensation payable to him. That result is reached here despite the legislative amendments designed to alleviate the injustice. Here the compensation amounted to $896.71. The employee received $1,000 in settlement from the tort-feasor. He had to pay his attorney $357.50 leaving a balance of $642.50, thus receiving less than the compensation to which he was entitled.

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125 Cal.App.2d 19

DEPARTMENT OF CALIFORNIA, VETERANS OF FOREIGN WARS OF UNITED STATES v. KUNZ et al.

Civ. 15801.

District Court of Appeal, First District, Division 2, California.

May 3, 1954.

Hearing Denied June 30, 1954.

Action for refund of assessments of unemployment insurance contributions against veterans' organization. The Superior Court, City & County of San Francisco, George W. Schonfeld, J., entered judgment from which the organization appealed. The District Court of Appeal, Nourse, P. J., held that veterans' organization which, according to its charter was organized in part for recreational purposes and fraternal purposes preserving and strengthening comradeship among its members, was not organized and operated exclusively for charitable and educational purposes, as was required for exemption from payment of unemployment insurance contributions.

Judgment affirmed.

1. Taxation ⚷542

Employment unit which contended that it was exempt from payment of contributions under the Unemployment Insurance Act could, if it chose, question the legality of but a single assessment by payment under protest followed by claim for refund, and when validity of prior unpaid assessments was placed in issue by cross-actions, employment unit could defend on ground of exemption. Gen.Laws, Act 8780d, §§ 45.1, 45.10, 45.11(d).

2. Taxation ⚷111.23

"Fraternal purposes" are not charitable or educational, and fraternal or social organizations are not exempt from making unemployment insurance contributions.

See publication Words and Phrases, for other judicial constructions and definitions of "Fraternal Purposes".

3. Taxation ⚷111.23

Although the exemption provisions of the Unemployment Insurance Act for benefit of charitable and other public welfare institutions are liberally construed, such liberal construction does not permit the ignoring of express limitations on exemptions. Gen.Laws, Act 8780d, §§ 1 et seq., 36.

4. Taxation ⚷111.23

Veterans' organization which, according to its charter was organized in part for recreational purposes and fraternal purpose of preserving and strengthening comradeship among its members, was not organized and operated exclusively for charitable and educational purposes, as was required for exemption on that ground from payment of unemployment insurance contributions. Corporations Code, § 9200; Military and Veterans Code, § 699.5; Gen. Laws, Act 8780d, §§ 7(f, g), 45.1.

5. Taxation ⚷543(7)

In suit by veterans' organization to recover unemployment insurance contributions allegedly improperly collected in that the organization was exempt, finding that organization was not operated exclusively for charitable and educational purposes, and that a substantial portion of its activities related to carrying on propaganda in an attempt to influence legislation, was not unwarranted by the record. Corporations Code, § 9200; Military and Veterans Code, § 699.5; Gen.Laws, Act 8780d, §§ 7(f, g), 45.1.

6. Taxation ⚷111.23

Mere fact that veterans' organization may have been performing public purpose in assisting veterans in presenting and pursuing claims under contract with the State, and that State paid portion of the costs of such assistance, did not entitle the organization to exemption from contributions to unemployment insurance fund on theory that it was an instrumentality of the State, since an organization does not become an instrumentality of the State merely by reasons of performance of a public service. Corporations Code, § 9200; Military and Veterans Code, § 699.5; Gen. Laws, Act 8780d, §§ 7(f, g), 45.1.

7. Social Security and Public Welfare ⚷273, 279

The Unemployment Insurance Act, being a general welfare statute designed to reduce economic security from unemployment, is subject to a liberal construction to effectuate its purpose, and exemptions therefrom should not be extended further than clearly justified by their language. Corporations Code, § 9200; Military and Veterans Code, § 699.5; Gen.Laws, Act 8780d, §§ 7(f, g), 45.1.

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J. R. Klawans, Orville C. Pratt, IV, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Vincent P. Lafferty, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

The Department of California, Veterans of Foreign Wars of the United States appeals from a judgment holding that it was not exempt from the payment of contributions under the Unemployment Insurance Act, Deering's General Laws, Act 8780d, herein further called the Act, and liable for assessments of such contribution from October 1, 1945 to December 31, 1949 with penalties and interest. Following an audit made, assessment for contributions was levied on appellant (who had failed to register with the Department of Employment as required by section 36 of the Act) for the first time in the year 1948, retroactive so far as not barred by the statute of limitations, to wit, from October 1, 1945 to September 30, 1948. The California Unemployment Insurance Appeals Board denied appellant's petition for reassessment September 8, 1949, Tax Decision 785. Appellant thereafter paid under protest the assessment over the last quarter of 1949, and after exhaustion of administrative remedies (the decision of the Appeals Board as to this quarter was based on the prior decision No. 785) on January 24, 1951, filed this action for refund in the superior court under section 45.11(d) of the Act. On November 8, 1948, appellant had applied for elective coverage of its employees (§ 15 of the Act) and since 1950 has paid contributions, it being left in abeyance until the final decision in this case whether its coverage will be considered elective or compulsory. No payment has been made for any period prior to the last quarter of 1949. On February 10, 1950, the Department of Employment filed in the Recorder's office in San Francisco a certificate of delinquent contributions under section 45.10 of the Act with respect to all assessment prior to the last quarter of 1949.

In this action respondents denied that appellant was exempt from contribution, denied that appellant was entitled to a judicial decision as to the principle of the exemption without having first paid all assessments imposed, and cross-complained for the amount of all assessments until and including the year 1949 with penalties and interest.

[1] Although payment under protest and claim of refund seems to be the only manner in which an employment unit could institute a court action as to the legality of an assessment, § 45.11(d) of the Act; Scripps Memorial Hospital **v.** California Emp. Comm., 24 Cal.2d 669, 673, 151 P.2d 109, 155 A.L.R. 360, respondents do not indicate any provision of the statute which prevents the application of such procedure to one separate assessment only. If such a court decision as to one later assessment only would not affect the validity of earlier assessments not paid, such would not be decisive of the situation in this case because respondents themselves submitted the matter of the prior assessments to the decision of the court in their cross-actions under sec. 45.1 of the Act. Such action is considered a normal civil action, California Employment Comm. v. Sutton, 69 Cal.App.2d 181, 158 P.2d 949, and respondents do not cite any authority for the contention that in such action the defense that the employment unit was exempt from contribution could not be presented. In such an action the certificate of respondents is, according to the provisions of section 45.1 of the Act, prima facie evidence only. Appellant does not deny that it has the burden of proving the exemption.

As to the merits, appellant's claim of exemption is based on two grounds, first that it is a nonprofit, nonstock corporation, organized and operated exclusively for charitable and educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, § 7(g) of the Act; second that its employees are in the employ of an instrumentality of the State of California, § 7 (f) of the Act, the funds for their employment being provided by the State under section 699.5 of the Military and Veterans Code. The court found that appellant is a nonprofit, nonstock corporation and that no part of its net earnings inure to the benefit of any individual, but that it does not operate exclusively for charitable and educational purposes, that it is not true that no substantial part of its activities relate to the carrying on of propaganda or the attempt to influence legislation and that it is not an instrumentality of the State of California.

There is no finding as to the character of the purposes for which appellant is *organized.* Appellant's contention that on this point a finding favorable to it is implied in the finding that it is a nonprofit corporation, no part of the earnings of which inure to the benefit of any individual is incorrect. Under section 593 Civil Code old, now section 9200 Corporations Code, a nonprofit corporation may be formed for any lawful purposes, among which "social" purposes are expressly named, and therefore not only for such purposes as would cause them to be exempt from unemployment contribution. In this case a finding that appellant was organized for charitable and educational purposes exclusively could not have been made. Its articles, received in evidence, include the following which show without dispute that the purposes for which it is organized are in part recreational, social and fraternal:

"Article III.

"That this corporation and association is organized and operates exclusively for charitable, scientific, educational and *recreational* purposes and not for profit. That the corporation intends to provide for the perpetuity and continuity of its existence and that said corporation will have no capital stock but that rights therein shall be limited to members; that the source of its income is from per capita tax and *social activities* of its members and all funds devoted to the purposes herein set forth and for the benefit of its members as a body.

"Article V.

"That the purposes for which this Corporation is formed are:

"*Fraternal*, patriotic, historical and educational.

"*To preserve and strengthen comradeship among its members.*

"To assist worthy comrades.

"To perpetuate the memory and history of our dead, and to assist their widows and orphans.

"To maintain true allegiance to the Government of the United States of America, and fidelity to its constitution and laws.

"To foster true patriotism.

"To maintain and extend the institutions of American freedom.

"To preserve and defend the United States from all her enemies, whomsoever."

[2–4] Fraternal purposes, mentioned in the first place, are not charitable or educational. "Fraternal or social organizations are not exempt from making unemployment insurance contributions". 81 C.J.S., Social Security and Public Welfare, § 124, p. 186. "An association or organization, in order to be exempt on the ground that it is engaged in charitable, benevolent, educational, or scientific work, has been required to be both organized and operated exclusively for such purposes; if either element fails, the exemption does not apply". 81 C.J.S., Social Security and Public Welfare, § 122, pp. 181–182; Chamber of Commerce of North Kansas City v. Unemployment Comp. Comm., 356 Mo. 323, 201 S.W.2d 771, 772; Northeast Osteopathic Hospital v. Keitel, 355 Mo. 740, 197 S.W.2d 970, 974; American Medical Ass'n v. Board of Review, 392 Ill. 614, 65 N.E.2d 350, 352–353; In re American Agriculturist Inc., 264 App.Div. 971, 37 N.Y.S.2d 98; Murphy v. Concordia Pub. House, 348 Mo. 753, 155 S.W.2d 122, 126, 136 A.L.R. 1461. These cases also hold that the question whether the purpose for which an organization is *organized* entitled it to exemption is judged according to its articles or charter. However in Bohemian Gymnastic Ass'n Sokol of City of N. Y. v. Higgins, 2 Cir., 147 F.2d 774, 775, cited by appellant, a judgment holding plaintiff exempt as organized and operated exclusively as an educational organization was affirmed notwithstanding the fact that its charter mentioned over and above clearly educational and cultural subjects: " 'To provide for recreational and social activities for its members and to foster friendship and mutual respect' ". Without commenting on this provision the court held that the continuous pursuit of physical and cultural instruction by plaintiff differentiated it from a mere social club. It does not seem clear how this decision can be reconciled with the cases cited above and the statute's requirement of *organization* for educational, etc., purposes exclusively. It is true that exemption provisions of unemployment compensation acts for charitable and other public welfare institutions are liberally construed, Cedars of Lebanon Hosp. v. Los Angeles County, 35 Cal.2d 729, 735, 221 P.2d 31, 15 A.L.R.2d 1045; Scripps Memorial Hospital v. California Emp. Comm., supra, 24 Cal.2d 669, 676–677, 151 P.2d 109, 155 A.L.R. 360; Ann. 155 A.L.R. 369; 81 C.J.S., Social Security and Public Welfare, § 7, p. 32; the contrary position defended by respondents might have considerable force "in view of the beneficent purposes of the Social Security Act to protect employees," City Club of Milwaukee v. United States, D.C., 46 F.Supp. 673, 674, but is contrary to accepted law. However liberal construction does not permit the ignoring of express limitations on such statutory exemptions. Better Business Bureau of Washington v. U. S., 326 U.S. 279, 283, 66 S.Ct. 112, 90 L.Ed. 67. It is on the ground of the too wide purpose for which it was organized alone that the Unemployment Insurance Appeals Board denied appellant's claim to charitable exemption and this position seems well taken.

[5] With respect to appellant's operation, the main witness, appellant's quartermaster adjutant Hermann, testified that appellant is a department of the national organization "Veterans of Foreign Wars of the United States" and as such a clearing house for payments from the California posts to the national organization; it does not conduct any social activities itself. Its main activity is the rehabilitation of veterans in connection with the federal Veterans Administration under contract with the Veterans Welfare Board of the State of California, in which work 82.2 percent of appellant's employees are employed, and 75% of the costs of which are paid by the State. The work of the 17.8 percent of the employees not exclusively so employed still contributes for a large percentage to the rehabilitation work. This service is open to all veterans, not only to members. Further activities relate to obtaining members, an educational program to educate the veterans of California "to their rights and entitlements" and a hospital program. No capital is built up. No money is spent for political or propaganda purposes. However from the audit made and the cross-examination of Mr. Hermann the following points were developed which are urged by respondents in support of the court's findings that the operation of appellant does not satisfy section 7(g) of the Act. One of appellant's activities is the giving of a California-Washington dinner to the California delegation in Congress to develop goodwill. In 1948 approximately $700 was spent for such a dinner and booked under "Legislative Expense." In the audit of 1945–46 there appeared an amount of $1,390 under "Legislation", but Mr. Hermann denied that it was used for influencing legislation, although he could not say what exactly the item represented. He denied that on the departmental level money was spent for lobbying. Mr. Hermann admitted that under "Legislation-Sacramento dinner" an item of $429 appeared on the 1946–1947 books representing costs of a dinner to have their commander-in-chief meet prominent persons in Sacramento and that at an annual encampment appellant officially endorsed and sponsored referendum proposition No. 2 which would have legalized greyhound racing in California, because the proceeds would have been distributed among veterans' organizations for their work under section 699.5 Military and Veterans Code. Whether the above evidence showed that a substantial part of appellant's activity was attempting to influence legislation and carrying on propaganda, notwithstanding the large extent of appellant's subsidized activities under section 699.5 is primarily a matter for the trial court and we cannot say as a matter of law that its finding to that effect was unsupported. As appellant cannot, at any rate come under the exemption of section 7(g) of the Act on the two grounds treated herein, we need not decide whether the fact that appellant's activities, educational and otherwise, were in large part intended to make veterans more conscious of and to further their financial and economic rights, and were limited to a restricted group, prevented it from being operated exclusively for charitable and educational purposes and brought it in the same category with labor unions, bar associations, medical associations, business leagues and such, which are not recognized as charitable.

[6, 7] Appellant's contention that it is exempt as an instrumentality of the State, § 7(f) of the Act, because it furthers a public purpose, the assisting of veterans in presenting and pursuing claims under contract with the State, § 699.5 Military and Veterans Code, and because the State pays 75% of the costs of said assistance is without merit. Public purposes can be accomplished in different manners, public, private or mixed, and not every activity of a private corporation, association or individual contributing to the accomplishment of such governmental purpose constitutes it a gov-

ernmental or public instrumentality or agency. So it has been held that a corporation which operated a bath house in a national park under lease and regulations of the Secretary of the Interior was not exempt from state unemployment contributions, Buckstaff Bath House Co. v. McKinley, 308 U.S. 358, at pages 362, 363, 60 S.Ct. 279, at page 281, 84 L.Ed. 322, the Supreme Court stating: "The mere fact that a private corporation conducts its business under a contract with the United States does not make it an instrumentality of the latter. * * * The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise." It has also been held that a private construction company constructing levees for the federal government was not exempt from state taxation, not being a governmental instrumentality, Trinityfarm Const. Co. v. Grosjean, 291 U.S. 466, 472, 54 S.Ct. 469, 78 L.Ed. 918, and the same was held to apply where the contractor worked under a cost plus contract so that the tax was passed on to the government itself. Curry v. United States, 314 U.S. 14, 18, 62 S.Ct. 48, 86 L.Ed. 9. Although no definition of government instrumentality will correctly cover all borderline cases it can be said that the characteristic government instrumentality is "public in nature, created and wholly owned by the government for the convenient prosecution of its governmental functions, existing at the will of its creator * * *." Unemployment Comp. Comm. of North Carolina v. Wachovia Bank & Trust Co., 215 N.C. 491, 2 S.E.2d 592, 595. See for the distinction of a governmental agency or instrumentality and a political subdivision (municipal corporation), also mentioned in section 7(f) of the Act, Laguna Beach County Water District v. Orange County, 30 Cal.App.2d 740, 743, 87 P.2d 46, overruled as to another point Rock Creek Water Dist. v. Calaveras County, 29 Cal.2d 7, 12, 172 P.2d 863; although both are governmental in origin (created by constitution or legislation) and normally have certain governmental powers, those of an agency are as a rule more restricted than those of a subdivision. It is the lack of governmental origin, ownership and powers that shows clearly that appellant is not a governmental instrumentality in the sense of the Act, the more so because the Act, as a general welfare statute designed to reduce economic insecurity from unemployment, is subject to a liberal construction to effectuate its purpose and exemptions should therefore not be extended further than clearly justified by their language. California Employment Comm. v. Butte County, Etc. Ass'n, 25 Cal.2d 624, 630–631, 154 P.2d 892; an exception as to charitable exemptions is mentioned earlier herein. Section 699.5 Military and Veterans Code permits the making of contracts with veterans' organizations, like those under which appellant works, only with organizations which have for five years regularly rendered such services, and only if the services can, owing to the confidential relation involved, not satisfactorily be rendered otherwise. The contracts with appellant expressly provide that appellant shall not be considered an agent or employee but an independent contractor responsible as to results, but not as to means or methods employed. There was no evidence showing that the actual relation of appellant to the State differs from the one described in the statute and the contracts. A certain degree of control and regulation by a party who reimburses all or most of the expenses is normal (e. g., in cost plus contracts) and does not change the essential character of the relation of the parties. It is a clear case of a private corporation whose services the State uses for its public purpose without constituting it a governmental agency.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 89

HALL v. BURNS.

No. 15884.

District Court of Appeal, First District, Division 1, California.

May 10, 1954.

Rehearing Denied June 9, 1954.

Hearing Denied July 7, 1954.

Action by daughter against mother for one-half amount received on a note. Cross-complaint by mother alleging ownership of entire proceeds. From adverse judgment of Superior Court, San Mateo County, Edward L. Kellas, J., holding that mother was entitled to entire proceeds, daughter appealed. The District Court of Appeal, Fred B. Wood, J., held that trial court did not abuse its discretion in dismissing without prejudice daughter's motion to amend her complaint, a year later and on first day of trial, to claim ownership of entire proceeds received on note upon theory that she was entitled to one-half of proceeds of sale of property of which note was part payment.

Judgment affirmed.

1. Trusts ⚷372(3)

In action by daughter against mother for one-half of amount received on a note secured by deed of trust payable to mother, evidence sustained finding that note was part of a trust estate created by mother and daughter by terms of which mother was entitled to entire proceeds of note upon her demand.

2. Pleading ⚷238(4)

In action by daughter against mother for one-half of amount received on note wherein upon stipulation of the parties and order of court, approximately one-half, as to which there was no issue, had been paid to the mother, denial without prejudice of daughter's motion to amend complaint a year later and upon first day of trial to claim ownership of entire amount, was not an abuse of discretion.

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Joseph A. Brown, Miguel A. Leite, San Francisco, for appellant.

Wagstaffe & Daba, Carlos R. Hulse, Redwood City, for respondent.

FRED B. WOOD, Justice.

Plaintiff Hall sued San Mateo County Title Company, a corporation, as sole defendant alleging that the defendant had received $2,853.04 for the use and benefit of plaintiff. Thereafter the title company paid the sum of $5,706.08 into court and Kathryn Burns was substituted as sole defendant. She denied that the title company had received moneys for the use and benefit of plaintiff and, cross-complaining, alleged that the title company had received $5,706.08 for her use and benefit and has deposited said sum in court and that she, Burns, is the owner and entitled to the immediate possession of said money and that plaintiff, without right, claims an interest in one-half thereof. Plaintiff denied these allegations except that she admitted claiming an interest in one-half of the money, alleging ownership in herself of said one-half.

The court found the allegations of the cross-complaint true and that (1) the sum of $5,706.08 is the balance due on a note secured by deed of trust dated August 12, 1942, payable to defendant Burns; (2) September 8, 1942, the note was endorsed by Burns to Wells Fargo Bank & Union Trust Co. as trustee in a certain trust created by plaintiff and defendant in 1931; (3) at the time of said deposit, and at all times thereafter, the trust provided that principal and income thereof could be withdrawn by defendant alone and not by plaintiff and defendant and that defendant could alone modify and amend the trust; (4) thereafter defendant instructed the trustee to, and the trustee did, endorse the note to plaintiff and defendant as joint tenants and to deliver the note to the San Francisco Bank for collection; (5) this endorsement and delivery were for purposes of convenience only and the intents of plaintiff and defendant were that the note remain subject to the terms of the trust; (6) thereafter defendant demanded all of the proceeds of the note and under the terms of the trust is entitled to the whole thereof, both principal and accumulated income in the sum of $5,706.08; (7) by order of court, entered July 30, 1951, $2,603.04 had been paid to defendant; and concluded that defendant is entitled to the sum so paid and to the sum of $3,103.04, the balance remaining on deposit in court.

[1] *Plaintiff claims, in effect, that these findings are not supported by the evidence and that the legal conclusions are erroneous.* Our examination of the record convinces us that the evidence is sufficient and that the legal conclusions drawn from the findings are correct. A summary of the supporting evidence follows.

Defendant and plaintiff are mother and daughter. In 1931, they created a trust by written agreement between them as trustors and Wells Fargo Bank & Union Trust Company as trustee. The corpus consisted of various securities which until then belonged to the defendant as her sole property. The trustee was to accumulate the income, adding it to the principal, until the death of the survivor of defendant and plaintiff subject to the right of each to withdraw any or all portions thereof. The trust could be terminated by their joint action only.

In September, 1935, with moneys withdrawn by her from this trust estate, defendant purchased a house and lot in Atherton, taking a deed in the name of plaintiff as grantee. Defendant testified that she put the property in plaintiff's name because they were living together and to avoid will or probate, without telling plaintiff at the time and not intending it as a gift; that plaintiff did not want to stay here and when she was leaving in November of that year executed a deed putting the property in the names of defendant and plaintiff as joint tenants;* that defendant lived on this property for a number of years, paid the taxes and improved it, including the erection of a guest house, in 1938, which she rented for $40 a month; that plaintiff never sent defendant any money for repair of this property or for any other purpose.

In December, 1935, plaintiff and defendant, by agreement in writing with the trustee, amended the 1931 trust agreement to the effect that the trustee would continue to accumulate the income, adding it to the principal until the death of the survivor of plaintiff and defendant, subject to a right in the defendant during her lifetime to withdraw any or all portions of the principal and accumulations and to modify, alter or terminate the trust agreement in whole or in part.

In August, 1942, defendant sold the Atherton property, delivering a deed executed by plaintiff and defendant and receiving payment in the form of $2,000 in cash and a promissory note for $8,500 in favor of defendant as sole payee, secured by a deed of trust in her favor as sole beneficiary. She put the $2,000 into the trust fund; advised plaintiff she had taken the note in her own name; and then assigned the note to the Wells Fargo Bank as trustee and put it into the trust. In September, 1942, defendant and the trustee amended the trust agreement, reciting that defendant had transferred to the trustee the $8,500 note and deed of trust which would be held by the trustee subject to the trust agreement of 1931 as amended, the trustee to receive a reasonable fee for services in connection with the collection and administration of the trust with respect to the note and deed of trust. The parties stipulated that defendant assigned the deed of trust to the Wells Fargo Bank, putting it into the trust fund.

The installment payments on the $8,500 note were made to the Wells Fargo Bank. Defendant testified they were put into her commercial account for her to draw on; that she has been making withdrawals from this fund from time to time, having no other money to live on.

In January, 1945, the Wells Fargo Bank endorsed the note* as follows: "Pay to the order of Kathryn Burns, a widow, and Rosalie Henningsen Hall, a married woman, as joint tenants, with right of survivorship, without recourse, endorsed by Wells Fargo Bank and Union Trust Company as trustee, subject to the terms and provisions of that certain trust agreement made in and executed on the 11th day of April, 1931, by and between Kathryn Burns and Rosalie Henningsen as trustees, and said Wells Fargo Bank and Union Trust Company as trustee." In March of that year, the Wells Fargo Bank, on behalf of the defendant, mailed the note to the San Francisco Bank for the account of the defendant individually.

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* Plaintiff went to New York and has lived there ever since.

* At the time of the January, 1945, endorsement by Wells Fargo Bank the balance due on the note was $6,513.55.

Defendant testified that the Wells Fargo Bank was charging a certain sum per year to collect on the note and she was informed that the San Francisco Bank would charge less. For that reason she told the Wells Fargo to send the note to the San Francisco Bank; it was for collection, that was all; the San Francisco Bank did collect and she lived on that money; in October, 1947, she told plaintiff about that assignment of the deed of trust from the Wells Fargo to the San Francisco Bank.

Defendant testified that when she received word from the title company that the note was going to be paid off in full, she had the San Francisco Bank deliver the note and deed of trust from the collection account and directed the title company to put the proceeds into the Wells Fargo trust account; it was and is her desire to have that money go back into the trust; that money is to go into the trust. Asked if she ever considered the moneys represented by the note and deed of trust as being out of the trust by the assignment for collection to the San Francisco Bank, she said "Oh, I never wanted to break the trust, no."

February 8, 1949, defendant gave the title company instructions (1) for delivery of reconveyance of trust deed and release of chattel mortgage (2) upon collecting for account of Kathryn Burns and Rosalie Henningsen Hall $5,075.81 plus interest in the sum of $630.27 and for account of attorney O'Malley $252.00 and then (3) to disburse (a) $5,075.81 to Wells Fargo Bank & Union Trust Co. for trust account of Kathryn Burns and Rosalie Henningsen Hall, (b) $630.27 to Kathryn Burns and Rosalie Henningsen Hall, and (c) $252 to O'Malley.

Asked if she was going to send any of the $630.27 to plaintiff, defendant said "No, that was all to go into the trust * * *."

March 4, 1949, defendant's instructions to the title company showed receipt by the title company from Kathryn Burns of a $630.27 check payable to Burns and Hall and a $5,075.81 check payable to Wells Fargo Bank & Union Trust Co. for Burns and Hall, which checks defendant instructed the title company to cancel and then to issue a new check to Wells Fargo Bank & Union Trust Co. for the trust account of Burns & Hall in the sum of $5,706.08.

Such a check was issued to the Wells Fargo Bank for the trust account of Burns and Hall. That check was subsequently returned to the title company by defendant, whereupon a new check was issued to Burns and Hall directly. The latter check was never cashed. It was reissued from time to time at six-month intervals because of a rule of the bank that a check is good for only six months.

Then this action was filed and the money was paid into court. The parties stipulated that the $5,706 on deposit is the balance of the proceeds of the sale of the Atherton property.

The inference is reasonable that the $8,500 note, at the time of its payment, was a part of the 1931 trust estate; that the proceeds of the note were a part of that estate when defendant's instructions were given the title company on February 8 and March 4 of 1949, and thereafter.

March 24, 1949, defendant revoked the trust. From December, 1935, until revocation, defendant had the right to make unlimited demands upon the principal and income of the trust and also to revoke it. Her unlimited power of withdrawal entitles her, upon revocation, to claim all of the assets of the trust, including the moneys paid into court in this action.

[2] *Plaintiff also claims error in the denial of her motion to amend the complaint.* We find in that denial no abuse of discretion, no basis for reversal.

In the complaint which was filed September 20, 1950, and in the answer to the cross-complaint, filed July 5, 1951, plaintiff claimed but one-half of the money received by the title company and paid into court. In June, 1951, defendant moved for release to her of a portion of the money on deposit, upon the ground that there was no issue as to one-half of the total sum on deposit. Thereupon, pursuant to stipulation of the parties and order of court, the sum of $2,603.04 was paid to the defendant.

A year later and on the first day of the trial, plaintiff requested permission to amend the complaint to claim ownership of the entire deposit in court ($5,706.08) upon the theory that she was entitled to one-half of the proceeds of the sale of the Atherton property.

Defendant objected because of the time that had elapsed and the change of circumstances thereby involved; plaintiff's release of the $2,603.04 without claim thereto; lack of notice of motion or of any written proposed amendments to the pleadings, asserting that any amendment of the kind proposed would completely alter the issues in the case, issues that would involve transactions which occurred as early as 1942 and possibly 1931, and would in turn involve questions of the running of the statute of limitations.

The court denied the motion without prejudice to any independent action which plaintiff might institute, if she has a right of action. In so doing, the court observed that the present action was commenced for recovery of a portion of the money then on deposit with the title company; that there might be some right of action for an accounting between the parties now before the court; that the case should proceed to determine the rights to the money on deposit under the issues as framed by the pleadings, but without prejudice to any such other action as the plaintiff may have, the intention being that this will preclude the defendant setting up res judicata in this case as to the next suit.

We find in this no basis for holding that the trial court committed an abuse of discretion in denying the motion.

The judgment appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

BROWAND
v.
SCOTT LUMBER CO., Inc., et al.

Civ. 8260.

District Court of Appeal, Third District, California.

May 5, 1954.

As Modified on Denial of Rehearing June 4, 1954.

Hearing Denied June 30, 1954.

Action against employee, his corporate employer, and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendant. The Superior Court, Shasta County, Curtiss E. Wetter, J., entered judgment upon verdict against all defendants and denied motions of one defendant for nonsuit, directed verdict, and judgment notwithstanding verdict, and defendant appealed. The District Court of Appeals, Peek, J., held that, where trial court had, upon defendants' motion for new trial, and after due deliberation, reduced, by qualified order, amount of punitive damages assessed against some defendants, and plaintiff had agreed to such reduction, the District Court of Appeal could not, as a matter of law, say that reduced amount of punitive damages was excessive.

Judgment and orders affirmed.

1. Appeal and Error ⚿882(18)

Where defendants had collectively requested and acquiesced in court's entry of verdict against one defendant, defendants could not, upon appeal, attack that which they had affirmatively helped bring about.

2. Appeal and Error ⚿882(18)

Judgment ⚿91

Consent to entry of judgment is waiver of any errors therein, and judgment will not be disturbed upon appeal by party who has expressly consented to making thereof.

3. Trial ⚿335

Where, in action against employee, his corporate employer and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendants, verdict for compensatory damages against employee had been entered, maximum compensatory damages which could be awarded against remaining defendants was thereby established.

4. Trial 🔑**335**

Where, in action against employee, his corporate employer, and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendants, $2,000 verdict against employee for compensatory damages was entered, remaining verdicts against corporation for $10,000 compensatory damages and against vice-president and general manager for $5,000 punitive damages, were inconsistent, and therefore such verdicts were properly returned to jury. Code Civ.Proc. § 619.

5. Damages 🔑**87(1)**

Plaintiff is never entitled, as a matter of right, to punitive damages.

6. Damages 🔑**87(1)**

Punitive damages are but incidents to cause of action and can never constitute basis thereof.

7. Trial 🔑**335**

Under Civil Code provision that exemplary damages are to be awarded in addition to actual damages as damages for sake of example and by way of punishing defendant, where defendants, as employee and employer, have been guilty of different degrees of oppression, fraud, or malice so that verdict for exemplary damages is justified, jury should be allowed to admeasure and apportion such exemplary damages for purpose of making the example as well as punishment fit offense. Civ.Code, § 3294.

8. Trial 🔑**328**

Fact that, in action against employee, his corporate employer, and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendant, award of punitive damages was not made against employee did not necessarily result in an implied finding that employee's acts were without malice.

9. Damages 🔑**208(8)**

Even though an act be malicious, it is still within sole discretion of jury to determine whether an award of punitive damages shall be made.

10. Damages 🔑**181**

Evidence of a defendant's wealth is admissible to enable jury to determine what amount of punishment should be imposed by compelling him to pay a fine.

11. Assault and Battery 🔑**39**

In action against employee, his corporate employer, and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendants, jury was entitled to consider what other punishment employee had received for act involved, and, in exercise of its discretion, could conclude that employee's conviction and fine in Justice Court was sufficient punishment for him upon issue of punitive damages.

12. Appeal and Error 🔑**1004(3)**

Where, in action for injuries received by plaintiff in altercation, trial court had, upon defendants' motion for new trial and after due deliberation, reduced, by qualified order, amount of punitive damages assessed against some defendants, and plaintiff had agreed to such reduction, the district court of appeal could not, as a matter of law, say that reduced amount of punitive damages was excessive.

13. Master and Servant 🔑**332(1)**

In action against employee, his corporate employer, and corporation's vice-president and general manager for injuries received by plaintiff in altercation allegedly occurring in course of employee's employment by the other defendants, question whether employee was servant of vice-president and general manager was for jury.

◆

Devlin, Diepenbrock & Wulff, Sacramento, for appellant Berry.

Pillsbury, Madison & Sutro, Francis N. Marshall & G. H. Eckhardt, Jr., San Francisco, Rich, Weis, Carlin & Fuidge, Marysville, Glenn D. Newton, Redding, for other appellants.

Carlton & Shadwell, Hiram R. Baker, Claude H. Caldwell, Redding, for respondent.

PEEK, Justice.

By his action plaintiff sought punitive as well as compensatory damages for injuries received in the course of an altercation with the defendant McFairen, sued herein as McFeran. The Scott Lumber Company and Raymond Berry, its vice president and general manager, were joined as defendants on the theory that McFairen's acts were committed in the course of his employment as the servant of each, thereby invoking the doctrine of respondeat superior. The jury found against all defendants, each of whom has now appealed from the judgments thereafter entered. Additionally the defendant Berry has appealed from the denial of his motions for nonsuit, for a directed verdict and for judgment notwithstanding the verdict.

The facts pertinent to the contentions made show that at the conclusion of the trial the jury returned verdicts in favor of plaintiff and against each defendant as follows: Against McFairen, compensatory damages in the sum of $2,000 but no punitive damages; against defendant Scott Lumber Company, compensatory damages in the sum of $10,000 but no punitive damages; and against defendant Berry, punitive damages alone in the sum of $5,000.

Upon examination of the verdicts the court requested that counsel together with the reporter and clerk meet in his chambers. The court, without stating the exact amounts, noted the variance in the awards and suggested to counsel that although the verdicts were ambiguous he was satisfied that he could correct the error by instructing the jury to return for that purpose. Attorney Newton, an associate counsel for the lumber company, replied that the verdicts were contrary to law and the instructions of the court, but he contended that since they were clear as to the amounts, the court had no jurisdiction. Attorney Diepenbrock, on behalf of Berry, joined with Attorney Newton in his comments, and added that it would be "an abuse of your honor's discretion or jurisdiction to return them to the jury room under any other or additional instructions." At the request of Attorney Fuidge, also an associate counsel for Scott Lumber, the court read the specific amounts set forth in the verdicts. Attorney Carlton for plaintiff agreed with the court stating that it should "properly advise the jury and try to eliminate the confusion from its mind so that they may return a verdict or verdicts which are consistent with legal principles regardless of who they may be for or against." Mr. Newton, jointly with Mr. Fuidge, stated that the amount of "compensatory damages fixed against McFairen must be the maximum so far as Scott Lumber Company is concerned * * * it necessarily follows that the Scott Lumber Company cannot be assessed for more." Attorney Diepenbrock stated that in addition to Newton's comments he made the further objection that the verdict did not follow the instructions of the court and was contrary to law in that it found against defendant Berry for punitive damages and did not find compensatory damages, and concluded his remarks with: "I further request and move the court that the verdicts as entered—the verdicts as read be entered and recorded." Both Newton and Fuidge made the same motion. After further discussion between the court and Newton, Diepenbrock again asked for "a formal ruling on my motion," and the same was denied by the court.

Thereafter court was again convened and the proceedings resumed before the jury. The court asked for the verdicts in order of submission, taking up first that against the defendant McFairen. Newton then stated, "I make the formal motion that each of the verdicts be read and that they be recorded as the verdict of the jury." Mr. Fuidge stated, "We join in that motion," and Mr. Diepenbrock added, "And I likewise, your honor." The motion was denied by the court. Thereupon the verdict against McFairen was read, the jury polled and the clerk instructed to enter the verdict. After a discussion by the court embodying further instructions to the jury, the suggestion was made by Fuidge that the foreman be instructed to correct the verdict against the lumber company by reducing it from $10,000 to $2,000. This was denied by the court. Thereupon Attorney Carlton moved that in view of the apparent confusion the jury be given all of the verdicts for further consideration. This motion was likewise denied by the court which observed that the McFairen verdict had already been entered and the court was of the opinion it had the power to send the remaining verdicts back to the jury for consideration if they desired so to do. Mr. Diepenbrock then stated, "At this time [I] move that the verdict as far as the defendant Berry is concerned be entered and recorded." Again the motion was denied. The verdicts were then returned to the jury and it retired for further deliberation. Upon return of the jury its verdicts were announced and the jury polled. Following the instructions by the court to the clerk to enter the verdict against the Scott Lumber Company, Mr. Fuidge objected to the entry thereof on all of the grounds previously mentioned. Attorney Newton joined in such objection. The court overruled the objection and the verdict was entered. Thereupon the verdict against Berry was read and the jury again polled. Mr. Diepenbrock then moved that the verdict not be entered without waiving other grounds theretofore made, which motion was denied.

As the record now stands the final verdicts as entered disclose an award for compensatory damages against McFairen in the sum of $2,000 with no award as to punitive damages; against the lumber company and Berry, the verdicts were in like amounts—$2,000 as compensatory damages and $11,000 as punitive damages.

The contentions of defendants are (1) that the original verdicts determined every issue raised and that the action taken and statements made by the court in ordering the entry of the McFairen verdict and in returning the other two verdicts to the jury, was unlawful and prejudicial; (2) that the awards of punitive damages against Scott and Berry were improper for the reason that their liability rested upon the doctrine of respondeat superior and the jury failed to find McFairen's acts to have been malicious; (3) that as a matter of law there was no evidence to support the finding that McFairen was an employee of Berry; and (4) that even assuming the award of punitive damages against Berry and Scott was free of compulsion by the court and lawfully arrived at, the amounts are excessive as a matter of law.

There can be no question but that the original verdicts as returned by the jury were defective, and that the provisions of Section 619 of the Code of Civil Procedure empowered the court to return the verdicts to the jury for further deliberation. That section reads as follows:

> "When the verdict is announced, if it is informal or insufficient, in not covering the issue submitted, it may be corrected by the jury under the advice of the court, or the jury may be again sent out."

Defendants do not question the power of the court under that section but argue that the initial determination by the jury was that Scott Lumber Company as the admitted employer of McFairen was liable in compensatory damages, and that the failure to find compensatory damages against Berry was a determination that he was not an employer of McFairen. Therefore, defendants argue, the court was confronted with a situation which it could have handled in one of four different ways: (1) Enter judgment in accordance with the jury's intent which they argue was clearly expressed by the valid portions of the verdict, and disregard the remainder as surplusage; (2) direct the jury to make the necessary corrections to cure the informalities, thereby conforming to the instructions; (3) enter the verdicts as returned and correct the informalities on defendants' motion for a new trial; or (4) set all of the issues at large by returning all of the verdicts to the jury for reconsideration on all of the issues. Furthermore they say having failed to follow any of these courses the splitting of the verdicts was error. All, including McFairen's, should have been returned to the jury or none should have been returned.

[1, 2] At the outset of a discussion of defendants' contention, it should be noted that counsel for each defendant specifically moved the court for entry of the McFairen verdict. By virtue of their collective request for and acquiescence in the action of the court in the entry of said verdict, they cannot now attack that which they affirmatively participated in bringing about. It has long been the rule that consent to the entry of a judgment is a waiver of any errors in it and it will not be disturbed on appeal by the party who expressly consented to the making thereof. Morrow v. Learned, 76 Cal.App. 538, 245 P. 442; and Dietrichson v. Western Loan & Bldg. Co., 123 Cal.App. 358, 11 P.2d 64.

[3] When counsel for each defendant moved the entry of the verdict against McFairen and the same was granted by the court, the maximum amount of compensatory damages which could be awarded against the remaining defendants was thereby established. At no time during the course of the discussion between the court and counsel was it contended, as defendants now argue, that "Splitting the verdicts was error—all, including McFairen's, should have been returned or none." Such argument is advanced for the first time on appeal. It is true that defendants did request that the remaining verdicts be entered, but obviously those verdicts were improper. When the court denied their motion to enter the remaining verdicts, they then had the opportunity to request that all should be returned. However, they chose to have the McFairen verdict entered.

[4] While the better practice would have been to have returned all of the verdicts to the jury, it cannot now be said under the facts previously noted that the court erred in failing to do so. In light of the McFairen verdict which set the amount of compensatory damages, neither of the remaining verdicts was consistent, hence the court did not err in returning those verdicts to the jury under the power granted it by Section 619.

We therefore turn to a consideration of the question raised by the award of punitive damages against Scott Lumber Company and Berry, and the lack of such an award as against McFairen.

[5–7] It is the general rule that a plaintiff is never entitled, as a matter of right, to punitive damages. Brewer v. Second Baptist Church, 32 Cal.2d 791, 197 P.2d 713. Such damages are but incidents to the cause of action, and can never constitute the basis thereof. It is also true that "* * * since exemplary damages are, under the terms of section 3294 of the Civil Code, to be awarded in addition to the actual damages and as damages 'for the sake of example and by way of punishing the defendant,' it would seem to be a rule of reason that, where the defendants, though joint tort-feasors, in an action for malicious prosecution, as well as in other actions, have been guilty of different degrees of oppression, fraud, or malice so as to justify a verdict or verdicts for exemplary damages under the above-quoted section of the Code, and where such damages under said section are to be awarded 'for the sake of example and by way of punishing' each particular defendant according to the measure of his offending, juries should be allowed so to admeasure and apportion such exemplary damages as to make the example as well as the punishment fit the offense." Thomson v. Catalina, 205 Cal. 402, at pages 405 and 406, 271 P. 198, at page 200, 62 A.L.R. 235.

Although the element of joint tort-feasors is not present in the instant case, and although no California case precisely in point has been cited by counsel, we see no reason why the same rule should not apply where as here the employer's liability, if any, is predicated upon the doctrine of respondeat superior.

[8, 9] The fact that the jury made no award of punitive damages as against McFairen was not, as defendants contend, necessarily an implied finding that his acts were without malice. As previously noted, even though an act be malicious, it is still within the sole discretion of the jury whether or not an award shall be made. The verdict of the jury did not exonerate McFairen. See State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282. It was simply silent as to the question

of punitive damages. Moreover the record contains no evidence to support the inference as contended by defendants. In fact the record is to the contrary. Thus after the jury had returned to the courtroom for the last time and just before returning to the jury room for further deliberations, one juror asked the court, "Was Mr. McFairen * * * fined in the justice court?"

[10, 11] Furthermore since evidence of a defendant's wealth is admissible to enable the jury to determine what amount of punishment should be imposed by compelling him to pay a fine, Marriott v. Williams, 152 Cal. 705, 93 P. 875, it would appear equally proper to consider, as obviously the jury here did, what other punishment the defendant McFairen had received for the same act, and in the exercise of its discretion to conclude that his conviction and fine in the justice's court was sufficient punishment for him. In other words, the jury might well have determined that McFairen had been punished but that Berry and the lumber company had not, and by its verdict sought to make the "example as well as the punishment fit the offense." Thomson v. Catalina, supra.

This was precisely the situation in Davis v. Hearst, 160 Cal. 143, 116 P. 530, 542. There the court said, "'* * * it would appear practicable to allow a recovery of an amount against all as compensatory damages, and a further amount against some as exemplary damages (and such verdict would be just if the evidence warranted it), and it would not seem impracticable to so shape the verdict as to bring about this result.'"

Defendants further argue that in any event the amount of punitive damages awarded was excessive. The Supreme Court stated in Finney v. Lockhart, 35 Cal. 2d 161, 217 P.2d 19, 21, that while exemplary damages should bear a reasonable relationship to the actual damages, that rule is only for the purpose of guarding against excess and "there is no fixed ratio by which to determine the proper proportion between the two classes of damages." The court after further discussion of this question stated—

> "* * * it is the province of the jury, and the trial court on the motion for a new trial, to say whether punitive damages should be awarded. The presumptions are in favor of the correctness of the verdict and judgment. After an award has been approved by the trial court the reviewing court will hesitate to declare the amount excessive unless upon consideration of the entire record including the evidence it must be said that the award was the result of passion or prejudice."

[12] The same argument now made by defendants was also made to the trial court upon their motion for a new trial, and the court after due deliberation, by a qualified order reduced the amount of punitive damages and the same was agreed to by the plaintiff. Under such circumstances we cannot say that the reduced amount thereof is excessive as a matter of law. State Rubbish Collectors Ass'n v. Siliznoff, supra.

It is further contended by appellants that the court erred in denying Berry's motion for a nonsuit, his motion for a directed verdict, and his motion for judgment notwithstanding the verdict. The argument made in support of such contention is that as a matter of law there was no evidence upon which a jury could find that McFairen, the admitted employee of the defendant lumber company, was also an employee of Berry.

[13] Whether or not McFairen was an employee of Berry as well as of the lumber company was essentially a question of fact. Brokaw v. Black-Foxe Military Institute, 37 Cal.2d 274, 231 P.2d 816. Here there was evidence that McFairen performed personal services at least to a degree for the Berrys in and about their home on the corporation's ranch. Moreover, there was testimony by plaintiff as well as by two witnesses for the defendant relative to statements by Berry that McFairen was his employee. Under such circumstances we cannot say that the court erred in denying the various motions made by Berry since we cannot see as a matter of law that there was no evidence to support such conclusions.

The judgments and orders are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

PEOPLE v. DAVIS.*

Cr. 5115.

District Court of Appeal, Second District,
Division 1, California.

May 10, 1954.

Rehearing Denied May 24, 1954.

Hearing Granted June 9, 1954.

Defendant was convicted of abortion. The Superior Court, Los Angeles County, Mildred L. Lillie, J., rendered judgment and denied defendant's motion for a new trial, and defendant appealed. The District Court of Appeal, Doran, J., held that conversation between defendant and arresting officers, wherein defendant allegedly stated that he did not wish to explain or discuss things found on his premises and wherein, in answer to an officer's statement that a certain book contained a record of abortions performed, defendant merely answered "O.K.", did not constitute an admission, and the overruling of objection thereto was prejudicial error.

Judgment and order reversed and cause remanded.

1. Criminal Law ⚷407(1), 1169(12)

In prosecution for abortion, conversation between arresting officers and defendant, wherein defendant allegedly stated that he did not wish to explain or discuss things found on his premises, and wherein, in answer to an officer's statement that a certain book contained a record of abortions performed, defendant merely answered "O. K.", did not constitute an admission, and the overruling of objections thereto was prejudicial error. Pen.Code, §§ 274, 1111; U.S.C.A.Const.Amend. 14; Const. art. 1, § 13.

2. Criminal Law ⚷824(7)

It is the trial judge's duty, where circumstances require, to instruct jury on law of accomplices, even though such instruction is not requested. Pen.Code, § 1108.

John H. Marshall, Richard E. Erwin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondents.

DORAN, Justice.

This is an appeal from the judgment and order denying motion for a new trial.

Defendant was charged by information with the crime of abortion. Penal Code, Section 274. Four counts were alleged. The jury returned a verdict of guilty on two counts and not guilty on two counts. A motion for a new trial was denied.

It is contended on appeal that:

"*Point I.* The court, in denying defendant's motion for a continuance, deprived the defendant of his right to aid of counsel and the process of the court in his defense as guaranteed by the state and federal constitutions, and in so doing violated the due process of law clause of the 14th Amendment of the Federal Constitution and Article I, Section 13 of the Constitution of the State of California."

"*Point II.* The trial court erred in admitting the testimony of an alleged 'Tacit' admission of the defendant. Over objection."

"*Point III.* The trial court erred in failing to instruct the jury, as a matter of law, that certain witnesses were 'accomplices'."

"*Point IV.* The trial court erred in failing to instruct the jury in the language of Penal Code Section 1111."

The alleged victims were Susan Ippolito and Mrs. Louella May Coon. The former testified that, "she had missed one of her menstrual periods" and the latter testified that, "she believed herself to be pregnant" and, that following the examination by defendant, "That the defendant told her she was not pregnant".

Defendant testified, "That he recalled seeing Mrs. Coon in his office on or about March 3, 1953; that she believed she was pregnant; that it did not seem she could be, it was too early to diagnose; that he examined her and followed his usual procedure; that she complained of pain and he suggested that she wait with the examination; that she said she wanted to get it over with; that he made the examination and told her there was no evidence of pregnancy; that he thought she returned later and he made a further examination and advised her he did not think she was pregnant", and "that there was no evidence of pregnancy with reference to Miss Ippolito".

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* Subsequent opinion 276 P.2d 801.

With regard to the motion appellant argues "that at the time of defendant's arrest, without either a warrant for arrest, or a search warrant, the arresting officers took from the home of the defendant three books containing information and data necessary to the defendant in the preparation of his defense. That counsel for defendant had several weeks before the time of trial, requested permission of Mr. Carr, Deputy District Attorney, to examine the books, but that permission was denied because they were in the possession of the arresting officers." The record reveals that defendant was denied an opportunity to examine the records until and during the trial. "The second ground for continuance urged by the defendant was he was not ready for trial because his counsel had only recently suffered a serious injury to his right leg, was appearing in court on crutches with his leg in a cast, and because of his injuries, had been unable to prepare the case for trial.

"The third ground for continuance urged by the defendant was that under the circumstances, the defendant had not had sufficient time to prepare for the defense of the case. This ground was based on the fact that the defendant's plea of not guilty was entered June 22, 1953, and the trial was set for July 15, 1953, giving the defendant only about three weeks in which to prepare.

"Upon the denial of the motion for a continuance, counsel stated that he was not ready, and could not proceed, and asked to be relieved as counsel in the case."

[1] With regard to the second contention, it appears from the record that the trial judge overruled an objection to the admission of evidence of a conversation between the officers and the defendant at the time of the arrest. At the time of the objection the prosecuting attorney argued:

> "Mr. Carr: Well, if the Court please, we propose to show that the witness showed these various items that have been identified in Exhibit 19, to the defendant and he stated in substance or effect that he, the defendant, has been arrested for performing abortions, wanted to give him an opportunity to make any explanation he wanted to about the things that they found on his premises, that is the instruments and book and so on and so forth. *The defendant stated that he didn't think he wanted to make any explanation, that he didn't think it would do him any good. The officer asked him if he didn't want to discuss it at all and he said no.* Then the officer showed him this book, which is 19 for identification, at which time the officer made the statement in substance as follows: 'I wish to make the formal statement to you, Doctor, I maintain this is a book which is a record kept by you of the persons who have been aborted by you, and with notations indicating the name of the person, the date and time, the amount of money paid to you by them for abortions.' And he then went on to enumerate certain things found in the book, at the conclusion of which the defendant merely made the statement 'O.K.'."

The ruling was prejudicial error. The expression "O.K." merely means all right. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18; People v. Spencer, 78 Cal.App.2d 652, 178 P.2d 520.

[2] With regard to appellant's third and fourth contentions, the failure of the court to instruct the jury on the law applicable to accomplices, respondent argues that, "Such an instruction was not requested". And, that "We submit that there is ample evidence apart from the testimony of any accomplices to sustain the convictions, and that there is ample evidence apart from any accomplice-testimony to corroborate the complaining witnesses under Penal Code Section 1108." Both of these arguments are beside the issue. It is the trial judge's duty as a matter of law to instruct the jury in such circumstances even though such instruction is not requested. People v. Heddens, 12 Cal.App.2d 245, 55 P.2d 230; People v. Scofield, 203 Cal. 703, at page 709, 265 P. 914. Incidentally, the evidence of pregnancy is not conclusive and although the evidence as a whole is not overwhelming it may be, as a matter of law, sufficient.

Appellant's first contention above mentioned is by no means without merit but, inasmuch as the judgment must be reversed for other reasons, that question need not be determined.

The judgment and the order denying defendant's motion for a new trial are, and each is reversed, and the cause remanded for a new trial.

WHITE, P. J., and DRAPEAU, J., concur.

RUGGLES v. RUGGLES et al. *

Civ. 15525.

District Court of Appeal, First District, Division 2, California.

May 10, 1954.

Rehearing Denied June 9, 1954.

Hearing Granted July 7, 1954.

Wife's action for separate maintenance wherein husband filed a cross complaint for divorce. The Superior Court, City and County of San Francisco, William M. Macmillan, J., granted husband a divorce and denied wife relief, and wife appealed. The District Court of Appeal, Dooling, J., held, inter alia, that wife's filing and prosecution of separate maintenance action was not, of itself, sufficient evidence of extreme cruelty to justify grant of divorce to husband.

Judgment reversed.

1. Divorce 🔑130

Wife's filing and prosecution of an action for separate maintenance was not, of itself, sufficient evidence of extreme cruelty to justify grant of divorce to husband.

2. Divorce 🔑127(3, 4)

In a contested divorce action, slight corroboration is all that is required, but there must be evidence in support of the cause of action upon which the divorce granted in addition to the evidence of either or both of the parties to the action.

3. Divorce 🔑127(4)

In husband's contested divorce action, that parties were living apart was not, under the circumstances, sufficient corroboration of husband's testimony that wife had deserted him.

L. L. James and Carl E. Day, San Francisco, for appellant.

Theodore M. Monell and John H. Smissaert, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal by plaintiff and cross-defendant from a judgment of the trial court denying her any relief and granting to defendant and cross-complainant a divorce on the grounds of desertion and extreme cruelty.

The marital life of the parties, as will be seen from the following recital, followed a strange and unusual pattern. Plaintiff Helen M. Ruggles and defendant William G. Ruggles were married in Austin, Texas on February 6, 1926. They lived in San Antonio, Texas until May 1927 when plaintiff at her husband's suggestion went to New York to oversee the reconditioning of an "orientator" which he had invented. The Navy purchased this apparatus and plaintiff returned to Texas. Mr. and Mrs. Ruggles went back to New York in order to raise money to finance production of the orientator on a large scale. They were unsuccessful in this endeavor and therefore in 1931 Mrs. Ruggles returned to Wisconsin where she stayed with Mr. Ruggles' parents for two years on their farm, while Mr. Ruggles remained in New York. Upon his father's death in 1934 Mr. Ruggles returned to the family farm in Wisconsin where they both lived until May of 1942.

Support was derived during this time from income off the farm and the serving of meals prepared by Mrs. Ruggles. When Mr. Ruggles' mother died his interest in the farm went to his sister because of debts owed by him to her and her family. After amiable discussion of their problem it was decided that Mrs. Ruggles should go to California to stay with relatives and Mr. Ruggles would join her at the earliest opportunity. Mr. Ruggles testified that as Mrs. Ruggles was boarding the train she said to him: "I am sorry I ever knew anyone named Ruggles, and that includes you." (This, as will appear, is the main evidence relied upon to prove desertion.)

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* Subsequent opinion 275 P.2d 42.

Mrs. Ruggles arrived in San Francisco in June 1942 and the two corresponded with each other. After March 1943 Mrs. Ruggles no longer heard from her husband until August of the same year when she received a gift from a department store in Oakland which was addressed in her husband's handwriting. She wrote to friends in Wisconsin asking the whereabouts of her husband and was informed he was living in Berkeley. She called at the house in Berkeley whose number had been sent to her as the residence of her husband. She was informed that her husband had moved to another house located in San Francisco, and that he was working in Richmond. She went to see him and asked him to come to visit her but not at that time nor at any time thereafter did he ever ask her to live with him. After she got in touch with him Mr. Ruggles began calling on her and on these visits he would bring over groceries or give her money. During this period the amount of money that he turned over to her averaged around $60 to $80 per month. From July 1, 1951 to the time of trial her income from this source dwindled to practically nothing.

After Mr. Ruggles moved from Berkeley, he had a room in San Francisco in the flat occupied by a Miss Hamilton whom he had known for over 40 years. Miss Hamilton died on March 7, 1951 at the age of 80 and left a legacy of $52,164 to defendant. (After taxes it would amount to approximately $32,000 or $33,000.) At the time of trial the parties were each about 70 years of age.

Mrs. Ruggles filed a complaint for separate maintenance on June 15, 1951 alleging wilful neglect, desertion and extreme cruelty. A temporary restraining order was issued ordering defendant not to transfer or otherwise dispose of his property and a copy was served on the bank which was executor of Miss Hamilton's will. Mr. Ruggles filed a cross-complaint for divorce alleging as grounds extreme cruelty and desertion. The court granted a divorce to the cross-complainant and denied relief to plaintiff upon her complaint for separate maintenance.

Appellant argues that the findings of extreme cruelty and desertion upon which the divorce was granted are not supported by the evidence and are not sufficiently corroborated. We are satisfied from an examination of the record that these contentions must be sustained.

[1] The only evidence of cruelty relied upon by respondent is the filing and prosecution of the action for separate maintenance. Respondent testified:

"Q. You stated in your direct examination that your health was impaired. When did you notice the commencement of ill health or the impairment of your health? A. Within a few seconds after the trust officer at the bank showed me the signature of Mrs. Ruggles on the attachment.

"Q. What attachment was that? A. On the bank, on the trust officer's trusteeship, or whatever it is I might inherit from this estate.

* * * * * *

"Q. But you did not suffer any impairment of health, as far as you knew, previous to that time— A. (Interrupting) No, I had been working right along."

Respondent relies upon those cases which hold that an untruthful charge of sexual misconduct in a complaint for divorce may constitute extreme cruelty justifying a divorce if it causes grievous mental suffering. (9 Cal.Jur., Divorce and Separation, § 32, pp. 658–659.) On respondent's own testimony it was the mere prosecution of the wife's action which caused the claimed suffering in this case and the courts have never extended this rule so far as to cover the mere bringing of an action for separate maintenance by a wife against her husband. In Schlecht v. Schlecht, 99 Cal.App. 163, 277 P. 1065 a husband charged as cruelty the fact that his wife had brought an action against him for separate maintenance. In that case this court said at page 168 of 99 Cal.App. at page 1067 of 277 P.: "The mere bringing of the action in an attempt to settle their respective rights could not be construed as extreme cruelty, and while the courts have held that charges of adultery or gross immorality falsely made in a complaint may constitute extreme cruelty, no case can be found where allegations of the sort herein made by respondent have been held sufficient to do so."

[2, 3] The claim of desertion is grounded solely on the statement of appellant when she was leaving for California above quoted from respondent's testimony and the fact that the parties never thereafter lived together. It is undisputed that before appellant left for California the parties had agreed that respondent should join her in California when he could, and that after appellant arrived in California she opened a correspondence by letter with respondent, that she went to some trouble to locate respondent after she learned that he had come to California and that thereafter he visited her frequently and furnished groceries and $60 to $80 per month for her support. Respondent testified that he never thereafter asked appellant to come back to live with him or made any effort to establish a home for her. His only explanation was that he could tell from her manner that it would be useless to do so. There was no corroboration of respondent's testimony, if it be so construed, that appellant refused to live with him. The only corroborating evidence was that the two were not living together. While in a contested action slight corroboration is all that is required (La Vigne v. La Vigne, 96 Cal.App.2d 531, 534, 216 P.2d 75) nevertheless "(t)here must be evidence in support of the cause of action upon which the divorce is granted, in addition to the evidence of either or both of the parties to the action". 9 Cal.Jur., Divorce and Separation, § 95, p. 738. The evidence that the parties were not living together, standing alone, is not under the facts of this case sufficient to meet this requirement. It is equally consistent with such evidence that respondent refused to live with appellant, as she claims, or that the parties were living separate and apart by agreement as is strongly indicated by their course of conduct. While there may be cases where the fact of desertion is otherwise so clear that evidence that the parties were living separate and apart might be sufficient corroboration, this is not such a case. Such evidence was held not to constitute sufficient corroboration in Fallon v. Fallon, 83 Cal.App.2d 798, 803, 189 P.2d 766 and Sweet v. Sweet, 64 Cal.App. 786, 222 P. 634 and where the conduct of the parties themselves has been so equivocal the necessity for explicit and unequivocal corroboration seems obvious.

Judgment reversed.

NOURSE, P. J., and KAUFMAN, J., concur.

PEOPLE v. DE PAULA et al.[*]

Cr. 5134.

District Court of Appeal, Second District, Division 2, California.

May 4, 1954.

Hearing Granted June 3, 1954.

Prosecution for using minor for purpose of transporting heroin. The Superior Court, Los Angeles County, Samuel R. Blake, J., entered judgment of conviction, and entered order denying motion for new trial, and defendant appeal. The District Court of Appeal, Fox, J., held, inter alia, that the minor involved in the offense was not an accomplice within statute requiring testimony of an accomplice to be corroborated.

Affirmed.

1. Infants 🔑13

The gravamen of offense of using minor for purpose of transporting narcotics is in its tendency to debauch children. Health and Safety Code, § 11714.

2. Infants 🔑13

The use of minor for purpose of transporting narcotics necessarily contributes to delinquency of that minor. Health and Safety Code, § 11714; Welfare and Institutions Code, § 702.

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[*] Subsequent opinion 276 P.2d 600.

3. Criminal Law ⚷507(1)

Minor involved in offense of using minor for purpose of transporting narcotics is regarded as a victim, not as an accomplice whose testimony it is necessary to corroborate. Pen.Code, § 1111; Health and Safety Code, § 11714.

4. Criminal Law ⚷507(1)

Similarity of offenses is not the same as identity of offenses within statute requiring testimony of accomplice to be corroborated. Pen.Code, § 1111.

5. Criminal Law ⚷507(1)

Minor involved in offense of using minor for purpose of transporting narcotics was not an accomplice of person committing such offense, and instruction, requested in prosecution for such offense, that testimony of accomplice was required to be corroborated was properly refused. Health and Safety Code, § 11714; Pen.Code, § 1111.

6. Infants ⚷20

Evidence supporting conviction for using minor for purpose of transporting heroin. Health and Safety Code, § 11714.

7. Criminal Law ⚷1159(4)

Trustworthiness of testimony of minor involved in offense of using minor for purpose of transporting heroin was for the jury to decide in the first instance, and later for the trial judge to consider in passing on defendant's motion for new trial. Health and Safety Code, § 11714.

8. Criminal Law ⚷1159(2, 4)

An appellate court may not re-evaluate the credibility of witnesses and reweigh the evidence.

9. Criminal Law ⚷1159(4)

Evidence was insufficient to show that testimony of minor, involved in offense of using minor for purpose of transporting heroin, was perjured or that minor had been given immunity in exchange for her testimony. Health and Safety Code, § 11714.

10. Criminal Law ⚷316

Where facts testified to by minor, involved in offense of using minor for purpose of transporting heroin, were within knowledge and power of accused to dispute, jury could consider accused's failure to explain or deny such testimony as tending to indicate the truth thereof and as indicating that among inferences that could reasonably be drawn therefrom, those unfavorable to accused were the more probable. Health and Safety Code, § 11714.

11. Criminal Law ⚷1128(1)

District Court of Appeal may not consider matters outside record in passing on sufficiency of evidence to sustain conviction.

12. Criminal Law ⚷878(4)

Acquittal on charge of furnishing, administering and giving a minor a preparation of heroin was not inconsistent with verdict of guilty on charge of using such minor for purpose of transporting heroin. Health and Safety Code, § 11714.

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Albert DePaula in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

This is an appeal by defendant DePaula from a judgment of conviction and order denying his motion for a new trial on a charge of using a minor for the purpose of transporting heroin in violation of Health & Safety Code section 11714.[1]

DePaula and his codefendant White were arrested at approximately 10:00 p. m. on June 6, 1953, in the city of Los Angeles, in company with Madonna, a minor girl, who was also taken into custody. She had in her hand a portion of a gum wrapper in which there were two paper bindles containing a light brown substance which was found to be heroin. Appellant, who had known the girl for some time, was waiting for her in his car that evening when she came out of a beauty parlor located at 43d Street and Central Avenue. He told her White was on the corner and that he wanted to go down on 5th Street to pick up some heroin. Madonna said that was "Okay." They then picked up White and drove to 5th Street in Los Angeles. Appellant gave her $5 which she handed to White. She and White got out of appellant's car. White made the purchase and gave the two bindles to her. She placed them in the gum wrapper and they got back into the car. Appellant, according to Madonna's testimony, knew she had the narcotic. He then drove to her address on Griffith Street. The group was on their way to Madonna's room to "shoot the heroin" when they were arrested and the contraband recovered by the officers from her possession.

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[1] The pertinent part of Section 11714, Health & Safety Code, reads as follows: "Every person who hires, employs, or uses a minor in unlawfully transporting, carrying, selling, giving away, preparing for sale or peddling any narcotic, or who unlawfully sells, furnishes, administers, gives, or offers to sell, furnish, administer, or give, any narcotic to a minor, is guilty of a felony * * *."

The evidence showed that all three of these people were narcotic users. The officers found equipment for administering narcotics in Madonna's room. She testified it was purchased for her by appellant and that he paid her room rent where she was living. An officer also testified that appellant stated to him that he had given her some money with which to rent a room; that he had visited her there on several occasions; that she had administered narcotics to him in her room; also, that he had met the girl on Central Avenue at about 9:00 p. m. on the 6th; had driven her and White to 5th Street; that they got out of the car and went somewhere (but he did not know where) while he remained in his car; that he did not know they were going to buy heroin but he presumed that was where they had gone; and that he did not know Madonna had heroin in her possession until the time of the arrest.

[1–3] Appellant contends his conviction is unlawful on the theory that Madonna was an accomplice and therefore the court prejudicially erred in refusing to give the jury an instruction that an accomplice's testimony must be corroborated before a conviction can be had. He relies on section 1111,[2] Penal Code, and certain cases applying it. The provisions of that section requiring corroboration of the testimony of an accomplice do not apply unless the person whose testimony is in question is an accomplice as therein defined, viz., "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." Pen.Code, sec. 1111. Measured by this statutory test, it is clear that Madonna was not an accomplice of appellant. The conduct denounced as a crime by the particular provision of section 11714, Health & Safety Code, is that of using a minor in unlawfully transporting a narcotic. The gravamen of the offense is in its tendency to debauch children. People v. Krupa, 64 Cal.App.2d 592, 599, 149 P.2d 416. The use of a minor for such purpose "necessarily contributes to the delinquency of that minor". People v. Knowles, 35 Cal. 2d 175, 186, 217 P.2d 1, 8; Welfare & Institutions Code, sec. 702. In such circumstances, "the minor is regarded as a victim and not as an accomplice whose testimony it is necessary to corroborate under the provisions of section 1111 of the Penal Code." People v. Deibert, 117 Cal.App.2d 410, 427, 256 P.2d 355, 366.

[4, 5] It is obvious that Madonna is not "liable to prosecution for the identical offense charged against the defendant". She was not using a minor to unlawfully transport a narcotic. She was, of course, guilty of possession in violation of section 11500, Health & Safety Code, but although such possession related to the same contraband the offense was not "identical" with that "charged against the defendant". Even if these offenses could be regarded as similar, that would not be sufficient to make Madonna an accomplice for it has been held

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[2] Penal Code, section 1111, reads: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

repeatedly that "similarity of offenses is not the same as identity." People v. Galli, 68 Cal.App. 682, 684, 230 P. 20; People v. Lein, 204 Cal. 84, 86, 266 P. 536; People v. Baskins, 72 Cal.App.2d 728, 731, 165 P.2d 510; People v. Mimms, 110 Cal.App.2d 310, 314, 242 P.2d 331. Since Madonna was not an accomplice of appellant the trial court properly refused to give an instruction upon that theory.

[6–8] Appellant also contends the evidence is insufficient to support the judgment. There is no merit in this contention. The evidence herein recited, which we may assume in support of the verdict and judgment the jury believed, is ample to sustain appellant's conviction. Appellant says the testimony of Madonna was untrustworthy. That, of course, was for the jury to decide in the first instance and later for the trial judge to consider in passing on the motion for a new trial. An appellate court may not re-evaluate the credibility of witnesses and reweigh the evidence. People v. Gould, 111 Cal.App.2d 1, 243 P.2d 809.

[9] Appellant attacks the testimony of Madonna charging that she "was given immunity for her perjured testimony against the defendants." It is not established that she was given immunity or that she committed perjury. Since Madonna was a minor she was necessarily turned over to the juvenile authorities and the juvenile court for discipline and rehabilitation. The record does not reveal what plan was worked out for her. The verdict of the jury and the implied finding of the trial judge in denying appellant's motion for a new trial definitely establish that they did not believe Madonna gave perjured testimony. There are numerous circumstances which support their evaluation of her evidence. In this connection appellant refers to an affidavit filed by his codefendant White in support of his motion for a new trial in which it is asserted White stated that Madonna visited him in jail and told him she testified against the defendants for the immunity extended by the prosecution. No such affidavit is in the record before us. However, after having heard White testify, for he, unlike appellant, did take the stand, and taking into consideration the other facts and circumstances disclosed by the evidence, the trial court may well have concluded that his *ex parte* affidavit was not worthy of credence.

[10, 11] In this connection it should be noted that defendant failed to testify. The facts testified to by Madonna were within his knowledge and power to dispute. The jury could, therefore, consider his failure to explain or deny such evidence as tending to indicate the truth thereof and as indicating that among the inferences that could reasonably be drawn therefrom, those unfavorable to appellant were the more probable. People v. Steccone, 36 Cal.2d 234, 239, 223 P.2d 17.

Appellant, however, seeks to excuse his failure to testify on the ground that he and his attorney feared the disclosure to the jury of his previous felony convictions would seriously affect his credibility and greatly weaken the value of his testimony. Such fears may have been well founded but it was a decision he and his counsel were necessarily required to make. In such respect they determined the state of the evidence that went to the jury. Appellant is bound by that decision. We may not consider matters outside the record in passing on the sufficiency of the evidence to sustain a conviction.

[12] Appellant was acquitted of Count One in the amended information in which it was charged that on or about May 19, 1953, he "furnished, administered and gave" Madonna, a minor, a preparation of heroin in violation of section 11714, Health and Safety Code. He now contends that "the verdicts of the jury are inconsistent as a matter of law." There is no merit whatever in this contention. In Count Two, on which appellant was convicted, he was charged with using a minor—Madonna—"for the purpose of transporting" narcotics, to wit, heroin, on June 6, 1953. It is thus plain that the alleged offenses are entirely different both as to substance and time of their asserted commission. A verdict on one of these counts could have no relation to a verdict on the other.

The judgment and order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

125 Cal.App.2d 118

KOEPER v. KOEPER.

Civ. 15842.

District Court of Appeal, First District,
Division 1, California.
May 11, 1954.

Divorce action. Appeal by defendant, from order of Superior Court, San Mateo County, A. R. Cotton, J., denying his motion to vacate default judgment which had been entered six months earlier, and to grant leave to answer. The District Court of Appeal, McMurray, J., held that service of summons issued on a so-called "supplemental complaint" which contained all allegations necessary to an original complaint for divorce, gave the court jurisdiction, though the summons issued on the original complaint had never been served.

Affirmed.

1. Divorce ⚿104

"Supplemental complaint" which contained all allegations essential to original complaint for divorce would be considered to be substitute pleading rather than supplemental one.

2. Divorce ⚿76

Service upon defendant of summons issued on substitute complaint for divorce vested court with jurisdiction though substitute complaint was designated as "supplemental complaint" and no service had been made of summons issued on original complaint. Code Civ.Proc. § 407.

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Frank V. Kington, Redwood City, for appellant.

O'Keefe & O'Keefe, Redwood City, for respondent.

McMURRAY, Justice pro tem.

Defendant appeals from an order denying his motion to vacate a default judgment and to grant him leave to answer plaintiff's complaint.

Respondent filed a complaint for divorce on October 2, 1951 and summons thereon was issued the same day. On January 21, 1952, respondent filed a pleading entitled "Supplemental Complaint for Divorce" which contained all of the allegations necessary to an original complaint for divorce, but, in addition, alleged the filing of the original complaint on October 2, 1951, and that since that filing an unsuccessful reconciliation had been attempted by the parties. A summons was issued on the same day this so-called "Supplemental Complaint" was filed. This summons was returned on February 20, 1952, showing service thereof, together with a copy of the "Supplemental Complaint" upon appellant on January 22, 1952.

The appellant defaulted, and on March 6, 1952, an interlocutory decree of divorce was entered, based upon such default. The decree provided for the payment of support and maintenance for respondent and for the minor children of the parties.

More than six months later, on September 24, 1952, appellant filed an affidavit to vacate the default, together with points and authorities. This affidavit is based upon the fact that the service upon appellant of the summons issued upon the so-called "Supplemental Complaint" was not sufficient to bring the appellant within the jurisdiction of the court.

Appellant contends that the summons issued at the time of the filing of the original complaint on October 2, 1951, is the only valid summons in this matter (that summons, incidentally, was not filed until April 29, 1953, and then with a return showing that the sheriff was unable to locate defendant), and that by serving the so-called "Summons on Supplemental Complaint" the court acquired no jurisdiction under the applicable code sections.

[1,2] The appeal is not well taken. Under the authority of Randall v. Randall, 203 Cal. 462, 264 P. 751, the so-called "Supplemental Complaint" is considered as a substituted pleading, complete in itself, and the service of the "Summons on Supplemental Complaint" gave appellant notice of the necessary facts required by the provisions of section 407 of the Code of Civil Procedure.

As early as 1893 the Supreme Court of this state in an analogous set of facts, in

Dowling v. Comerford, 99 Cal. 204, said, at page 206, 33 P. 853, at page 853: "The summons [an "amended summons"] refers to the complaint on file, and not in terms to the amended complaint. I think this the proper mode, even when the complaint has been amended, although it would have been sufficient had the reference been in terms to the amended complaint. In neither case would there have been anything misleading. When an amended pleading is filed, which entirely takes the place of the former one, it becomes the complaint, answer, or demurrer, as the case may be, and such a reference is not at all uncertain or ambiguous."

This language can as well apply to a "Supplemental Complaint" and a "Summons on Supplemental Complaint," as it does to an amended complaint and an amended summons.

The order appealed from is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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125 Cal.App.2d 79

BECKERMAN v. HUTESON.

Civ. 19801.

District Court of Appeal, Second District, Division 3, California.

May 7, 1954.

Action by assignee of real estate salesman to recover commissions allegedly due from broker and former employer. The Superior Court, Los Angeles County, Arnold Praeger, J., granted defendant's motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that evidence was insufficient to make case for trier of fact in that it showed a voluntary termination by salesman of employment, without showing any agreement to receive commission on transactions consummated after termination of employment, or that his efforts had gone into the consummation of the sale.

Order and judgment affirmed.

1. Trial 🔑165

In ruling upon a motion for nonsuit, evidence must be viewed in light most favorable to plaintiff.

2. Master and Servant 🔑80(13)

In suit by assignee of real estate salesman to recover commissions allegedly due on certain sale of realty from broker who employed salesman, evidence was insufficient to make case for trier of fact in that it showed a voluntary termination of employment prior to sale in question, without showing any agreement that salesman should receive commissions on transactions consummated after termination of employment, or that his efforts had contributed to the consummation of the transaction. Code Civ.Proc. § 2055.

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Moidel, Moidel, Moidel & Smith, and Isadore Moidel, Los Angeles, for appellant.

Marcus, Rabwin, Nash & Naiditch, and Louis Naiditch, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff commenced this action as assignee of Herman Cannon, a real estate salesman, to recover commissions allegedly due the salesman from defendant, a real estate broker. Defendant's motion for nonsuit was granted. Plaintiff appeals from "the order of nonsuit and judgment for costs."

At the trial the depositions of Cannon and defendant were received in evidence, and it was stipulated that said "depositions may become part of the record on appeal in lieu of the reporter's transcript of the testimony." Those depositions, not having been included in the reporter's transcript nor having been sent to this Court, this Court ordered that the depositions be transmitted here. They have been considered as a part of the record on appeal.

Cannon was employed by defendant as a salesman from May 18, 1951 to September 12, 1951. At the time he became so employed, he and defendant made an oral agreement to share expenses and to divide commissions. While he was employed by defendant they consummated two deals and divided the commissions. Also while he was so employed they made efforts on behalf of Liberty Building Company to purchase 250 acres of land from the Pomona Valley Company but the transaction was not consummated. On June 7, 1951, Liberty paid $1,000 to defendant, and defendant paid one-half thereof to Cannon.

Cannon testified that defendant was drinking heavily and was unable to work steadily; in the early part of September he told defendant that he wanted to go with another broker and wanted his license transferred, and the defendant "agreed to that." Then he left defendant's place of business and was employed by another broker. He testified further that he was not discharged by defendant—he left of his own accord; prior to leaving the employ of defendant, the defendant did not tell him that the deal for the Pomona property had fallen through; he (Cannon) did not know whether it fell through—it was a question of not being able to get financing.

Defendant testified, under section 2055 of the Code of Civil Procedure, that in October or November, 1951, the Pomona Valley Company was dissolved and its assets were divided among the shareholders; in December, 1951, defendant sold about 49 acres of the property (which was then owned by shareholders) to Liberty for $132,300; also in December he sold the remainder of the property (owned by shareholders) to Hillcrest Investment Company for $448,700; he received commissions on those sales. The negotiations on behalf of Liberty Building Company were conducted by Norman Feintech. The negotiations on behalf of Hillcrest Investment Company were conducted by Norman and Irving Feintech. Defendant testified further that, while Cannon was employed by him, Norman Feintech, vice president of Liberty, asked defendant if he could locate some property for that company; when defendant and Cannon learned about the Pomona property they told Liberty about it; Norman Feintech said they could not pay more than $2,000 an acre for it; defendant obtained information regarding the property and submitted a report to Liberty on May 19, 1951; thereafter executives of Liberty told defendant that there would be no need to look at the Pomona property again—the sellers were talking about $3,000 an acre and would not accept their offer; thereafter defendant talked with a representative of Pomona Valley Company, who said that the company would be willing "to talk $2,300" an acre; on June 7, 1951, Liberty rejected "the deal" and gave defendant a check for $1,000, and he gave one-half of it to Cannon; on August 24, 1951, Norman Feintech told defendant that Liberty wanted acreage near Van Nuys; at that time Cannon said that defendant was a fool to waste any more time with Liberty Building Company, and that defendant had no chance to make a deal—as far as he (Cannon) was concerned he would not waste any more time with them.

Appellant contends that the motion for nonsuit should not have been granted; that Cannon did not waive his right to share in the commissions.

[1, 2] In ruling upon a motion for a nonsuit the evidence must be viewed in the light most favorable to plaintiff. The evidence herein, viewed in accordance with that rule, was not of sufficient substantiality to support a finding for plaintiff. The testimony of Cannon shows that he voluntarily terminated his employment with defendant and went to work for another broker. There is no evidence of any agreement that Cannon should receive any commission on a transaction that was consummated after he had terminated his employment. There is no evidence that the sales of the property were the result of the efforts of defendant and Cannon or either of them during the time Cannon was employed by defendant. On June 7, 1951, about three months before Cannon left said employment, the Liberty Building Company gave defendant $1,000 for some purpose in connection with the Pomona property transaction, and defendant divided said amount with Cannon. There is no evidence that Liberty showed any further interest in the Pomona property during

the remainder of the time (about three months) Cannon was employed by defendant, and there is no evidence that Hillcrest or any one showed any interest therein during that time. Defendant testified, under section 2055 of the Code of Civil Procedure, that Cannon told him, about three weeks prior to leaving, that defendant had no chance to make a deal with Liberty and that he (Cannon) would not waste any more time with it. Cannon did not dispute that testimony. The trial judge properly granted the motion for a nonsuit.

The order and judgment are affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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125 Cal.App.2d 109

JENKINS v. JENKINS (two cases).

Civ. 19883.

District Court of Appeal, Second District, Division 3, California.

May 10, 1954.

Hearing Denied July 7, 1954.

Cross-actions for divorce were consolidated with matter of determination of amount to be awarded for support under prior decree granting wife separate maintenance. The Superior Court, Los Angeles County, Ernest D. Wagner, J., made determinations adverse to the husband, and he appealed. The District Court of Appeal, Vallée, J., held that where wife pleaded, in cross actions for divorce, separate maintenance decree previously granted her on ground of husband's cruelty and further alleged that decree had become final and that she had lived separate and apart from her husband since its entry, and husband did not disprove judgment of separate maintenance or other acts alleged, court properly found issue as to husband's cruelty in accordance with decree in maintenance action.

Affirmed.

1. Infants 🔑19

In custody proceeding, judge should not talk to minor in private over objection of either party, since such procedure may give rise to serious constitutional questions of due process.

2. Infants 🔑19

Where trial judge, in case involving custody of minor child, recited in his findings that he had talked privately in his chambers to the child but went on to state that his findings of fact and conclusions of law were based solely on evidence introduced in open court, reviewing court would assume that trial judge had done as he said and, in view of such assumption, would hold the procedure nonprejudicial.

3. Husband and Wife 🔑299(1)

A decree of separate maintenance determines that as of its date of entry plaintiff was innocent party and defendant was wrongdoer, and it is a bar to a suit brought on facts that occurred prior to its entry.

4. Divorce 🔑27(1)

Fact that parties live apart after decree of separation does not relieve them from their obligation to abstain from acts of cruelty towards one another, and a cause of action for divorce may be grounded on acts of cruelty committed subsequent to decree of separation.

5. Divorce 🔑184(12)

Error, if any, in failing to strike, from wife's answer to husband's complaint for divorce on ground of cruelty, defense of wife's prior separate maintenance decree granted on same ground was rendered nonprejudicial by trial court's finding that husband had failed to prove his allegations of cruelty committed by wife after entry of separate maintenance decree.

6. Husband and Wife 🔑299(1)

Separate maintenance decree in favor of wife does not bar wife's subsequent action for divorce on same ground.

7. Husband and Wife 🔑286

Purpose of suit for separate maintenance is to specifically enforce general duty of husband by directing certain definite payments to be made at regular intervals for wife's support.

8. Husband and Wife ⚷288

Status of parties to separate maintenance decree may be restored by reconciliation, in which case necessity for separate maintenance terminates. Civ.Code, § 137.

9. Husband and Wife ⚷299(1)

Where wife pleaded, in cross-actions for divorce, separate maintenance decree previously granted her on ground of husband's cruelty and further alleged that decree had become final and that she had lived separate and apart from her husband since its entry, and husband did not disprove judgment of separate maintenance or other acts alleged, court properly found issue as to husband's cruelty in accordance with decree in maintenance action.

10. Divorce ⚷147

Whether in any given case there has been extreme cruelty is question of fact to be deduced from all circumstances in the case, keeping always in mind the intelligence, refinement, and delicacy of sentiment of complaining party.

11. Appeal and Error ⚷1008(1)

Findings of trial court, based on any reasonable analysis of facts and circumstances as shown by evidence, will not be disturbed on appeal.

12. Divorce ⚷235, 240(2)

Alimony is question for trial court's exercise of discretion, and in fixing allowance to wife, court may consider earnings of husband and his ability to earn money. Civ.Code, § 139.

13. Divorce ⚷235, 296

Where it appeared that husband owned 225 acre ranch, two separate rental producing dwellings, over $15,000 in bonds, shares, and bank account, and two automobiles, and that his gross income was over $12,000 per year, trial court did not abuse its discretion in awarding wife $175 a month for her support and $100 a month for support of minor son of parties. Civ. Code, § 139.

14. Parent and Child ⚷2(2)

Civil Code section providing that child of age requiring education and preparation for labor or business should be entrusted to father's custody does not give father absolute right to custody of child under such circumstances and conditions. Civ.Code, § 138(2).

15. Parent and Child ⚷2(3.1)

In child custody cases, it is for court, in first instance, to determine, after considering all evidence, how best interests of child will be served, and such question is to be determined solely from standpoint of child, and feelings and desires of contesting parents are not to be considered except in so far as they affect best interests of child. Civ.Code, § 138(2).

◆

W. P. Butcher and Frank R. Crandall, Santa Barbara, for appellant.

Cornwall & Westwick and John A. Westwick, Santa Barbara, for respondent.

VALLÉE, Justice.

Appeal by John Jenkins, referred to as defendant, from a judgment which granted Ramona Jenkins, his wife, referred to as plaintiff, an interlocutory decree of divorce, custody of a minor child, John Lee Jenkins, and support for herself and the minor.

On July 8, 1949, plaintiff sued defendant for separate maintenance on the ground of cruelty. After a contest, the court found that defendant had been guilty of extreme cruelty. Plaintiff was granted a decree of separate maintenance, custody of John Lee, certain property, $75 a month for her support, $100 a month for the support of the son, and with the son the exclusive use of the parties' home. Defendant appealed from that judgment. On appeal the judgment was affirmed insofar as it granted separate maintenance, the right to support, certain property, and custody of the minor. It was reversed insofar as it awarded support for plaintiff and the son with directions to redetermine the same, and insofar as it awarded plaintiff and the son the exclusive possession of the home. Jenkins v. Jenkins, 110 Cal.App. 2d 663, 243 P.2d 79.

In July 1951, when the trial court had before it the matter of determining the amount of support for plaintiff and John Lee, defendant filed an action for divorce. He alleged extreme cruelty on the part of plaintiff, specifying acts purported to have been committed after March 8, 1951, the date of the entry of the decree of separate maintenance. He also prayed for custody of John Lee. Plaintiff answered, denying the charges of cruelty and defendant's right to custody, and setting up the separate maintenance decree as a defense. She then filed a cross-complaint for divorce in which she pleaded the decree of separate maintenance; that it was final; that since its entry she had lived separate and apart from defendant and had not cohabited with him or forgiven him any of the offenses on which the finding of extreme cruelty was based; and that in the separate maintenance action she had been awarded custody of John Lee.

The divorce action and the matter of the determination of the amounts to be awarded for support were consolidated. At the opening of the trial, defendant demurred to the special defense of the plea of the decree of separate maintenance in the answer to the complaint for divorce, and moved to strike it. He argued that the decree was not a defense to the acts of cruelty alleged in his complaint—acts occurring subsequent to the entry of the decree of separate maintenance. The court overruled the demurrer and denied the motion. Over the objection of defendant, the court proceeded to determine the amounts to be awarded for support. The record in the separate maintenance action was received in evidence.

One set of findings was made applicable to the issues in the two actions. The court found: 1. Both plaintiff and defendant are fit and proper persons to have the custody of John Lee, but that the best interests of the child require that he be awarded to plaintiff. 2. In the separate maintenance action defendant was found to have been guilty of extreme cruelty toward plaintiff and she was awarded a decree of separate maintenance from him and was authorized to live separate and apart from him; that judgment has since become final as to the parts herein referred to. Since the entry of the decree, plaintiff has lived separate and apart from defendant and has not cohabited with him or forgiven him any of the offenses on which the finding of extreme cruelty was based. 3. Plaintiff, the cross-complainant in the divorce action, should be granted an interlocutory decree of divorce from defendant on the ground of extreme cruelty. 4. Defendant's allegations of plaintiff's cruelty in his complaint for divorce are untrue. 5. Defendant should pay plaintiff $175 a month for her support and maintenance. 6. Defendant should pay plaintiff $100 a month for the support and maintenance of John Lee during his minority. One judgment was rendered accordingly, applicable to the issues in the two actions. Defendant appeals.

[1, 2] At the conclusion of the trial and after both sides had rested, the court, over the objection of defendant, talked to John Lee in chambers without the presence of a reporter or counsel. The court did not state for the record what the conversation had been. Defendant contends the hearing in chambers was contrary to the statute, beyond the jurisdiction of the court, and a denial of due process. In Morris v. Morris, 121 Cal.App.2d 707, 264 P.2d 106, 107, we said: "There is nothing in the record as to any arrangement for the children to be interviewed by the court, although it is apparent that there was some agreement for it. The court made no statement of what the children had said in the interview. Plaintiff criticizes the practice as one which permitted the court to take evidence that was not known to the parties, or their attorneys. No request was made for a statement by the court. Nevertheless we think it would be the part of wisdom for the court to make a record of such interviews with children in custody cases in order to protect itself against any suspicion of unfairness on the part of the parent against whom the decision is rendered." We disapprove of the practice of a judge in a custody proceeding talking to a minor in private over the objection of either party. Such procedure may give rise to a serious constitutional question of due process. However, it did not in the case at bar.

The findings recite that "the Court talked privately in chambers to John Lee Jenkins, the minor child of the parties hereto, but the Court makes its findings of fact and conclusions of law herein solely on the basis of the evidence introduced in open Court at the trial of said consolidated actions." We must assume that the judge did what he said he did and that he based his findings solely on the evidence received in open court and not on his talk with John Lee. In view of that fact it cannot be said that the procedure was prejudicial.

Defendant next contends that the motion to strike the special defense of the separation decree should have been granted; and that plaintiff, having failed to prove further acts of cruelty since the date of that decree, is bound by her former remedy of separate maintenance.

[3–5] A decree of separate maintenance determines that as of the date of its entry the plaintiff was the innocent party and the defendant was the wrongdoer. It is a bar to a suit brought on facts that had occurred prior to its entry. Gough v. Gough, 101 Cal.App.2d 262, 268, 225 P.2d 668; Chirgwin v. Chirgwin, 26 Cal.App.2d 506, 79 P.2d 772. The fact that parties live apart after a decree of separation does not relieve them from their obligation to abstain from acts of cruelty towards one another. Williams v. Williams, 37 Ariz. 176, 291 P. 993. A cause of action for divorce may be grounded on acts of cruelty committed subsequent to the decree of separation. Cardinale v. Cardinale, 8 Cal.2d 762, 767–768, 68 P.2d 351; Cook v. Cook, 164 N.C. 272, 80 S.E. 178, 179, 49 L.R.A.,N.S., 1034; Zukerberg v. Zukerberg, 188 Md. 428, 53 A.2d 20, 22; 27 C.J.S., Divorce, § 174, p. 830; 17 Am. Jur. 400, § 489. Assuming, without deciding, that the defense of the decree of separate maintenance should have been stricken from the answer to the complaint and defendant's demurrer thereto sustained, the action of the court was not prejudicial since the court found that defendant did not prove his allegations of cruelty purportedly committed after entry of the decree of separate maintenance.

[6–8] A decree of separate maintenance in favor of a plaintiff does not bar the plaintiff's subsequent action for a divorce on the same ground. "[I]n the jurisdictions where it [the question] has arisen the holding has generally been that a decree of separation is not a bar to divorce on the same ground, that the two remedies are not inconsistent and the doctrine of election does not apply, that the two have different objects and effect, one is in a sense ancillary to the other, the cause of action is not the same, and there is therefore no merger of the cause of action." Kunze v. Kunze, 153 Minn. 5, 189 N.W. 447, 448, 25 A.L.R. 1045; Murdock v. Murdock, 148 App.Div. 564, 132 N.Y.S. 964, 966; Williams v. Williams, 33 Ariz. 367, 265 P. 87, 89, 61 A.L.R. 1264; 17 Am.Jur. (Supp.) 48, § 178.1; annotation 138 A.L.R. 367. See Slavinsky v. Slavinsky, 287 Mass. 28, 190 N.E. 826. The purpose of a suit for separate maintenance is to specifically enforce the general duty of the husband by directing certain definite payments to be made at regular intervals for the wife's support. The status of the parties may be restored by reconciliation, in which case the necessity for the separate maintenance would terminate. Civ.Code, § 137; Monroe v. Superior Court, 28 Cal.2d 427, 429, 170 P.2d 473; Johnson v. Johnson, 33 Cal.App. 93, 96, 164 P. 421. In Quagelli v. Quagelli, 99 Cal.App. 172, 277 P. 1089, the plaintiff in 1925 had obtained a decree of separate maintenance founded on extreme cruelty. There was no appeal from the judgment. Later plaintiff sued for a divorce on the grounds of cruelty, desertion, and habitual intemperance. The complaint contained specification of acts of cruelty running from 1913 to 1925. It was held that the decree of separate maintenance based on the finding of extreme cruelty was "conclusive evidence in the instant case to prove the charge of extreme cruelty. * * * Unless the defendant disproved the judgment in the maintenance action the issue on extreme cruelty must necessarily have been found for the plaintiff."

[9] In the present case, plaintiff pleaded the decree of separate maintenance,

the finding that defendant had been found guilty of extreme cruelty, that the decree had become final, and that since its entry she had lived separate and apart from defendant and had not cohabited with him or forgiven him any of the offenses on which the finding of cruelty was based. She prayed for a divorce. Defendant did not disprove the judgment of separate maintenance nor the other facts alleged. The court therefore properly found the issue of extreme cruelty in accordance with the decree in the maintenance action.

[10, 11] In defendent's complaint for divorce, he set forth twenty-two particulars allegedly constituting extreme cruelty on the part of plaintiff. The court found that these allegations were not true. He contends the finding is contrary to the evidence. Whether in any given case there has been extreme cruelty is a question of fact to be deduced from all the circumstances in the particular case, keeping always in mind the intelligence, refinement, and delicacy of sentiment of the complaining party. The finding of the trial court, based on any reasonable analysis of the facts and circumstances as shown by the evidence, will not be disturbed on appeal. Walker v. Walker, 108 Cal.App.2d 605, 607, 239 P.2d 106. No purpose would be served in detailing the evidence. Suffice it to say that it clearly appears from the record that the court did not believe the testimony of defendant. The trial court, with the witnesses before it, having determined that defendant's allegations of extreme cruelty were not true, that question is settled.

It is next contended that the findings are contradictory and uncertain in that it cannot be ascertained whether the finding against defendant's charge of cruelty was based on plaintiff's decree of separate maintenance or on a failure of his proof. The court specifically found that the allegations of extreme cruelty were not true. The finding was clearly based on defendant's failure to prove the acts of cruelty alleged in his complaint for divorce.

[12] Defendant says that the award of alimony cannot be justified in the light of his income and all the circumstances shown by the evidence. "Section 139 of the Civil Code provides that the court may compel the husband to make 'suitable allowance' for the wife, 'having regard to the circumstances of the parties respectively.' Such suitable allowance is a matter for the determination of the trial court, having in mind those circumstances. Barham v. Barham, 33 Cal.2d 416, 431, 202 P.2d 289. The amount to be paid by the husband is within the discretion of the trial court. Bowman v. Bowman, 29 Cal.2d 808, 811, 178 P.2d 751 [170 A.L.R. 246]." Thomasset v. Thomasset, 122 Cal.App.2d 116, 264 P.2d 626, 635. In fixing the allowance to the wife, the court may consider the earnings of the husband and his ability to earn money. Melny v. Melny, 90 Cal.App.2d 672, 678, 203 P.2d 588.

In the separate maintenance action, plaintiff received only a refrigerator, a deep freeze, and $700 for her share of the community property. Practically all of defendant's property is his separate estate. At the time of the second trial, in 1952, defendant had more property than he had at the first trial. He owns a 225 acre ranch near Santa Maria, the value of which he refused to estimate though he has owned it for thirty-two years. The ranch is encumbered to the extent of about $2,500. Half of the acreage is leased at a rental of $8,000 a year. He also owns two separate rental producing dwellings in the city of Santa Maria, the value of which he refused to estimate; he receives $55 a month rental from one that is partially furnished, and had, up to a week before the trial, received $60 from the other which is unfurnished. He owns approximately 21 shares of stock in the Pacific Gas and Electric Company, which were worth about $36 a share at the time of trial, and two shares in the Santa Maria Club, worth $200. He owns a half interest in the joint tenancy home—a five bedroom, four bath house—the value of which he refused to estimate though he did not repudiate plaintiff's estimate that her half interest was worth $20,000. He owns defense saving bonds in the sum of $10,000, has $3,000 in a checking account, and has between $3,000 and $3,500 in a savings account. He also owns two automobiles. He owes no debts—all the property being free of encumbrances except the ranch.

Defendant does not work, but claims to be dependent entirely on the income from his separate property. His gross income for 1952 was $12,111.60; the farm expenses $2,903.21, rental expenses $587, or a total of $3,490.21; leaving a net of $8,621.39 from which he purports to deduct $8,299.93 for personal expenses, leaving a net balance of $321.46. He claims that he requires $100 a month to live.

[13] We cannot say as a matter of law that the trial court abused its discretion in awarding plaintiff $175 a month for her support and $100 a month for the support of John Lee.

[14, 15] Defendant contends the finding that plaintiff should have the custody of John Lee, the sixteen year old son, is unsupported by the evidence. He claims that under subdivision 2 of section 138 of the Civil Code the boy should have been placed in his care and custody. This subdivision provides: "As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor or business, then to the father." The last clause does not give a father the absolute right to the custody of a child under such circumstances and conditions. See Scott v. Barnes, 118 Cal.App.2d 271, 275, 257 P.2d 700; Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268. The phrase "other things being equal" leaves a large measure of discretion with the trial court. Munson v. Munson, supra, 27 Cal.2d 666, 166 P.2d 268. In the first instance it is for that court to determine, after considering all the evidence, how the best interest of the child will be served. The question is to be determined solely from the standpoint of the child, and the feelings and desires of the contesting parents are not to be considered except in so far as they affect the best interests of the child. Taber v. Taber, 209 Cal. 755, 756–757, 290 P. 36.

The record in this case discloses no such abuse of discretion as would warrant a reviewing court in disturbing the award of custody to the mother.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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125 Cal.App.2d 34

HARGRAVE
v.
ACME TOOL & TESTER CO. et al.
Civ. 19914.

District Court of Appeal, Second District, Division 1, California.
May 4, 1954.

Rehearings Denied May 18 and 24, 1954.
Hearing Denied June 30, 1954.

Drilling crew member's action against testing company and others for injuries sustained when plug, used to cap upper open ends of drill pipe as equipment used in water shut-off test of harbor district well was being removed, fell and struck plaintiff. The Superior Court, Los Angeles County, Fred Miller, J., entered a judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence presented was sufficient to raise question of fact as to whether defendants, by their failure to supply proper plugs and safety chains and by permitting plaintiff to use makeshift plugs were guilty of negligence which was proximate cause of accident.

Reversed.

1. Negligence 🔑124(3)

Where evidence in drilling crew member's action against testing company and others for injuries sustained when plug, used to cap upper open ends of drill pipe as equipment used in water shut-off test of harbor district well was being removed, fell and struck plaintiff, clearly indicated that all parties were aware that plugs were required in making test and that plugs brought in by testing company had not fitted drill pipe being used, it was error to refuse to permit proof of custom for testing companies to furnish adequate plugs with chains and swivels. Public Resources Code, § 3220 et seq.

2. Negligence ⚿136(18, 25)

In drilling crew member's action against testing company and others for injuries sustained when plug, used to cap upper open ends of drill pipe as equipment used in water shut-off test of harbor district well was being removed, fell and struck plaintiff, evidence presented was sufficient to raise question of fact as to whether defendants, by their failure to supply proper plugs and safety chains and by permitting plaintiff to use makeshift plugs were guilty of negligence which was proximate cause of accident.

3. Trial ⚿139(1)

Trial court is justified in granting a nonsuit only when, disregarding conflicting evidence and giving plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from such evidence, there is no evidence of sufficient substantiality to support verdict for plaintiff.

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Russell H. Pray and William C. Price, Joseph A. Capalbo, Long Beach, of counsel, for appellant.

Ball, Hunt & Hart, Long Beach, for respondent Richfield Oil Co.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondents Acme and Vorhees.

DRAPEAU, Justice.

On July 16, 1950, plaintiff was one of a drilling crew employed by Loffland Brothers Company, an oil well drilling contractor. Said company had contracted to drill several wells for Richfield Oil Company. The latter company had a contract with the Harbor Department of the City of Long Beach to drill and operate numerous wells on city property in the harbor area.

As drilling operations on Well No. A–15 were nearing completion, to-wit: a depth of 3,400 feet, it was necessary to conduct a water shut-off test in compliance with section 3220 et seq., Public Resources Code. By the terms of its contract, Richfield was required to select the testing company. In this case, it selected defendant Acme Tool & Tester Company, which supplied the testing tools.

Defendant Hale was drilling foreman for Richfield, and defendant Watson was his sub-foreman or tool pusher. The Loffland drilling crew, working under drilling superintendent Dahlitz, consisted of five men: foreman Morris, derrick man Holcomb, and three floor men or rotary helpers: Steinberg, Chastain and the plaintiff, Hargrave.

In making the water shut-off test, it was necessary to attach the testing tool to the bottom of the drill pipe by threading it into the final joint at the lower end of a section of drill pipe, and then lower the tester to the desired depth; in this case, 2,000 feet below the surface.

Both the statute and the rules of Richfield required the use of caps or plugs in drilling wells in the harbor district. They were used in capping the drill pipe at the surface, as the pipe was being raised or pulled out of the well bore or "hole" and disconnected into sections or "stands". Their use was to prevent and protect against pollution and fire hazard, and also for safety of the crew.

Richfield had instructed Loffland to have available, and to use plugs in any operation that might cause a spillage.

In a majority of instances, the company furnishing the testing tools also furnished plugs and chains.

At the appointed time, Acme delivered the testing equipment and brought along two light weight plugs, weighing about 1½ pounds each, equipped with six to eight-foot chains, including swivels and snap catches. When the testing tool was ready for lowering into the hole, superintendent Dahlitz discovered that Acme's plugs were not the proper size to fit Loffland's drill pipe. As a result, Loffland's plugs were used. These weighed 25 pounds each. Also, when it was found that the chains furnished by Acme would not fit the bails or handles of the Loffland plugs, a length of one-inch manilla rope was spliced to the bail or handle of each plug.

The testing tool was lowered to the proper depth in the hole, the test was run, and then it was pulled up for a few feet to "break it loose." The drilling crew then commenced to raise it out of the hole, and in doing so, used the two Loffland plugs in capping the upper open ends of the drill pipe. As the men were all experienced, Dahlitz gave them no specific instructions. Neither did he instruct them concerning the manner of using the Loffland plugs.

In coming out of the hole, the crew screwed one of the plugs into the top of the drill pipe, which was held in position a short distance above the derrick floor. Then the free end of the rope (the other end being spliced to the bail of the plug) was tied to the elevator link by a bowline knot, which did not pinch or jamb and could be readily untied. The drill pipe was pulled up about 85 feet so it would be unjointed at the bottom of the third section. Three sections make up a stand, and this stand was then set to one side and racked.

The derrick man, Holcomb, who was in the derrick at about the level of the top of the stand, unscrewed the plug and let it hang from the elevator link by the short end of rope. In the meanwhile, the other plug was used to cap the next stand. When the elevator was lowered, the first plug was untied from the link and the second plug tied to it. This process was repeated several times without incident.

After the crew had commenced to "come out" with the testing tool, Dahlitz and Watson, the subforeman for Richfield, left for a field service office nearby. Dahlitz had observed part of the operations which had been carried on in the usual manner when such plugs were used.

Morris, the Loffland foreman, who was in immediate charge of the crew, decided that the untying and tying of the plugs were too slow and cumbersome. He directed that a cat-hook (a large, heavy hook with an eye at the top, and a spring latch closing the hook), should be tied to the casing hook just below the traveling block which held the elevator links; and that the free end of the plug rope should be tied to the bail of the plug, forming a rope loop attached to the bail. This was done. In resuming operations, the crew at the derrick floor, instead of tying or untying the rope, merely snapped or unsnapped the rope loop through the cat-hook.

After several more stands of pipe had been pulled out, and as the derrick man was removing the plug from the top of the stand in the upper position of the derrick, the rope loop for some reason got out of the cat-hook by twisting or some other means. It fell, and before the crew could get out of the way, the plug struck plaintiff Hargrave on the arm severely injuring him.

An examination made after the accident failed to show any failure or defect in the plug, the rope or the cat-hook, all of which were introduced in evidence.

Mr. Holcomb, the derrick man for Loffland, testified that "the cat hook was used in this case to give more length so the rope wouldn't twist so much. * * * I unscrewed the plug with my hands, and at that time with the length of the ropes, why it gave enough free movement to unscrew the plug completely. After this means was taken, you could unscrew the plug all the way out without it twisting so much. * * * I don't remember how many stands we pulled until the plug dropped. * * * It was just the same procedure over and over, pulling one stand and loosening the plug, and the elevators go back down again for another stand. * * Well, in twisting the plug out and unscrewing the plug the twist in the rope caused it to come out of the cat hook. * * * The plug dropped. * * * I was unaware of the fact that it was out of the cat hook because it was slightly over my head * * * and as I took the plug out of the pipe and reached over back of the elevator to turn it loose, I was surprised by the fact that it was out of the cat hook. It pulled out of my hand and dropped. * * * I hollered 'Watch out', but the plug fell pretty fast."

Appellant urges that the failure of Acme to provide the proper items in accordance with the custom in the field was negligence which proximately contributed to the accident. Further, that there was "ample evidence from which the jury could have inferred negligence on the part of Richfield in failing to provide the proper tools and in permitting the use of makeshift tools that were unsafe, contrary to their duty by both custom and contract to furnish such proper tools and safety devices."

In this connection, appellant points out that respondent Hale, drilling foreman for Richfield, testified (when examined under section 2055, C.C.P.) that he alerted Acme "that the test was coming up at an approximate time." He told them the type of drill pipe that was being used by Loffland, the type of threads in the pipe and the size, in order that the proper fittings could be brought with the tester. He personally instructed Loffland Brothers that they were to use plugs in connection with the tests. His subforeman or tool pusher, Watson, was charged with "supervising the drilling operations in drilling the well * * *. It is his responsibility to see that it is done in good oil field practice"; that the result of the water shut-off test was as Richfield wanted it, and that the right material and right tools were used in making the test.

In answer to the question: "As a matter of fact it would have been his duty to have stopped the operation if they had tried to remove the tester without caps or plugs?" he stated: "If he would have been aware of that, yes."

He also testified that Acme was ordered to make the test at the sole expense of Richfield.

On cross-examination, Mr. Hale stated that during the drilling operation, Loffland Brothers "received their instructions several times during each calendar day"; that he was advised by Richfield's engineering staff; and that a representative of the State Division of Oil and Gas, and a licensed engineer of Richfield were present when the water shut-off tests were made "to ascertain whether the test was successful and in accordance with the requirements."

Prior to the time that Mr. Hale telephoned Acme regarding making the test, he knew that Loffland had plugs for two sizes of pipe being used on the various wells. Also prior to the accident, Loffland "had been furnished a memorandum of written instructions concerning the drilling of the well by Richfield." Moreover, he had instructed Loffland to have plugs available and to use them. Previously he had seen Loffland Brothers using their own plugs.

On redirect examination, he was asked: "Now, Mr. Hale, I take it that if you gave them instructions about the use of these plugs that Richfield reserved the right to instruct them upon the use of the plugs, didn't they?" To this he answered: "Not the manner they were used."

At this point, appellant sought to elicit testimony from Mr. Hale to the effect that the Haliburton and Johnson companies who also maintained and rented testers in this field, customarily furnished plugs to cap the top of the drill pipe when their testers were being pulled. This testimony was first permitted and then struck by the court and objections sustained, even though appellant offered to prove that Loffland "never did use their own plugs" when testing, and "didn't even have plugs", but that the tester companies brought their own plugs with them.

Mr. Hale was permitted to testify that plugs were not provided by other tester companies on all occasions, but were provided on some occasions. However, the court sustained an objection to appellant's question: "On the majority of occasions where a tester was used, the tester company furnished the plugs, isn't that right?"

Paul Dahlitz, drilling foreman for Loffland, testified that because the Acme plugs did not fit the drill pipe, they used Loffland plugs. Appellant inquired of him: "What is the custom with regard to the tester company furnishing plugs with the tester tool and tester?" And made an offer of proof of such custom. To this the court sustained respondents' objection that there was a direct showing that if there was such a custom, the parties knew it was not being conformed to. Therefore, whether such custom existed was irrelevant and immaterial.

[1] The evidence clearly indicates that all parties were aware that plugs were required in making the test and that the light weight plugs brought in by Acme did not fit the Loffland pipe. If, as appellant asserts, a custom existed in the field for the tester company to furnish adequate plugs with chains and swivels, evidence thereof and failure to observe it is admissible on the question of negligence. Miller v. Midway Fishing Tool Co., 106 Cal.App.2d 612, 614, 235 P.2d 630, 631, where it was stated:

"The rule is well established that evidence of the custom of a trade is ordinarily admissible in negligence cases where it has a bearing on either negligence or contributory negligence. Fowler v. Key System Transit Lines, 37 Cal.2d 65, 230 P.2d 339; 38 Am.Jur., Negligence, sec. 317. In Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 108 P.2d 738, 743, hearing denied, the court said: 'Where the issue is one of negligence in the performance or failure to perform some act, it is clear that evidence of the ordinary practice and custom which is generally followed in the performance of such act under the same or similar circumstances is competent. Thomas v. Southern Pacific Co., 116 Cal.App. 126, 2 P.2d 544; Hennesey v. Bingham, 125 Cal. 627, 58 P. 200.'" See, also, Covely v. C.A.B. Construction Co., 110 Cal.App.2d 30, 32, 242 P.2d 87.

Refusal to permit proof of custom was erroneous.

Respondents concede that on this appeal from a judgment of nonsuit, the evidence must be viewed in the light most favorable to appellant.

[2] Such evidence shows that Richfield not only hired Acme to supply the tools to make the test, but that both Acme and Richfield were present and participating in the testing operation. Moreover, Richfield retained the right to control and give instructions for the test to be made, timed it and gave instructions for the removal of the tester. This court is of the opinion that the evidence presented was sufficient to raise the question of fact: whether respondents by their failure to supply the proper plugs and safety chains and by permitting appellant to use the makeshift plugs, were guilty of negligence which was the proximate cause of the accident.

As stated in Blumberg v. M. & T. Incorporated, 34 Cal.2d 226, 229, 209 P.2d 1, 3:

[3] "A trial court is justified in granting a motion for nonsuit '* * * when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff.' Card v. Boms, 210 Cal. 200, 202, 291 P. 190, 191; see also Hale v. Depaoli, 33 Cal.2d 228 [229], 201 P.2d 1 [13 A.L.R.2d 183]; Neel v. Mannings, Inc., 19 Cal.2d 647, 650, 122 P.2d 576; Estate of Lances, 216 Cal. 397, 401, 14 P.2d 768. As stated in Estate of Lances, supra, 216 Cal. [at] page 400, 14 P.2d [768] page 769, 'Unless it can be said as a matter of law that * * * no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal, or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury.'"

For the reasons stated, the judgment is reversed.

WHITE, P. J., and DORAN, J., concur.

125 Cal.App.2d 83

PEOPLE v. BROWN.

Cr. 961.

District Court of Appeal, Fourth District, California.

May 7, 1954.

Rehearing Denied May 21, 1954.

Hearing Denied June 2, 1954.

Defendant was convicted of perjury. The Superior Court, Riverside County, O. K. Morton, J., entered judgment, and defendant appealed. The District Court of Appeal, Mussell, J., held that an oath administered in connection with the obtaining of a certificate of registry of marriage was one authorized or required by law, so as to constitute the making of false statements in such certificate perjury.

Judgment affirmed.

1. Perjury ⚷5

A conviction for perjury will be sustained where oath in question is either authorized or required. Pen.Code, § 118.

2. Perjury ⚷5

Oath administered in connection with the obtaining of a certificate of registry of marriage was one authorized or required by law, so as to constitute the making of false statements in such certificate perjury. Pen. Code, § 118; Civ.Code, §§ 69, 69a; Health and Safety Code, § 10526.

3. Statutes ⚷223.2(23)

Code provisions relative to obtaining of marriage license and certificate of registry of marriage should be construed together and harmonized wherever possible. Civ. Code, §§ 69, 69a, 72; Health and Safety Code, §§ 10000, 10029, 10030, 10526.

4. Perjury ⚷10

Where defendant stated before officer having authority to administer oaths that the facts set forth in certificate of registry of marriage were true, and officer thereupon certified that such information was subscribed and sworn to before her, and read oath contained in certificate to defendant, oath was properly administered, and fact that it did not appear how defendant responded, or that the words "oath", "swear" or "depose" were used, was no defense to prosecution for perjury arising out of false statements made by defendant in such certificate. Pen.Code, §§ 118, 121; Government Code, § 24057; Civ.Code, §§ 69, 69a; Health and Safety Code, § 10526.

◆

Herz & Fredman, Homer F. Herz, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Alan R. Woodward, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was found guilty by the court, sitting without a jury, of the crime of perjury as defined in Penal Code section 118, in that he did knowingly, corruptly, falsely and feloniously say, declare, depose and state as true in a certificate of registry of marriage that he was a single man and that he had never been married, and that the said defendant then and there knew said statements, declarations and things so given, sworn to and stated by him in said certificate of registry of marriage were then and there false and untrue in that he did at said time have a lawful wife then living. Defendant was sentenced to the state prison. The sentence was suspended and probation was granted on certain terms and conditions.

On May 24, 1953, Patricia Donahue, then twenty-nine years of age, entered into a marriage contract with defendant and a marriage ceremony was performed in Arlington, California. Previously, on March 30, 1953, defendant and Miss Donahue appeared at the office of the county clerk in Riverside and there applied for, signed and obtained a certificate of registry of marriage as required by sections 69 and 69a of the Civil Code. Both defendant and Miss Donahue were asked by the deputy county clerk who waited upon them to state their names, ages, residences and places of birth; whether they or either of them had ever been married, widowed, divorced or had a marriage annulled. The answers to these questions were then set forth in the certificate by the deputy clerk, who handed it to the parties and asked them to see that the information given was correct. Defendant and Miss Donahue signed the certificate and returned it to the deputy clerk to administer the oath. Both applicants raised their right hands at the request of the clerk and the following portion of the certificate was read to them:

> "We, the bride and groom named in this certificate, each for himself, state that the foregoing information is correct to the best of our knowledge and belief, that no legal objection to the marriage nor to the issuance of a license to authorize the same is known to us, and hereby apply for license to marry."

The certificate was then signed by the deputy clerk as subscribed and sworn to on March 30, 1953, and the clerk's seal was put upon it. Defendant stated in the certificate that he had not been previously married, when in fact he then had a lawful living wife and this fact was stipulated by the parties at the trial.

The principal question raised by this appeal is whether the oath administered herein was authorized or required by law.

[1, 2] A conviction for perjury under Penal Code section 118 will be sustained where the oath in question is "either authorized or required", People v. Godines, 17 Cal.App.2d 721, 724, 62 P.2d 787, 789, and it seems clear to us that the oath here involved is authorized by sections 69 and 69a of the Civil Code and section 10526 of the Health and Safety Code. Said section 69 provides for the issuance of marriage licenses and requires that the license must show: (1) The identity of the parties; (2) their real and full names, and places of residence; (3) their ages; (4) whether white, Mongolian, Negro, Malayan or mulatto. Section 69 further provides:

> "* * * For the purpose of ascertaining all the facts mentioned or required in this section, the clerk, at the time the license is applied for may, if he deems it necessary in order to satisfy himself as to matters enumerated in this section, examine the applicants for a license on oath, which examination shall be reduced to writing by the clerk, and subscribed by them.
>
> "The forms for the application for license to marry and the marriage license shall be prescribed by the State Department of Public Health, and shall be adapted to set forth the facts required in this section. * * *"

Civil Code section 69a provides:

> "All persons about to be joined in marriage must obtain from the county clerk of the county in which the license is issued, in addition to the license therefor provided for in Section 69 of the Civil Code, a certificate of registry of marriage as provided in Section 10526 of the Health and Safety Code containing the items therein listed which certificate of registry of marriage shall be filled out as provided, in the presence of the county clerk issuing the marriage license and shall then be presented to the person performing the ceremony who shall complete the certificate thereon and shall cause to be entered thereon the signature and address of one witness to the marriage ceremony. Such certificate of registry of marriage shall be filed by the person performing the ceremony with the local registrar for marriages (county recorder) of the county in which the license was issued within four days after the ceremony."

Section 10526 of the Health and Safety Code provides:

> "The form of the certificate shall be prescribed by the State Registrar and shall contain among other matters as near as can be ascertained:
>
> "(a) The place and date of marriage.
>
> "(b) The race, color, age, name, and surname, birthplace, and residence of the parties married.
>
> "(c) The number of marriages and condition of each party, whether single, widowed or divorced.
>
> "(d) The maiden name of the female, if previously married.

> "(e) The names and birthplaces of the parents of each, and the maiden name of the mother of each.
>
> "(f) The county where issued, date issued, and number of the marriage license.
>
> "(g) The certification of the person performing the ceremony, which shall show his official position including the denomination if he is a priest or minister.
>
> "(h) The signature and address of one witness to the marriage ceremony."

Section 72 of the Civil Code provides:

> "The person solemnizing a marriage must first require the presentation of the marriage license; and if he has any reason to doubt the correctness of its statement of facts, he must first satisfy himself of its correctness, and for that purpose he may administer oaths and examine the parties and witnesses in like manner as the county clerk does before issuing the license."

It is apparent that all of the information required by said section 69 of the code is also required by section 10526 of the Health and Safety Code. The oath provisions of section 69 are not repeated in section 69a or in said section 10526. However, section 69a, in specifically referring to section 10526, clearly authorizes the certificate of registry of marriage. Section 69 of the Civil Code which expressly authorizes the oath as to the matters enumerated therein provides that the forms for the application for license to marry and the marriage license shall be prescribed by the State Department of Public Health. This department has compiled the information to be obtained under section 69 of the Civil Code with the requirements of the certificate of registry of marriage as provided by section 10526 of the Health and Safety Code, thus making one document instead of two. The director of public health, as state registrar of vital statistics, is charged with the enforcement of provisions relating to vital statistics and given authority to promulgate additional regulations for such enforcement. Sec. 10000, Health and Safety Code. The department is charged with the preparation and distribution of all forms for use in carrying out the purposes of division IX, section 10029, of that code and it is provided that no forms or blanks other than those prepared by the director of public health shall be used. Sec. 10030, Health and Safety Code.

[3] All of the cited code provisions should be construed together and harmonized wherever possible. R. C. A. Photophone, Inc., v. Huffman, 5 Cal.App.2d 401, 42 P.2d 1059. The director of public health has included the oath involved in the form prepared by the department under statutory authority in furtherance of his duty to direct a thorough and uniform enforcement of the provisions of the Health and Safety Code relating to vital statistics.

In People v. Torterice, 66 Cal.App. 115, 119, 225 P. 760, 762, a conviction for perjury was upheld where defendant made and subscribed his name to an affidavit which stated that one Jennie Patt was of the age of nineteen years when in fact she was only seventeen. The court said: "It thus appears that the oath was administered in a case provided by law, and related to a material matter concerning which, according to the information, the defendant knew that his statement was false."

In State ex rel. Richardson v. Lawrence, 120 Fla. 836, 163 So. 231, annotated in 101 A.L.R. 1263 it was held that the affidavit required by the county judge of an applicant for a marriage license, in the exercise of his power to determine the status of persons applying for a license, will, although not expressly required by statute, support a charge of perjury.

In People v. Ziady, 8 Cal.2d 149, 153–154, 64 P.2d 425, 108 A.L.R. 1234, it was held that a felony prosecution for perjury may be predicated upon a false statement in an affidavit when the only requirement for such an affidavit is by virtue of a provision of an ordinance of the board of supervisors of a county. The court therein quoted from United States v. Smull, 236 U.S. 405, 408, 35 S.Ct. 349, 59 L.Ed. 641, in which it was held that a charge of perjury may be based upon section 125 of the Criminal Code where the affidavit is required either expressly by an act of Congress or by an authorized regulation of the General Land Office, and is known by the affiant to be false in a material statement. See, also, State v. Whitlock, 138 Kan. 602, 27 P.2d 262, wherein it was held that an oath given to an applicant required by an administrative board, such as the Soldiers Compensation Board, pursuant to a statute authorizing the board to establish rules for proof of the claim was legally administered so as to furnish an adequate basis for perjury, and Field v. State, 29 Ohio C.C. 302, in which the statute provided that applicants for marriage license should state under oath certain enumerated things and then provided "and shall also state", among other things, the number of times either party has been previously married. The court held that by such statute it was intended that all of the statements given by the applicant should be under oath and that when defendant falsely stated that he had not been previously married he was guilty of perjury.

[4] Defendant contends that no oath was administered since the statement contained in the certificate of registry of marriage was read to him while his hand was raised but at no time were the words "oath", "swear" or "depose" used by the clerk and that it does not appear how the applicant responded. However, section 121 of the Penal Code provides:

> "It is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered."

The deputy county clerk has authority to administer oaths. Sec. 24057, Government Code. The uncontradicted evidence shows that the defendant stated, with his right hand raised, that the facts set forth in the certificate were true and that he appended his signature to the certificate containing the following statement:

> "We, the bride and groom named in this certificate, each for himself, state that the foregoing information is correct to the best of our knowledge and belief, that no legal objection to the marriage nor to the issuance of a license to authorize the same is known to us, and hereby apply for license to marry."

After receiving this information, the deputy clerk certified that the information contained in the certificate was subscribed and sworn to before her and the oath contained in the certificate was read to defendant after he had signed the appropriate place. This evidence was amply sufficient to support the conclusion that an oath was administered as required by the statute.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

125 Cal.App.2d 144

PEOPLE v. PEDROZA.

Cr. 5159.

District Court of Appeal, Second District, Division 2, California.

May 11, 1954.

Hearing Denied June 9, 1954.

Defendant was convicted of the unlawful possession of a narcotic. The Superior Court, Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and denied defendant's motion for a new trial. Defendant appealed. The District Court of Appeal, Moore, P. J., held that court did not err in failing to instruct on circumstantial evidence where record established that evidence on which defendant had been convicted was all direct, and not circumstantial, evidence.

Affirmed.

1. Criminal Law 🔑552(1)

A conviction can be properly based on circumstantial evidence.

2. Criminal Law ⚿814(17)

On issue as to propriety of court's failure to instruct on circumstantial evidence in prosecution for unlawful possession of a narcotic, record established that evidence on which defendant had been convicted was all direct. Health and Safety Code, § 11500.

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Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

The sole question posed on this appeal is whether the court erred in refusing to instruct the jury on the law as it relates to circumstantial evidence.

Appellant was arrested while in a room which contained heroin which was in the possession of appellant at the time the officers entered. Appellant admitted prior narcotic and robbery convictions; he "does not challenge the sufficiency of the evidence" to support the judgment here on appeal. He contends, however, that the evidence is not direct but circumstantial in regards to his possession of narcotics and he contends that the jury should have been instructed as to the meaning of circumstantial evidence. He concedes that if the evidence adduced against him by the prosecution had been believed by the jury, he would have been convicted, but he contends that the evidence is such that if the jury had been properly instructed, he would not have been convicted.

[1] Conceding, arguendo, that the evidence was circumstantial, this fact would not necessarily have induced a verdict of acquittal. But the evidence was not circumstantial. It was direct. The officers entered room 336 in the Y.M.C.A. at San Pedro, occupied at the time by appellant and one Marrato. Appellant stood a foot from the window; Marrato was behind the door. Appellant at once made a backward swing of his arm, as if to throw out a light colored object. A small square piece of paper containing brown powder lay on a table. Officer Steele folded the paper with the powder, sealed it and enclosed it in a large envelope. Officer Harvey descended to the ground below the window and after a search finally discovered a rubber latex bag tied in a knot. The bag was also sealed in an envelope and booked at the property desk of the Harbor Division of the Los Angeles Police Department. In response to the inquiries of the officers, one of the men stated that the powder on their hands was talcum. A search by the officers disclosed no talc in the room.

Two days later, Officer Dill conversed with appellant at the jail. The latter at first stated that he knew nothing of the "stuff" the officers had found. But a half hour later while Officer Dill and Sergeant Logue were transporting appellant and Marrato, appellant freely and voluntarily told them the powder was his and that he had thrown the latex bag out the window; that he had been in the room "to paper the stuff up." Police chemist Joncich with a university degree and 700 experiences in testifying as an expert testified how he had run a series of tests on the brown powder and had concluded that it contained heroin. His tests on the contents of the latex bag revealed them to be heroin.

[2] Such proof is not circumstantial. It is all direct evidence. The arresting officers found appellant in possession of the powder. Its analysis proved it to be heroin after having been carefully kept under seal until it was delivered to the chemist Joncich. Where a suspect at the time of his arrest moves as though he were throwing something out of a window and the officer retrieves an object and has it analyzed by a competent chemist and the latter testifies the contents of the cast-away package are heroin, and the defendant admits he threw the package out, and the jury believes such testimony, the accused is thereby convicted on direct evidence of having violated section 11500 of the Health and Safety Code. People v. Monge, 109 Cal.App.2d 141, 240 P.2d 432; People v. Agajanian, 97 Cal.App.2d 399, 403, 218 P.2d 114. In such event there is no need for instructions on circumstantial evidence. Therefore, it was

not error to reject instructions with reference to circumstantial evidence.

The judgment and order denying appellant's motion for a new trial are affirmed.

McCOMB and FOX, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

125 Cal.App.2d 120

SHULMAN v. SHULMAN.

Civ. 15857.

District Court of Appeal, First District, Division 1, California.

May 11, 1954.

Proceedings on application by plaintiff and defendant for modification of an alimony and support order arising out of a divorce suit. The Superior Court in and for the County of Alameda, Chris B. Fox, J., entered order of modification, and plaintiff appealed. The District Court of Appeal, McMurray, J., pro tem, held that evidence warranted modification by reduction of amount of alimony and support which defendant was required to pay.

Order affirmed.

1. Divorce 🔑245(3), 309

In proceeding on applications by both plaintiff and defendant for modification of alimony and support provisions of divorce decree, evidence warranted a reduction of the amount of support for plaintiff and minor daughter from $240 per month to $150 per month.

2. Divorce 🔑245(3), 309

On application by husband for modification of alimony and support provision of divorce decree, sale of property by husband to meet provisions of existing alimony and support order, and borrowing on his personal property, could properly be considered in determining whether amount of alimony and support should be reduced.

3. Divorce 🔑286

It is not the province of reviewing court, on appeal after modification of order awarding alimony, to judge the credibility of witnesses.

4. Divorce 🔑245(3), 286

The modification of an award of alimony rests within discretion of trial court, and its order may not be set aside without a clear showing of an abuse of discretion. Civ.Code, § 139.

Pearl L. Shulman, in pro. per.

Desky & Lindsay, Monroe Friedman, Elaine F. Nemer, Oakland, for respondent.

McMURRAY, Justice pro tem.

On January 4, 1951, plaintiff obtained "Final Judgment of Divorce" from defendant, wherein defendant was ordered to pay the sum of $280 per month for alimony and support of the two minor children of the parties. One of these children reached majority and the amount of monthly payment was reduced thereby to $240. In May, 1951, both parties filed affidavits and requests for modification of the support payments, the plaintiff seeking to have such payments increased, the defendant seeking to have them decreased. After hearing in June, 1951, both of these requests were denied. In November, 1952, defendant filed his affidavit and request for a decrease of support and in January, 1953, plaintiff filed her affidavit and request for an increase of support. Both of these requests were heard in January, 1953, and the court modified the final decree of divorce by reducing the amount of support for plaintiff and the minor daughter from $240 per month to $150 per month.

Plaintiff appeals from this order.

The record does not include any transcripts of the original divorce action or of the proceedings on the former applications for modification of the divorce decree. Appellant has, however, incorporated in her briefs certain excerpts from these earlier proceedings, which are not, of course, properly before us at this time.

Appellant contends that the court erred in ordering the modification of the decree, without having before it any evidence of change of condition of the parties since the last hearing requesting modification. She cites Snyder v. Snyder, 219 Cal. 80, 25 P.2d 403, for this proposition. That case does so hold, but here the record affirmatively shows evidence of change in condition since the prior hearing. There is testimony that respondent's income for the year 1951 was $3,156.43, and that during that year respondent paid appellant $2,880, and that in 1951 defendant sold a diamond ring in order to realize $1,500. It also appears that appellant in October, 1951, transferred her home to her sister without consideration, although this house was worth $11,000 less an encumbrance of $2,500.

In 1952 respondent's earnings from his junk business amounted to $3,241.34, of which amount, after depreciation, $2,504.50 was taxable profit. Respondent paid appellant approximately $2,700 under the court's order and found it necessary to borrow $2,000 from a bank, giving a mortgage on his automobile and truck to secure payment, and also borrowed $1,000 from a private individual in the same year. Respondent during the entire period here in question has been in a wheel chair and consequently requires more money for living expenses than if he were not so afflicted.

[1, 2] The sale of the ring and the necessity of borrowing on his personal property show a change of condition sufficient to justify the court's order here. These latter transactions all took place after the first hearing for modification, and resulted in increasing respondent's obligations by a substantial amount. This is a proper subject for consideration on an application for modification of an order awarding alimony. Becker v. Becker, 64 Cal.App.2d 239, 148 P.2d 381.

Appellant further contends that the court erred in shifting the burden of proof to her, but a thorough reading of the record shows no such shift. Appellant also complains of testimony of respondent's accountant based on certain notations. The evidence was admitted without objection and was based upon business entries, informal though they were. The other points urged by appellant show a misunderstanding of the law.

[3] In essence, appellant's position is that the evidence is not credible. It is not the province of this court to judge the credibility of witnesses.

[4] "It is clear that a modification of an award pursuant to section 139 of the Civil Code, * * * rests within the discretion of the court, and its order may not be set aside without a clear showing of an abuse of discretion." Leupe v. Leupe, 21 Cal.2d 145, 151, 130 P.2d 697, 700.

The order appealed from is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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125 Cal.App.2d 138

PEOPLE v. KISS.

Cr. 5146.

District Court of Appeal, Second District, Division 2, California.

May 11, 1954.

Defendant was convicted of driving an automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another. The Superior Court, Los Angeles County, Edwin L. Jefferson, J., suspended proceedings at conclusion of the trial and granted defendant probation for three years, subject to prescribed conditions, and denied defendant's motion for a new trial. Defendant appealed. The District Court of Appeal, Moore, P. J., held that defendant's conviction was sustained by the evidence.

Appeal from the sentence dismissed; judgment granting probation and order denying motion for new trial affirmed.

1. Criminal Law ⟹1023(12)

Where defendant was convicted of driving an automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another, but at conclusion of trial proceedings were suspended and accused granted probation for a period of three years subject to prescribed conditions, sentence was not appealable. Pen.Code, § 1237.

2. Automobiles ⟹355(6)

Evidence sustained conviction of driving an automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another. Vehicle Code, § 501; Pen.Code, §§ 501, 1237.

3. Criminal Law ⟹1144(13)

On appeal, reviewing court must accept testimony supporting criminal conviction.

4. Criminal Law ⟹394

Even if violence was applied to defendant to induce his cooperation in taking intoximeter test, results of intoximeter test were lawful and admissible in prosecution of defendant for driving an automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another. Vehicle Code, § 501; Pen.Code, §§ 501, 1237.

5. Criminal Law ⟹394

Evidence illegally obtained from the premises or the person of an accused is admissible against him in a prosecution for violation of state law in a state court.

6. Constitutional Law ⟹266

Due process as guaranteed by the Fourteenth Amendment does not inhibit the admission of illegally obtained evidence in state courts. U.S.C.A.Const. Amend. 14.

7. Courts ⟹97(1)

The policy of the state of California in admitting illegally obtained evidence in prosecutions in state courts for state offenses cannot be altered by the highest federal court.

8. Criminal Law ⟹394

The taking of evidence from one suspected of crime is not in itself unlawful and such evidence will be excluded only where the accused is, by threats and punishment, so terrorized into submission that to admit the evidence would be a mockery and a pretense of a trial.

9. Criminal Law ⟹1169(1)

Even if results of intoximeter test were improperly admitted into evidence because of violence used in obtaining such evidence, reversal was not warranted, where testimony of prior witnesses had already established that defendant had been under the influence of intoxicating liquor at time of accident. Vehicle Code, § 501; Pen.Code §§ 501, 1237

10. Criminal Law ⟹31

Custom of motorists or of any other class of citizens is no excuse for violating the law.

11. Negligence ⟹5

A custom of negligence does not excuse it in anyone.

12. Criminal Law ⟹808½

Even though Vehicle Code § 525(a) relating to portion of roadway upon which a motor vehicle shall be driven, is evidently intended to apply to motorists traveling in the same direction, court did not err in reading such subsection to jury in prosecution for driving automobile while under the influence of intoxicating liquor and in an unlawful manner, where defendant and party with whom he collided were going in opposite directions. Vehicle Code, § 525(a).

13. Criminal Law ⟹823(1)

Even if it was error for court, in prosecution for driving automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another, to read to jury Vehicle Code subsection relating to part of roadway motor vehicles shall occupy in going one way, such error was cured by reading of motor vehicle code relating to position motor vehicles shall occupy when meeting other vehicles. Vehicle Code, §§ 525(a), 527(a).

14. Criminal Law ⚿829(1)

Court's refusal to give requested instruction in prosecution for driving automobile under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to another was cured by the giving of an instruction appropriately covering the facts proved. Vehicle Code, § 501.

15. Criminal Law ⚿736(1)

Admissibility of proof is for the court to determine.

16. Criminal Law ⚿473

In prosecution for driving an automobile while under the influence of intoxicating liquor in an unlawful manner proximately causing bodily injury to another, admission of testimony of forensic chemist that the contents of a balloon used in making intoximeter test can determine whether another is under the influence of intoxicating liquors, and that intoximeter results showed defendant's blood alcohol concentrate to be sufficient to place a person under the influence of alcohol, was proper. Vehicle Code, § 501.

◆

Richard E. Erwin, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Martin M. Ostrow, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

[1] Defendant appeals from a conviction of violating section 501 of the Vehicle Code. The information accused him of driving an automobile while under the influence of intoxicating liquor and in an unlawful manner proximately causing bodily injury to one George Collier. Such crime is a felony. But at the conclusion of the trial, proceedings were suspended and the accused was granted probation for a period of three years subject to prescribed conditions. The appeal is "from the judgment and sentence, and from the order denying defendant's motion for a new trial." The judgment is an order granting probation. Penal Code, § 1237. The sentence is nonappealable.

The evidence is sufficient

The unfortunate event occurred in the night time on a public boulevard of Los Angeles. As Collier was driving northerly on the east side of the street, and four feet from the center, he stopped when he saw appellant approaching, but was crushed by the latter's car. He suffered injury to his chest and a compound fracture of his left knee which required the surgical removal of half of his kneecap.

That appellant was drunk was established by a cloud of witnesses. Officer Ogg of the Accident Investigation Division of the Los Angeles Police Department testified that he took measurements at the scene of the accident. He found the point of impact was about five feet east of the center line. The witness Sichler driving behind Collier saw appellant coming southward, cross over into the northbound lane and collide with the Collier car. Officer Barone testified that he had followed appellant going at 30 miles per hour for half a mile; saw him speed up and waver from the west side to the east side; drift over the center two or three times and once to the easterly curb, and finally collide head-on with the Collier vehicle, while the latter was four feet east of the center line.

That appellant was under the influence of intoxicating liquor was proved by scientific as well as nonexpert evidence. Miss Sichler tried to talk to him. He was incoherent. Officer Barone conversed with appellant after the collision. His speech was thick and the officer's opinion was that he was drunk. Officer Ogg talked with appellant at the hospital forty five minutes after the collision, found his breath strongly alcoholic, his eyes bloodshot, and his speech slurred. He told the officer that he had consumed two bottles of beer; that he was not driving on the wrong side of the street at the time he collided, but Collier was; that he could not walk a line because he had been hurt.

The officer applied the intoximeter test to appellant by having him blow into a balloon and sealing it at 12:30 a. m. when he told the officer that he had drunk nothing after the accident. The witness Geraldine Lambert is a forensic chemist. She testified that it can be determined from the contents of a balloon used in making the intoximeter test whether a person thereby tested is under the influence of intoxicating liquors; that her analysis of the sample taken from appellant revealed a twenty per cent "blood alcohol concentration" and that such amount of alcohol in the body of a person causes him to be definitely under the influence of alcohol. It was her opinion that if the test shows twenty per cent blood-alcohol concentration an hour and forty-five minutes after an accident, and the person tested had taken in no alcohol in the meantime, then, at the time of the accident, the amount of alcohol in his blood was about 22 per cent. It was her opinion that the intoximeter test showed appellant had consumed at least eight glasses of beer.

Appellant testified that he had been struck by an officer in the face and stomach before the intoximeter test; that he submitted to the test because he was afraid he would be again beaten by the officers. Officer Ogg testified that appellant had made no complaint to him of having been mistreated by any one. The testimony of the forensic chemist was enough to prove appellant's being under the influence of intoxicating liquor, but if such testimony were stricken the testimony of the other witnesses would support the verdict as to appellant's intoxication.

[2] But appellant's guilt was not merely as to his intoxication. It was necessary to prove and it was proved that he did an unlawful act besides driving while intoxicated. He drove upon the left side of the main portion of the highway instead of keeping to the right of its center. Also, he drove in an erratic manner. Finally, by reason of such unlawful behavior, he caused bodily injury to Mr. Collier. He was therefore guilty of violating section 501, supra. In re Ryan, 61 Cal.App.2d 310, 313, 142 P.2d 769.

No prejudice caused by rulings on admissibility

[3] Appellant contends that he was prejudiced by the court's overruling his objection to the introduction of the intoximeter test; that after an argument an officer struck him and left a bruise on his stomach; that he submitted to the intoximeter test by reason of his fear of other punishment. While Officer Ogg contradicted appellant's testimony and proved that appellant was cooperative in taking the test, and the jury evidently believed him, the testimony supporting the judgment must be accepted here as it was by the trial court. People v. Frederick, 109 Cal.App.2d 897, 901, 241 P.2d 1039.

[4–8] But conceding that violence was applied to appellant to induce his cooperation in taking the test, its results are nonetheless lawful and admissible. People v. Gonzales, 20 Cal.2d 165, 169, 124 P.2d 44. Such evidence though illegally obtained from the premises or the person of an accused is admissible against him. In re Polizzotto, 188 Cal. 410, 411, 205 P.2d 676; People v. Oreck, 74 Cal.App.2d 215, 217, 168 P.2d 186; People v. Martin, 70 Cal.App. 271, 273, 233 P. 85. Due process as guaranteed by the Fourteenth Amendment does not inhibit the admission of illegally obtained evidence in state courts. Wolf v. People of State of Colorado, 338 U.S. 25, 33, 69 S.Ct. 1359, 93 L.Ed. 1782. Such is the policy of this state which cannot be altered by the highest federal court. Wolf v. People of State of Colorado, supra. The taking of evidence from one suspected of crime is not in itself unlawful. It will be excluded only where the accused is by threats and punishment so terrorized into submission that to admit it would be a mockery and a pretense of a trial. Rochin v. People of State of California, 342 U.S. 165, 173, 72 S.Ct. 205, 96 L.Ed. 183; People v. Kendall, 111 Cal.App.2d 204, 215, 244 P.2d 418. No such conduct is found to have preceded the intoximeter test of appellant.

[9] The results of the test for drunkenness were received to prove the inebriated condition of appellant, one of the factors

of his guilt. It had no part in proving that Mr. Collier was seriously injured; that appellant drove on the wrong side of the street and collided head-on with the automobile of another. Before the intoximeter test had been disclosed to the jury, the testimony of the several witnesses already recited had established that appellant was under the influence of intoxicating liquor. That he was guilty as charged was faithfully proved. People v. Dawes, 37 Cal.App.2d 44, 48, 98 P.2d 787.

[10, 11] But appellant sought to prove that in driving on the left side of the "mainly traveled portion of the street"[1] at the point of the collision, he did as is the custom of motorists in rounding the curve in the street. Custom of motorists or of any other class of citizens is no excuse for violating the law. Mehollin v. Ysuchiyama, 11 Cal. 2d 53, 57, 77 P.2d 855; Reinders v. Olsen, 60 Cal.App. 764, 771, 214 P. 268. A custom of negligence does not excuse it in any one. County of Alameda v. Tieslau, 44 Cal.App. 332, 339, 186 P. 398; Phoenix Assur. Co. v. Texas Holding Co., 81 Cal. App. 61, 75, 252 P. 1082.

Instructions

[12, 13] Appellant assigns as error the court's reading to the jury section 525(a) of the Vehicle Code.[2] While such section is evidently intended to apply to motorists traveling in the same direction, it is not error to read it where they were going in opposite directions. Crooks v. White, 107 Cal.App. 304, 312, 290 P. 497; Neilson v. Walker, 105 Cal.App. 23, 27, 286 P. 1091. See Morrison v. Jose, 57 Cal.App.2d 795, 801, 135 P.2d 586. Even if it were error to read section 525 to the jury, it was cured by the reading of section 527(a) which requires cars proceeding in opposite directions to "pass each other to the right" and "each driver shall give to the other at least one-half of the main traveled portion of the roadway whenever possible." Bennett v. Chandler, 52 Cal.App.2d 255, 263, 126 P.2d 173.

[14] Appellant requested the court to instruct the jury that to justify a conviction, they "must find the intoxicating liquor had so far affected his nervous system, brain and muscles as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care and under like condition." Instead of complying with such request, the court gave CALJIC 971 which appropriately covered the facts proved.[3]

[15, 16] Appellant's complaint that the court erred in not directing the jury to disregard the testimony of the police chemist is rejected. Admissibility of proof is for the court to determine. Having been wisely received when offered, her testimony belonged in the record throughout the trial and until submission. For reasons heretofore given, the court's rulings with refer-

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[1] Refers to the paved section. Silvey v. Harm, 120 Cal.App. 561, 568, 8 P.2d 570.

[2] Vehicle Code, § 525(a). "Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

"(1) When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"(2) When placing a vehicle in a lawful position for, and when such vehicle is lawfully making a left turn.

"(3) When the right half of a roadway is closed to traffic while under construction or repair.

"(4) Upon a roadway designated and signposted for one-way traffic."

[3] California Jury Instructions, Criminal. 971. "To constitute a violation of section 501 of the Vehicle Code it is not necessary that the driver be 'drunk' or 'intoxicated,' as the section merely provides that such driver shall be 'under the influence of intoxicating liquor.' If intoxicating liquor has so far affected his nervous system, brain or muscles as to impair to an appreciable degree his ability to operate the vehicle in a manner like that of an ordinarily prudent and cautious man in the full possession of his faculties, using reasonable care and under like conditions, then such driver is under the influence of intoxicating liquor within the meaning of the statute."

ence to the forensic chemist's testimony were sound. People v. Tucker, 88 Cal.App. 2d 333, 339, 198 P.2d 941.

The appeal from the sentence is dismissed.

The judgment and order are and each is affirmed.

McCOMB and FOX, JJ., concur.

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125 Cal.App.2d 95

BARBER et al.

v.

LEWIS & KAUFMAN, Inc., et al.

No. 15356.

District Court of Appeal, First District, Division 2, California.

May 10, 1954.

Rehearing Denied June 9, 1954.

Hearing Denied July 7, 1954.

Action by certain minority stockholders to rescind a sale of assets of corporation for a price exactly equivalent to book value of outstanding shares. From a judgment of dismissal entered in the Superior Court for the County of Santa Clara, M. G. Del Mutolo, J., for failure of stockholders to post security covering reasonable litigation expenses of corporation, stockholders appealed. The District Court of Appeal, Kaufman, J., held that the evidence supported order requiring stockholders to post security.

Affirmed.

1. Trial ⚷9(1)

In stockholders' derivative suit, it was not an abuse of trial court's discretion to hear a motion, regarding posting of security as a condition precedent to prosecution of action, on the trial calendar rather than on the law and motion calendar. Corporations Code, § 834.

2. Trial ⚷9(1)

The court's discretion in how it should operate and control its calendar is very broad.

3. Trial ⚷9(1)

In stockholders' derivative suit, by submission of motion to post security, as condition to prosecution of action, on affidavits without objection, shareholders waived any alleged irregularities in trial court's order to hear motion on trial calendar rather than on law and motion calendar. Corporations Code, § 834.

4. Depositions ⚷1

The taking of a deposition is one of the proceedings of an action.

5. Corporations ⚷214

In stockholders' derivative suit, taking of a deposition constitutes "prosecution of action" within statute providing that prosecution of action shall be stayed until 10 days after motion for posting of security shall have been disposed of, and where motion for security had not been disposed of, issuance and service of subpoena to take deposition were properly quashed. Corporations Code, § 834.

See publication Words and Phrases, for other judicial constructions and definitions of "Prosecution of Action".

6. Corporations ⚷214

One of the primary purposes of the statute providing for judicial determination of whether security shall be posted by shareholder as condition to prosecution of stockholders' derivative suit is to give corporation security against groundless suits on the part of shareholders. Corporations Code, § 834.

7. Receivers ⚷8

Trial courts have wide and broad discretion in appointment of receivers to take over operation of a business.

8. Corporations ⚷214

In stockholders' derivative suit, there was no abuse of discretion in denying motions of shareholders for appointment of a receiver and to remove counsel before security had been posted or the motion to require such security by shareholder as condition to prosecution of action against corporation had been determined. Corporations Code, § 834.

9. Corporations ⚷182

Nonassenting stockholder is bound by action of the holders of the voting majority of stock consenting validly to proposed transfer of corporation property and the action of the directors in accordance therewith in the absence of fraud in the transaction.

10. Corporations ⚷214

Where affidavits of directors of corporation prima facie indicated they had right to sell corporation assets, trial court had sufficient basis to order stockholders, bringing suit to rescind sale, to give security to protect the corporation against loss in the event the suit turned out to be without merit. Corporations Code, § 834.

11. Appeal and Error ⚷1011(1)

In stockholders' derivative suit, trial court, in passing on motion for security, must weigh the evidence, and its findings, when based upon substantial conflicting evidence, are binding upon the appellate court. Corporations Code, § 834.

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Maurice L. Martin, San Jose, for appellants.

Arthur H. Connolly, Jr., Connolly & Cerini, San Francisco, for respondents.

KAUFMAN, Justice.

This is an appeal by plaintiffs and appellants from a judgment dismissing their shareholders' suit by reason of their failure to furnish security as required by an order of the trial court made pursuant to Sec. 834 of the Corporations Code of the State of California.

This case presents a suit by certain minority stockholders of a California corporation to rescind a sale of substantially all of the assets of the corporation for a price exactly equivalent to the book value of the outstanding shares.

The defendant Lewis and Kaufman, Inc., is the selling corporation, the defendant Pacific Electronics Corporation, is the buyer, the defendants Jack Kaufman, Eleanor M. Lewis, Alvin B. Campbell, and V. N. Lundy, are directors of the selling corporation, and the defendant Ray C. Wilcox is the president of the buying corporation.

The original complaint, praying for a rescission of the sale in question and a removal of the named directors of Lewis and Kaufman, Inc., makes no charge that the sale was made other than in full compliance with the provisions of Section 3901, Corporations Code. The adopting of the appropriate resolutions by the board of directors and by the shareholders are all admitted.

The basic charge of the complaint appears to be that the sale is "fraudulent" because, (a) the price is inadequate, and (b) stockholders Kaufman and Lewis became employed by Pacific Electronics and were given options to purchase a minority stock interest in Pacific Electronics for cash at the book value of such stock at such time as the options might be exercised.

The defendant Lewis and Kaufman, Inc., and the named directors of Lewis and Kaufman, Inc., filed a motion for an order requiring plaintiffs to furnish security pursuant to Section 834, Corporations Code, and based upon the affidavits and counter-affidavits on file, and the oral argument had, and the briefs submitted by respective counsel, the court below made its order granting the defendants' motion and requiring plaintiffs to furnish security in the amount of $5,000. Plaintiffs having failed to comply with this order within the time allowed, and as extended, a judgment of dismisssal was duly entered.

The applicable provisions of section 834 are found in paragraph (b) thereof. They are as follows: Within 30 days after service of summons in a stockholder's derivative suit the corporation or any defendant may move for an order, on notice and hearing, requiring plaintiff to furnish security. The motion may be based on either of the following grounds: (1) that there is no reasonable probability that prosecution of the cause of action against the moving party will benefit the corporation or its security holders; (2) that the moving party, if other than the corporation, did not participate in the transaction complained of in any capacity. At the hearing on the motion the court shall consider evidence material to the grounds of the motion and, when material, to a determination of the probable reasonable expenses, including attorney's fees, of the defense of the action. If the court determines that the moving party has established a probability in support of the grounds of the motion, it shall fix the amount and nature of security to be furnished by plaintiff for reasonable expenses, including expenses for which the corporation may become liable under Section 830 of the Corporations Code. A determination as to the furnishing of security is not a determination of the merits of any issue in the action. "The corporation and the moving party shall have recourse to such security in such amount as the court shall determine upon the termination of such action." The amount of security must be reasonable and may be changed from time to time within the court's discretion. If the court requires that security be furnished as to any defendant, the action shall be dismissed as to such defendant unless the security has been furnished within a reasonable time fixed by the court.

[1–3] Appellants contend that the trial court erred in ordering the motion to post security to be heard on the trial calendar rather than on the law and motion calendar. This contention is without merit. It was clearly within the trial court's discretion to hear the motion on whatever calendar it chose, having in mind the over-all business of the court. The court's discretion in how it should operate and control its calendar is very broad and the record does not show an abuse of discretion. Furthermore, the appellants waived any alleged irregularity in this connection by submitting the motion on affidavits without objection.

[4–6] Appellants further contend that the issuance and service of the subpoena to take a deposition was quashed erroneously by the trial court. Section 834 of the Corporations Code provides in part as follows: "the prosecution of such action shall be stayed, until 10 days after such motion shall have been disposed of." The question herein involved is whether the taking of a deposition is part of the prosecution of the action. In our opinion it is. The courts have held that the taking of a deposition is one of the proceedings of an action. Crocker v. Conrey, 140 Cal. 213, 217, 73 P. 1006; Gay v. Thorpe, 1 Cal.App. 312, 82 P. 221. To permit the taking of depositions before the determination by the court as to whether the security provided for by Sec. 834 of the Corporations Code should be furnished would defeat the purposes of that section. One of the primary purposes of the section is to give the corporation security against groundless suits on the part of shareholders. To enforce the corporation to incur suit expense by appearing in deposition proceedings prior to the court's hearing and disposing of the motion to post security would do violence to the plain intent of the statute in question.

In Melancon v. Superior Court, 42 Cal.2d 698, 268 P.2d 1050, 1056, wherein the same point was involved and urged the Supreme Court said: "Petitioner further urges that he is entitled to proceed with the depositions he seeks, in the course of preparing for the eventual trial of the derivative action, even though he has not as yet complied with the order for the posting of security. It seems clear, however, that the taking of depositions for such purpose would constitute a step in the 'prosecution' of the action and therefore falls within the stay provisions of section 834. (See Ray Wong v. Earle C. Anthony, Inc., 1926, 199 Cal. 15, 18, 247 P. 894, in which it is stated that 'The term "prosecution" is sufficiently comprehensive to include every step in an action from its commencement to its final determination.') It therefore appears that the court has properly refused to proceed further with respect to the depositions until such time as petitioner may comply with the order respecting security."

[7, 8] Appellants next contend that their motion for appointment of a receiver should have been granted. The record before us does not show any abuse of discretion in the denial of this motion on the merits. Trial courts have wide and broad discretion in appointment of receivers to take over the operation of a business. Furthermore, the proceeding to appoint a receiver was a step

in the prosecution of the action and the motion was properly denied because no security had been posted nor had the motion to require security been determined.

Appellants' point that the court erred in refusing their motion to remove counsel is likewise without merit. This motion was prematurely made. The trial court was within its discretion in denying such a motion when there had been no decision on the main issue of posting security. Until the disposal of that issue by the trial court all other proceedings in the action were stayed.

The main issue on this appeal is whether there was any abuse of discretion on the part of the trial court in making its order requiring appellants to post a $5,000 bond pursuant to Sec. 834 of the Corporations Code. See Beyerbach v. Juno Oil Co., 42 Cal.2d 11, 265 P.2d 1.

[9] The affidavits of the parties show that appellants sought to have a sale rescinded and force the majority of stockholders to continue the operation of the corporate business. Any fraud or concealment was negatived by respondents' affidavits. The general rule of law regarding a sale of corporation assets is, as stated in 6A Cal.Jur. 1326: "So far as the rights of a nonassenting stockholder are concerned, he is bound by the action of the holders of the voting majority of stock consenting validly to the transfer proposed and the action of the directors in accordance therewith, in the absence of fraud in the transaction." See Graham v. Pasadena Land & Water Co., 152 Cal. 596, 93 P. 498.

[10, 11] Respondents' affidavits prima facie indicate that they had a right to make the sale in question. This was believed by the trial court and was a sufficient basis to order that appellants give security to protect the corporation against loss in the event the suit turned out to be without merit. It was for the trial court to weigh the evidence and its findings, based upon substantial conflicting evidence, is in this as in every civil case, binding upon the appellate court. Wood v. Gordon, 112 Cal.App.2d 374, 246 P.2d 84.

It is our view that the granting of the motion to require security was well within the discretion of the trial court and it did not deprive appellants of the right to proceed with their action after posting the security. Appellants failed and refused to post the security and the judgment dismissing their action followed in due course.

No prejudicial error appearing in the record before us, the judgment of dismissal must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

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125 Cal.App.2d 28

PEOPLE v. PAPS.

Cr. 5123.

District Court of Appeal, Second District,
Division 1, California.

May 3, 1954.

Defendant was convicted in the Superior Court of Los Angeles County, Orlando H. Rhodes, J., of bookmaking, and his motion for new trial was denied, and he appealed. The District Court of Appeal, White, P. J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law ⚷1144(13)

On appeal in a criminal case following a conviction, evidence must be considered in light most favorable to prosecution, since reviewing court is not authorized to retry the case and is not warranted in attempting to determine the weight of the evidence or the credibility of witnesses.

2. Criminal Law ⚷1159(2)

Reviewing court in a criminal case following conviction is restricted to decision only as to whether upon faith of evidence it can be justly held that sufficient facts could not have been found by duly constituted arbiter of facts to warrant inference of guilt, and only where it is made clearly to appear that upon no hypothesis whatever is there evidence of sufficient substantiality to support the conclusion reached in the trial court, may reviewing court disturb the finding of the trier of facts.

3. Gaming ⚿98(3)

Evidence sustained conviction of defendant of bookmaking. Pen.Code, § 337a, subd. 1.

4. Criminal Law ⚿563

In proving the corpus delicti it is not required that proof be as clear and convincing as that required to establish the fact of guilt, but rather slight or prima facie proof is sufficient for such purposes.

◆

Paul Leiter and Watson G. Thoms, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., James D. Loebl, Dep. Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County defendant was charged in Count I with the crime of engaging in bookmaking upon the result of a horse race, in violation of subdivision I, Section 337a, of the Penal Code. In Count II he was charged with the offense of accepting a bet or wager upon the result of a horse race, in violation of subdivision VI, Section 337a, of the Penal Code.

Following the entry of not guilty pleas to each count of the information, and appropriate waiver of trial by jury, the cause proceeded to trial before the court resulting in a decision adjudging defendant guilty as charged in both counts. Motion for a new trial was made and denied. Defendant was sentenced to serve a term of one year in the county jail on each of the two counts, execution of the sentence was suspended and he was placed on probation for three years on condition that he serve thirty days in the county jail on each count, said jail terms to run concurrently.

From the judgment of conviction and from the order denying his motion for a new trial defendant prosecutes this appeal.

We consider the following a fair epitome of the factual background surrounding this prosecution as revealed by the record herein.

On the 12th day of March, 1953, at about 12 o'clock noon, Vernon Moen, a Los Angeles City police officer, accompanied by an unidentified woman companion, entered the Studio Cafe, owned and operated by defendant on Santa Monica Boulevard, in the city of Los Angeles. The cafe contains a bar approximately twenty-five feet in length with a number of stools in front of it. On the opposite side of the cafe there are three or four booths. As one enters the premises, the bar is to the left and the booths are on the right. On a wall in the rear and near the right hand corner is a pay telephone. Just to the side of the wall phone is a door opening into defendant's office.

Upon entering the cafe Officer Moen and his companion went directly to the booth nearest the front door and ordered a meal which was served them by defendant's daughter. As he came into the cafe the officer observed defendant conversing with patrons on the customers side of the bar, noticed defendant take currency from a couple of them and walk back to his office. A lady, identified at the trial as Mrs. Grant, entered the cafe, seated herself in the booth next to that occupied by the police officer and engaged defendant in conversation. She handed him a white piece of paper and some currency. Defendant left and returned shortly with some money which he handed to Mrs. Grant. The officer was unable to describe the piece of paper nor the denominations of the currency.

Shortly thereafter the officer and his companion were served with food and some beer, and they spilled a glass of the latter on the table. Defendant wiped it up and officer Moen went to the rear of the cafe to the wall phone to call the police station. While at the phone he observed three men in the rear booth studying a scratch sheet and the racing section of a daily newspaper. Each of these three men then wrote down the name of a horse and the amount of the bet on little pieces of green paper. The scratch sheet was given to these men by defendant. Two of them handed their pieces of green paper to the third man, who arose, entered the office and had a conversation with defendant. This man handed defendant some currency which he put in his front pants' pocket. Officer Moen then hung up the phone, walked directly into the office, recovered the green betting markers which were on the desk in front of defendant, and placed him under arrest. Officer Moen never lost sight of the markers from the time he first saw them on the table in the rear booth until he took possession of them on the desk in the office in front of defendant.

Officer Moen then ordered defendant to empty his pockets, and he removed approximately $480. The man who delivered the money and green betting markers to the defendant at the time Mr. Moen entered the office immediately left the room.

While Officer Moen was standing with defendant in the office, another person entered the room and offered the latter some paper money which was rolled up. Officer Moen took it, opened the money up and found a marker with the name of a horse "Bigun" on it. When the money was presented to defendant he drew back and asked "Well, what is that?" The man said, "What do you mean, what is that?" and defendant answered, "Well, I don't know what it is."

Officer Moen recovered a scratch sheet known as the "National Daily Reporter", dated Thursday, March 4, 1953, from a beer case in the back room near the desk. The officer testified he saw the defendant put it there.

Officer Moen and his partner Officer Jenkins had a conversation with defendant on the way to the police station. Defendant said, "Can't we talk this thing over, because I just got off probation for bookmaking, in July, and this will ruin me."

Officer Moen also testified, "I asked the defendant how he was handling his action, or how he was doing it, and he stated that he worked on five per cent on losing weeks, whereas he would get fifty per cent on wining weeks, and he worked for a person by the name of 'Sal', who worked at 20th Century Fox. He further stated, 'Sal comes by the bar during the day and picks up the action.' The defendant stated, 'I know you have got me good, but, actually, this $480 I have in my possession is money I use to cash checks in my business.'"

On behalf of defendant it was shown in evidence that upon arrival at the police station there was included in his possessions a check for $5, made out to cash. Defendant testified that this check was the paper handed him by Mrs. Grant and which he cashed for her. That the currency returned to her was the amount due after deducting the cost of her lunch.

Jesse Blazek, a bartender employed by defendant, testified that while he was engaged in mopping up the spilled beer on the table in the booth occupied by the officer, one of the other customers approached him to pay a lunch check and was directed by the witness to go to the office and pay defendant.

As a witness in his own behalf, defendant testified that he knew the arresting officer, Vernon Moen, by sight, having previously seen him at Hollywood Police Station, a few months prior to the arrest. Seeing three men in the last booth, scribbling bets on green pieces of paper, he told them to "cut it out" because there was an officer present and he didn't want any trouble. That he then went into his office and called his butcher to order the next day's meat supply. While seated at the desk and talking at the phone, the heretofore referred to man, "Sal" entered the office, reached in his pocket and took out a twenty dollar bill and handed it to him. That he told "Sal" to forget it and to come back the next day because he wanted him to get out of his place. "Sal" left, and then the officer walked in and asked the defendant to empty his pockets and also for the bet he was supposed to have taken from the lady in the booth. Defendant testified he told Officer Moen that the man he wanted was "Sal" and that "Sal" had just left; and if he hurried, he could catch him. The officer admitted this conversation took place and that he did not attempt to follow or take the man who left into custody. The defendant testified that he did not take any bets from any one, and made no notations of horses or bets.

With reference to the conversation testified to by Officer Moen as having taken place en route to the police station, defendant testified that after leaving Hollywood Police Station for Lincoln Heights Station, Officer Moen said to him, "Well * * * it looks like we got you pretty good". That in reply defendant said, "Look, Officer, I don't know why you guys keep rousting me around this way". That the officer inquired, "How is business?". Defendant testified that thinking the inquiry was directed to his cafe business, he answered that, "I have worked six months trying to build that place up, and you guys have come around and rousted me around three times. You have never found any evidence. * * * I do not see why you guys do not give me a break."

Defendant further testified that Officer Moen laughed and asked, "How are you doing on the books?". That defendant repled, "I am not doing any books". That the officer then said, "How do they operate now, the bookmakers?". Defendant testified that to this question he replied, "I don't know. When I did book we were getting five percent and 50 percent." Defendant testified that the foregoing was all of the conversation, and that at no time did he say that he was working for "Sal", or any other bookmaker on a percentage basis.

Appellant's sole ground for a reversal of the judgment and order herein is that the evidence is insufficient to sustain a conviction on either count of the information.

[1, 2] In considering this contention, appellate tribunals are governed by well-defined principles of law. At the outset, on appeal in a criminal case following a conviction, the evidence must be considered in the light most favorable to the prosecution. The reason for this rule is that an appellate court is not authorized to retry the cause. We are not warranted in attempting to determine the weight of the evidence or the credibility of witnesses. This court is restricted to a decision only as to whether upon the face of the evidence it can justly be held that sufficient facts could not have been found by the duly constituted arbiter of the facts to warrant the inference of guilt. Only where it is made clearly to appear that upon no hypothesis whatever is there evidence of sufficient substantiality to support the conclusion reached in the trial court, may we disturb the finding of the trier of facts. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Kristy, 111 Cal.App.2d 695, 698, 245 P.2d 547.

[3] When the evidence in the instant case is reviewed in the light of the foregoing rules, we are persuaded that appellant's contention as to its insufficiency to support the judgment cannot be sustained.

[4] We have hereinbefore set out in considerable detail the evidence adduced at the trial and it is unnecessary to here repeat it. Suffice it to say that prior to the admission of appellant's extra-judicial statements into evidence the *corpus delicti* was established by ample evidence. In proving the *corpus delicti* it is not required that the proof be as clear and convincing as that required to establish the fact of guilt, but rather slight or *prima facie* proof is sufficient for such purposes. People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Grimes, 91 Cal.App.2d 629, 631, 632, 205 P.2d 416.

With reference to appellant's contention as to the existence of inconsistencies in the testimony of Officer Moen, it might be said that rarely does it happen that a case is presented on appeal in which some inconsistencies in the testimony of certain witnesses may not be discovered.

So far as the instant case is concerned, we might observe that while the alleged variances or inconsistencies claimed in the testimony given by Officer Moen at the preliminary examination and that given at the trial afforded opportunity for a persuasive argument to the trier of facts against the reliability of the officer's testimony, we see in them nothing from which a reviewing court could justly conclude that the officer's entire testimony is *per se*, unbelievable, and that it was, therefore, the duty of the trial judge not only to wholly disregard it, but to accept the defendant's story, or at least find that the latter's guilt had not been disclosed by the evidence to a moral certainty and beyond a reasonable doubt.

Having in mind the foregoing evidence in the case now engaging our attention, it would challenge credulity and do violence to reason to say that sufficient facts could not have been found from the evidence by the trial judge to warrant an inference of guilt.

For the foregoing reasons, the judgment and the order from which this appeal was taken are, and each is, affirmed.

DORAN and DRAPEAU, JJ., concur.

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124 Cal.App.2d 807

In the Matter of Diane MARSHALL'S GUARDIANSHIP.

Margaret DUPRAY, Petitioner and Appellant, v. Lorraine Bridges MARSHALL, Contestant and Respondent, Security-First National Bank of Los Angeles, Guardian of the Estate of Diane Marshall, a Minor and Respondent.

Civ. 19968.

District Court of Appeal, Second District, Division 3, California.

May 12, 1954.

George L. Hampton, Van Nuys, for appellant Dupray.

Le Sage & Bowman, Pasadena, for respondent Marshall.

Charles E. Quirollo, Beverly Hills, for Security-First National Bank of Los Angeles.

PER CURIAM.

In the opinion, Cal.App., 269 P.2d 160, we stated the trial court found that Margaret is now a fit and proper person and is maintaining a fit and proper home, but that she is not a fit or proper person to have the custody of Diane. In Margaret's petition for rehearing it is said that this was an incorrect statement of the finding. Counsel is in error. Margaret, in paragraph XV of her petition to terminate the guardianship of Diane, alleged that she is a fit and proper person to have the custody of Diane. The court found that the allegations of paragraph XV "of said petition are not true, except that petitioner is now a fit and proper person and is maintaining a fit and proper home." The finding that the allegations of paragraph XV are not true except as stated is necessarily a finding that Margaret is not a fit or proper person to have the custody of Diane. We must assume that in stating the exception the court intended precisely what is written and nothing more.

Rehearing denied.

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125 Cal.App.2d 126

ALBAUGH v. MOSS CONST. CO. et al.

Civ. 19895.

District Court of Appeal, Second District, Division 2, California.

May 11, 1954.

Action to recover on contract by which plaintiff agreed to do certain carpentry work. The Superior Court, Los Angeles County, Clarence M. Hanson, J., sustained defendants' objection to receipt of any evidence on ground that complaint did not state cause of action, and entered judgment against plaintiff, who appealed. The District Court of Appeals, Moore, P. J., held that plaintiff's failure to obtain a contractor's license before embarking upon his venture rendered his contract illegal, and hence plaintiff had no standing before the law in suit on contract.

Judgment affirmed.

1. Licenses 🔑39.44

Where complaint to recover on contract by which plaintiff was to do carpentry work clearly showed that plaintiff was a contractor and not an employee, and complaint contained no allegation that plaintiff was licensed as a contractor as required by law, complaint failed to state cause of action. Business and Professions Code, §§ 7000–7145, 7026, 7031, 7053.

2. Pleading ⇨428(1)

The sustaining of an objection to introduction of any evidence in support of an insufficient complaint leaves plaintiff in same position as when general demurrer is sustained without leave to amend.

3. Pleading ⇨312

Amendment of complaint, which sought recovery on an oral contract, by referring to a written contract between the parties, incorporated the writing to same extent as though it had been interlined in original pleading, and hence terms of writing could not be changed by any amount of declaration, and any allegations contradictory of the alleged writing, or which falsely construed it, were required to be disregarded.

4. Pleading ⇨311

Where complaint seeking recovery on oral contract was made to incorporate, by reference, a written contract between the parties, the contract so incorporated could be considered along with the allegations in determining whether the complaint was valid.

5. Contracts ⇨150

Where agreement of parties litigant has been reduced to writing, their relationship must be determined therefrom.

6. Licenses ⇨11(5)

One who undertakes to, or offers to undertake to submit a bid to construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building is a "contractor" within statutes requiring contractors to be licensed. Business and Professions Code, §§ 7000–7145, 7026, 7031, 7053.

See publication Words and Phrases, for other judicial constructions and definitions of "Contractor".

7. Licenses ⇨39.43

Where contractor, who entered into agreement to do carpentry work, failed to obtain a license before embarking upon the venture, the contract was illegal, and contractor had no standing before the law in a suit thereon. Business and Professions Code, §§ 7000–7145, 7026, 7031, 7053.

8. Licenses ⇨39.44

In order to be entitled to prevail in a legal action, a contractor must allege and prove that he was licensed at all times during performance of his contract sued upon. Business and Professions Code, § 7031.

9. Contracts ⇨313(1)

Although an employee may terminate employment at any time before the work is finished, a contractor who has an agreement to deliver a finished job breaches his contract if he terminates, without cause, his efforts, and such contractor is bound to his task until it is finished.

10. Licenses ⇨39.44

A subcontractor, as well as a contractor, must obtain license and must allege such fact in order to maintain action on his contract, and even though the subcontract provides that the owner furnish plans and materials and reserved right to direct how work should be done, and though he advanced the weekly payroll according to number of men at work, and although contractor in chief retained privilege of making alterations, additions to or repairing omissions from structure to be built, such provisions do not change relation of subcontractor to that of a mere servant. Business and Professions Code, § 7026.

11. Contracts ⇨176(1, 8)

Where language of contract is clear and its meaning is certain, its effect and the relation of the parties becomes a question of law.

12. Licenses ⇨39.44

Where plaintiff, who sued upon contract, was an independent contractor and not an employee, and hence was required to allege in his complaint that he was licensed as such, neither the language of the contract nor any presumption or inference arising therefrom would serve as a substitute for such allegation. Business and Professions Code, § 7031.

13. Contracts ⟹245(2)

In suit on written contract, prior oral agreement which was merged with the writing was of no significance, and where neither fraud, nor accident nor surprise nor any other occurrence was pleaded as basis for supplanting the written contract with the preliminary parol commitment later merged in the writing, the oral agreement could serve no lawful purpose.

◆

Donald K. Gault and Hampton Hutton, Los Angeles, for plaintiff.

Charles J. Katz and Samuel W. Blum, Los Angeles, for respondents.

MOORE, Presiding Justice.

By conventional allegations, appellant sued to recover $28,617.39 on an "oral contract." The objection of respondents to the receipt of any evidence on the ground that the complaint does not state a cause of action was sustained and judgment against appellant was entered. Hence, this appeal.

Appellant, on behalf of himself and his partner Reichert, sued to recover on an "oral contract, the exact terms of which are unknown to plaintiff." He alleged that respondents were to "provide the labor, materials and supervision for erection and construction of 219 houses and to act as general contractors" and appellant was to act as a supervisor and director of construction labor in installing the rough carpentry on the houses; that appellant was to be paid a wage of $125 per week and to receive "as incentive pay, to be divided with a co-supervisor, Jacob Reichert, the difference between the actual cost per square foot for the rough carpentry and fifty cents per square foot, if any"; that he and Reichert spent thirteen weeks on the job for which they were paid "$125 per week on account of wages" but that they have received no part of the sum of $28,617.39 due them on the square footage of construction as agreed. He demands a foreclosure of a mechanic's lien for such sum.

But promptly on the opening of the trial it was disclosed that the partners had never made but one contract with respondents; that it was in writing and was thereupon marked Exhibit A and offered to the court for consideration. Pursuant to the court's request, both parties made opening statements. Appellant stated substantially the contents of his complaint. Also, he did not desire "to go into whether we have a written agreement or oral." He stated that all payments were made and all materials were furnished by the Moss Construction Company, hereinafter referred to as "Moss"; that they did all the hiring and firing but all "termination checks" issued by Moss were handed to the employee by Albaugh or Reichert; that the latter were advised by Moss by weekly progress sheets as to cost up to date whereby they could determine their bonus. A written contract was to be prepared.

Respondents stated that in May 1951 Cecil Moss asked the partners for a price on doing the rough carpentry for the two hundred nineteen houses and they finally agreed to accept "$125 per week and fifty cents per square foot"; that on June 11, 1951, the written contract, Exhibit A, was signed by respondents and with their consent by Albaugh only; that the partners employed all labor and discharged them without consulting respondents; that time records were kept by the partners and were used for computing wages and were delivered to respondents every Wednesday for preparation of the payrolls, but no record was kept of the partners' time. Also, they paid for the sharpening of their saws. Neither the opening statement of appellants nor Exhibit A discloses otherwise than that they were "contractors" in the usual sense of that word. The writing begins with the declaration that they are the "contractor"; by the first article the contractor agrees to furnish all material, labor, equipment; the contractor shall complete the several parts of the whole work at the rate of six houses per day; the contractor recognizes, etc. If none of the methods suggested for determining the value of work is agreed upon "Contractor shall proceed with the work * * * Contractor shall keep a correct account * * * if the Contractor shall neglect * * * Contractor shall maintain insurance * * * Contractor shall do cutting, fitting * * * Contractor shall not endanger. * * *"

Appellant admitted that (1) at his first meeting with Cecil Moss in May it was agreed there was to be a written contract; (2) the word "price" in Exhibit A referred to the 50 cents per square foot only and not to the weekly wage, and included saw sharpening; (3) under his claim of an "oral agreement" there never was a meeting of minds; (4) exhibit A on its face is a contract used with subcontractors, and it is a contract; (5) the typed portions of Exhibit A are the same as the asserted oral agreement; (6) the writing has superseded the claimed, oral contract.

[1, 2] Furthermore, coming to the vice of the complaint, it was stipulated that neither on June 11, 1951, nor at any time during the performance of the contract was either of the partners licensed as a "contractor" and exhibit A is the only written contract before the court and was the contract pleaded in the complaint, as amended. Appellant then moved that his complaint be amended by inserting the italicized words in the following: "That on or about May 29, 1951, plaintiff entered into an oral contract, *which was subsequently merged into a written contract which is Exhibit A of the offer of proof.*" After such motion had been granted, appellant admitted that this changed his complaint to one based solely upon exhibit A. The court thereupon sustained respondents' objection to appellant's offer of proof on the ground that the amended complaint is based upon the written contract. Other matters contained in the written offer of proof either tend to vary the terms of the writing, or are incompetent. Since there is no allegation in the complaint that the partners were licensed contractors, it is clear that the pleading does not state a cause of action. Inasmuch as the sustaining of an objection to the introduction of any evidence in support of an insufficient complaint leaves the plaintiff in the same position as when a general demurrer is sustained without leave to amend, Shattuck v. Chase, 86 Cal.App.2d 810, 812, 195 P.2d 475; Calhoun v. Calhoun, 81 Cal.App.2d 297, 299, 183 P.2d 922, we proceed to explore the merits of the appeal.

[3–5] The amendment of the complaint by referring to exhibit A incorporates the writing to the same extent as though it had been interlined in the original pleading. The terms of the contract cannot be changed by any amount of declaration, and any allegation contradictory of the alleged writing or which falsely construes it, must be disregarded. Alphonzo E. Bell Corp. v. Bell View Oil Syndicate, 46 Cal.App.2d 684, 691, 116 P.2d 786; Pimental v. The Hall-Baker Co., 32 Cal.App.2d 697, 701, 90 P.2d 588. Therefore, the contract when so incorporated may be considered along with the allegations in determining whether the complaint is valid. North Side Property Owners' Association v. Hillside Memorial Park, 70 Cal.App.2d 609, 614, 161 P.2d 618. It is likewise elemental that where an agreement of the parties litigant has been reduced to writing, their relationship must be determined therefrom. Davis v. Basalt Rock Co., 114 Cal.App.2d 300, 303, 250 P.2d 254; Cash v. Blackett, 87 Cal.App.2d 233, 236, 196 P.2d 585; Batt v. San Diego Sun Publishing Co., Ltd., 21 Cal.App.2d 429, 434, 69 P.2d 216. The contract being clear and nonambiguous, its interpretation is one of law. Batt v. San Diego Sun Publishing Co., supra, 21 Cal.App.2d 437, 69 P.2d 219.

[6] It is known to every lawyer and to most men of the general public that the State has a Department of Professional and Vocational Standards whose functions are to regulate the behavior of contractors. Div. 3, Ch. 9, secs. 7000 to 7145, Code of Business and Professional Standards. Contractor is defined to be a person who undertakes to, or offers to undertake to submit a bid to "construct, alter, repair, add to, subtract from, improve, move, wreck or demolish any building * * *." Howard v. State, 85 Cal.App.2d 361, 363, 193 P.2d 11, 13. Section 7030 makes it a misdemeanor for any person who acts in the capacity of a contractor without a license. Section 7031 provides that "no person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

To be exempt from the license law, one must be an employee with wages as his sole compensation. B. & P. Code, sec. 7053. By virtue of that provision, it cannot with reason be said that an action by a contractor for $28,617.39 derived from a computation of construction at 50 cents per square foot is maintainable if he had no license. The amount in suit is a specific recompense for a designated result, a profit upon the labor of the men employed by the partners. While all compensation for effort furnishes incentive to the performer, it is a bold dream for a builder to say that $28,617 promised him for construction was *incentive*. That word when applied to the ordinary transaction signifies some perquisite of less value than the chief consideration. But in supervising the construction work for respondents, the partners were paid $1,625 for thirteen weeks. Now, they ask for more than $28,000 as incentive pay for their supervising labors.

[7–9] By virtue of their failure to obtain a license before they embarked upon their venture with respondents, their contract is illegal. For that reason they have no standing before the law; they have incensed the sovereign power and no court can honor their demands. Loving & Evans v. Blick, 33 Cal.2d 603, 609, 204 P.2d 23; Howard v. State, 85 Cal.App.2d 361, 364, 193 P.2d 11; Franklin v. Nat C. Goldstone Agency, 33 Cal. 628, 632, 204 P.2d 37. In order to be entitled to prevail in a legal action, a contractor must allege and prove that he was licensed at all times during the performance of his contract. B. & P. Code, sec. 7031; Shields v. Shoaff, 116 Cal.App.2d 306, 309, 253 P.2d 1002; Marogna v. Mitchell, 104 Cal.App.2d 799, 805, 233 P.2d 70. The same rule obtains as to an action to foreclose a mechanic's lien by a contractor. The difference between the natures of the relations of the employee and the contractor in their relations to the source of compensation is vast. An employer may give orders and direct an employee with reference to the acts to be done; also, he may terminate the employment at any time before the work is finished. But where a contractor has an agreement to deliver a finished job, a termination, without cause, of his efforts constitutes a breach of contract. An employee may quit at pleasure, but the contractor is bound to his task until it is finished. Helmuth v. Industrial Accident Comm., 59 Cal.App. 160, 161, 162, 210 P. 428.

[10, 11] The subcontractor is also a contractor, B. & P. Code, sec. 7026. A person is none the less amenable to the Act because he is a subcontractor. He is as such required to obtain a license and must allege such fact in order to maintain an action on his contract. Even though the contract of a subcontractor provides that the owner furnish plans and materials and reserved the right to direct how the work should be done and though he advanced the weekly payroll according to the number of men at work and although the contractor-in-chief retained the privilege of making alterations, additions to or repairing omissions from the structure to be built, yet such provisions do not change the relation of the subcontractor to that of a mere servant. Mickel v. Althouse, 38 Cal.App. 321, 326, 176 P. 51; Green v. Soule, 145 Cal. 96, 99, 78 P. 337. And where the language of the contract is clear and its meaning is certain, its effect and the relation of the parties becomes a question of law. Ibid.

The payment of the carpenters with the checks of Moss was a mere matter of mechanics and did not serve to make the partners employees instead of subcontractors. Such advances were charged against the contract price. The partners did the work in accordance with their contract and had full control over the carpenters at all times. The manner in which their wages were paid is a matter of no consequence. Houghton v. Loma Prieta Lumber Company, 152 Cal. 574, 577, 93 P. 377; see Raftis v. McCloud River Lumber Company, 35 Cal.App. 397, 400, 170 P. 176; Fay v. German General Benevolent Society, 163 Cal. 118, 121, 124 P. 844.

Finally, the nature of the relation of Moss to appellant is cemented by the covenant in the contract that the partners were charged, not only with the labor of their carpenters, but also with all payroll taxes, saw sharpening and compensation insurance. Such charges are never made against an employee.

[12] From the foregoing, it is established that appellant and Reichert were independent contractors, not employees, and therefore are subject to the cited statutes. Appellant was required to allege in his complaint that he and Reichert were licensed contractors. B. & P. Code, sec. 7031. Neither the language of their contract nor any presumption nor inference arising therefrom will serve as a substitute for such allegation. Hayt v. Bentel, 164 Cal. 680, 686, 130 P. 432.

Appellant Bound By Parol Evidence Rule

Despite the mutations of the complaint from an action based on an alleged oral contract to its merger into an action founded on a writing which shows the partners were contractors, appellants contend on appeal that (1) there is no code provision requiring a supervisor or superintendent of construction to be licensed; (2) the opening statement contains no fact to show necessity for a license; (3) the "written contract * * * is not a part of the complaint and plaintiff did not present it in the opening statement"; (4) parol evidence is admissible in spite of a written contract under many circumstances.

Such contentions are not supported by the record. As to number 1, we have quoted the statute requiring a contractor to be licensed. There is no equivalent allegation to overcome the written contract. As to point 2, the opening statement declared that in addition to the agreement to pay the partners $125 per week "straight salary * * * they were to receive a bonus of the difference between fifty cents a square foot of house area and the cost of labor and the carpentry * * * the cost of compensation insurance and * * * payroll deductions." In addition thereto, appellant finally admitted the written contract and stipulated that his oral agreement was merged in the writing. That exhibit A shows the necessity for a license cannot be seriously denied.

As to point 3, while the contract was never physically attached to, or by reference made a part of, the complaint, by appellant's admission to the court that there was only one contract and it was exhibit A, he stood in the same position as though it had been pleaded in *haec verba*.

[13] As to point 4, it speaks the truth in general terms only. But appellant was "fenced in" on his only written contract with respondents. He never abandoned it or sought its revision. The only evidence he ventured to suggest as proof of his claim was the conversations that occurred in the "prior oral negotiations," thirteen days before exhibit A was signed. All such conversations were merged in the writing, which fact appellant admitted. By no asserted event or conversation occurring after the execution of the contract was it altered or modified. His contention at all times is that he had a prior, parol agreement. But since his oral understanding was merged in exhibit A, it is destitute of significance. Civ.Code, sec. 1625; Parker v. Meneley, 106 Cal.App.2d 391, 400, 235 P.2d 101. In the Parker case, supra, 106 Cal.App.2d at page 399, 235 P.2d at page 105, the court said, "the written instrument and the oral agreement, if there was one, eventuated from the same previous negotiations and covered the same subject matter. * * * the result was an integrated agreement to which the parol evidence rule concerning such documents would apply. * * * The parol evidence offered here simply contradicted the terms of the written instrument. It did not tend to show in any way that the parties executed the contract for some extrinsic purpose, such as sham or artifice, or that it was intended for some purpose other than to set forth their respective rights and obligations."

The question is pertinent here. The oral agreement claimed to have been made on May 29, 1951, can serve no lawful purpose. Neither fraud, nor accident nor surprise nor any other occurrence is pleaded as a basis for supplanting the written contract with the preliminary parol commitment later merged in the writing.

Judgment affirmed.

McCOMB and FOX, JJ., concur.

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125 Cal.App.2d 44

BALDWIN
v.
FRESNO CITY UNIFIED SCHOOL DIST. et al.
Civ. 4687.

District Court of Appeal,
Fourth District, California.
May 4, 1954.
Hearing Denied June 30, 1954.

Mandamus proceeding to compel school board to classify and employ teacher as permanent teacher. The Superior Court, Fresno County, Arthur C. Shepard, J., entered judgment for board. Teacher appealed. The District Court of Appeal, Mussell, J., held that letter to teacher signed by superintendent, in accordance with established policy of school board, notifying her that she would not be rehired was sufficient notice from board.

Judgment affirmed.

1. Schools and School Districts 🔑133.11

Where teacher was employed as probationary teacher for three consecutive school years, and served as substitute teacher, teacher in adult education, and part-time teacher in summer session during fourth year, teacher had not been reelected to her position within statute providing for classification as permanent employee upon reelection for fourth term. Education Code, §§ 13081, 13085.1, 13086, 13099.4.

2. Schools and School Districts 🔑141(5)

Where probationary teacher was notified that she would not be rehired by letter signed by superintendent, pursuant to established policy of school board, after teacher had been omitted from resolution of board reelecting certain teachers, teacher had been duly notified of nonrequirement of her services for ensuing year within statute providing therefor. Education Code, § 13582.

3. Appeal and Error 🔑1010(1)

The question of laches is one for determination of trial court and its conclusion will not be set aside if supported by substantial evidence.

4. Mandamus 🔑143(2)

In mandamus proceeding to be classified and employed as permanent teacher, brought six months after last notification of dismissal by teacher who had been employed as probationary teacher for three years, not rehired but hired as substitute teacher for one year, then reemployed as probationary teacher for three years and subsequently notified that she would not be rehired, evidence supported finding that teacher was guilty of laches, particularly with regard to any rights arising out of first dismissal. Education Code, §§ 13081, 13582.

5. Schools and School Districts 🔑133.11

Under statute providing that probationary teacher who is reelected to position for fourth consecutive school term shall be classified as permanent teacher, school board had the right to refuse to reemploy teacher after completion of three school terms and to employ her again a year later as probationary teacher. Education Code, § 13081.

Louis M. Piccirillo, San Francisco, Stutsman, Hackett & Nagel, Fresno, for appellant.

Robert M. Wash, County Counsel of Fresno County, Fresno, and John E. Loomis, Asst. County Counsel, Fresno, for respondents.

MUSSELL, Justice.

This is an appeal by plaintiff from a judgment in a mandamus proceeding in which she petitioned for a writ to compel the respondents to classify and employ her as a permanent teacher of respondent school district.

Appellant was employed by the Fresno Unified School District as a probationary teacher in the day school for the 1945–1946, 1946–1947 and 1947–1948 school years. On May 10, 1948, she was notified by a letter signed by the superintendent of schools that her name would be omitted from the list of teachers to be presented to the board of education for reelection. This letter was sent pursuant to a long established policy of the school board that teachers who are not specifically reelected by the board are dismissed. Appellant was not reelected to teach in the day school for the 1948–1949 school year and during that year she served as a substitute teacher for eight days between February and June, 1949, teaching in the adult education division, and as a part time teacher for a short time in summer session. She was again employed by the respondent district as a probationary teacher for the school years 1949–1950, 1950–1951 and 1951–1952. On April 11, 1952, a letter, signed by an assistant superintendent of adult education, with the approval of the superintendent of schools, was sent to appellant notifying her that her contract would not be renewed for the next year. This letter was sent pursuant to the established policy of the school board and pursuant to a specific direction given the superintendent at a regular, open meeting of the board.

The controlling question to be here determined is whether the appellant has acquired the status of a permanent teacher in the Fresno Unified School District.

Appellant contends that she obtained tenure as a matter of law by her admitted probationary service during the school years 1945–1946, 1946–1947 and 1947–1948 because her services were not dispensed with by action of the governing board on or prior to May 15, 1948; that the letter of dismissal from the superintendent of schools was not based upon affirmative action of the governing board and did not constitute dismissal as defined by the Education Code; that even if she had not become a permanent teacher as a matter of law effective with the school year 1948–1949, tenure was again achieved by virtue of her services during the years 1948–1949, 1949–1950, 1950–1951 and 1951–1952; that there was no action taken by the governing board authorizing dismissal of appellant on or prior to May 15, 1952, but merely a letter of the superintendent.

Section 13081 of the Education Code provides in part as follows:

> "Every employee of a school district * * * who, after having been employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, at the commencement of the succeeding school year be classified as and become a permanent employee of the district."

Appellant was not "reelected" at the termination of her first three years of service as a probationary teacher. During the fourth year she served as a substitute teacher, taught in the adult education division and as a part time teacher in the summer session.

In Hogsett v. Beverly Hills School Dist., 11 Cal.App.2d 328, 53 P.2d 1009, petitioner had served in the schools of Beverly Hills School District for three complete, successive school years from 1929 to 1932 as a probationary teacher of music, that being a position requiring certification qualifications and having been employed thereafter as a substitute teacher, she claimed the right to classification as a permanent employee of the district. The court held that she was not "reelected" within the meaning of the statute and that the reelection intended by the legislature is one which would result in the retention of the employee for another year in the class of employees to which the employee reelected belongs.

[1] Employment in summer school may not be included in computing service for classification as permanent employee, Education Code, § 13099.4, and rights to permanent classification in the day and adult or night school branches involve entirely different classifications. Education Code, §§ 13085.1 and 13086. Appellant, therefore, was not reemployed in her former position at any time during the 1948–1949 school year. She, having been employed as a probationary teacher for three consecutive school years, beginning in the 1945–1946 school year, would be entitled to classification as a permanent employee if reemployed in her previous position at the beginning of the fourth year and in the absence of resignation or dismissal, would be automatically reemployed and classified as a permanent employee. Kimberlin v. Los Angeles City High School Dist., 115 Cal.App.2d 459, 461, 252 P.2d 344; Chambers v. Davis, 131 Cal.App. 500, 22 P.2d 27. However, appellant was notified by letter signed by the superintendent of schools that her name would be omitted from the list of teachers to be presented to the board for reelection. She contends that this notice was ineffective as a dismissal in that it was not based upon affirmative action of the school board. We are not in accord with this argument.

Section 13582 of the Education Code provides as follows:

> "*Notice of nonrequirement of services during ensuing year.*
>
> "*(Time for giving.)* On or before the fifteenth day of May in any year the governing board may give notice in writing to a probationary employee that his services will not be required for the ensuing year.
>
> "*(Delivery or mailing to employee.)* The notice shall be deemed sufficient and complete when delivered in person to the employee by the clerk or secretary of the governing board of the school district or deposited in the United States registered mail with postage prepaid, addressed to the employee at his last known place of address."

The record shows that the procedure and policy of the respondent school board in respect to reemploying or discharging employees, for many years, was to include in a resolution of the board the names of all teachers reemployed for the ensuing year and to omit therefrom the names of those who were not so reemployed; that it was understood by the board members that a teacher whose name was not included in the resolution would not be reemployed and that a notice of dismissal would be given such teacher by the superintendent of schools or by a person designated by him. In this connection, the president of the board of education testified that he was and had been a member of the board continuously for twelve years; that the same policy of the board existed over the years at least as far back as 1946–1947; that when he first went on the board, he inquired what the procedure was; that "the statement that it was the procedure and apparently fulfilled the law was satisfactory to me at the time." It was stipulated at the trial that three other board members, if called to testify, would testify substantially as did the president of the board. The letter of dismissal of May 10, 1948, was an official notification that appellant's name would be omitted from the list of teachers to be presented to the board for reelection for the 1948–1949 school year and it was so stated therein.

In Steele v. Board of Trustees, etc., 121 Cal.App. 419, 422, 9 P.2d 217, it was held that the act of serving the notice required by the statute is purely ministerial and whether the clerk is an officer or merely an agent, he has the right to delegate the performance of that ministerial act.

In Salmon v. Allen, 1 Cal.App.2d 115, 119, 36 P.2d 153, it was held that it will be presumed in the absence of proof that official duty has been regularly performed and that a notice of the action of the board which was signed by the secretary as such and duly mailed and received was sufficient.

In Knickerbocker v. Redlands High School Dist., 49 Cal.App.2d 722, 122 P.2d 289, it was held that a letter signed by the superintendent of schools is sufficient notice. The sufficiency of dismissal proceedings was discussed in Fleming v. Board of Trustees, etc., 112 Cal.App. 225, 296 P. 925, 926, where the petitioner had been previously elected and served as a probationary teacher for the school district in 1928–1929. At a meeting of the board it was decided by the majority of the members present not to employ petitioner for the following year. No minutes of the meeting were kept and no formal motion or vote of the members was taken or registered with respect to the employment of the petitioner. The subject was discussed orally and two of the members declared their opposition to petitioner's reelection. The clerk then stated that he would notify petitioner and on June 10, 1929, a written notice, signed by the clerk and one other member of the board, was served on petitioner notifying her that her services as a teacher in that school district were no longer desired. There, as here, the question for determination was whether the action of the board with relation to the termination of petitioner's employment was sufficiently formal to bind her. It was there held that the proceedings of the board were adequate, and the court said:

> "There is no statutory provision of law requiring the meetings of school boards to be held at any specific time or place. There is no provision requiring the board to formally decide school matters by a vote of aye or nay. There is no provision requiring the minutes of its proceedings to be recorded. Construing a statute similar to that of California involving the validity of meetings held by school trustees in upholding a contract of the board, it is said in Brown v. School Dist. [No. 41], 1 Kan.App. 530, 40 P. 826, 827: 'The statute prescribes no special form or manner by which, and no particular place at which, the district board shall be convened, nor do we think it was intended or necessary that any formal call should be made for the purpose of legally convening a school district board. It is sufficient if all are present, * * * and that at least two of them agree to make the contract in dispute.'
>
> "The due determination of a board of school trustees to dispense with future services of a teacher is not invalid merely because the action of the board in that regard was omitted from the records of the meeting. 35 Cyc. 906(c)."

[2] In the instant case formal action of the board was taken in adopting a resolution reelecting certain teachers with the understanding of the board members that petitioner would be dismissed and would not be reemployed for the 1948–1949 school year. The record does not show that any board member was opposed to this method of dismissal and we are of the opinion that the appellant was duly notified by the superintendent of schools of her dismissal before May 15, 1948, by tacit authority of the board.

Edwin C. Kratt, superintendent and secretary of respondent board, testified that he had been employed as assistant superintendent and superintendent and had met with the board for the past ten years; that it was the standing policy of the board, in order to save embarrassment on the part of teachers, not to list the names of the teachers to be dismissed in the meetings; that they would be eliminated when the teachers were considered for reelection; that petitioner accepted this procedure; that he "followed the policy right along that unless there is some reason for it we do not discuss it in board meetings"; that his signature was stamped on the letter of dismissal sent to petitioner on April 11, 1952, by his direction. When asked to state the basis upon which this letter was written, he stated "this particular case, in 1952 it was discussed. It's unusual, as I pointed out before that these, that individual teachers are discussed, but this particular case, because of the number of 'phone calls received by the board members and by the superintendent it was discussed at the board meeting, and the board approved the sending of this letter."

The trial court found that the governing board of the respondent district gave appellant due and proper notice of dismissal prior to May 15, 1948, and again prior to May 15, 1952. Both of these findings are sufficiently supported by the record. In this connection the evidence shows that appellant accepted non day school substitute teacher employment for the district during the 1948–1949 school year. That fact strongly indicates that she was familiar with the established policy of the school board and was not objecting to the form of the notice sent, or claiming that it was not sent by authority of the respondent district in 1948. She did not challenge the sufficiency of the dismissal until the present action was filed in November, 1952, more than four years after receiving the letter of dismissal of May 10, 1948.

The period prescribed for the commencement of an action upon a liability created by statute, other than a penalty or forfeiture is within three years. Code Civ. Proc. § 338, subd. 1. This provision of the statute has been held applicable to a mandamus action by a teacher seeking classification as a permanent employee. Ingram v. Board of Education, 36 Cal.App.2d 737, 98 P.2d 527.

[3, 4] The trial court also found "that the petitioner has been guilty of laches and unreasonable delay in bringing this action". In Kimberlin v. Los Angeles City High School Dist., supra, petitioner sought by his proceeding in mandamus to compel the respondent to reinstate him in a teaching position; classify him as a permanent employee; and pay him accumulated salary. The proceeding was commenced about one year after the notice of dismissal. The court held that the action was barred by laches; that the question of laches is in the first instance one for the determination of the trial court and its conclusion will not be set aside by an appellate court if such determination finds substantial support in the evidence. The finding of the trial court herein as to laches is supported by substantial evidence, particularly as to any cause of action which appellant claims arose out of the proceedings of the respondent board in 1948.

[5] Appellant argues that the fact that she was dismissed after serving three years as a probationary teacher, not hired for the fourth year and hired again as a probationary teacher and then dismissed is a circumvention of the purpose of the law relating to the status of permanent teachers and as such is a violation of public policy. We find no merit in this contention. Appellant was not coerced to submit a resignation and was not reemployed in her regular position for the fourth consecutive year. The respondent board exercised its prerogative under section 13582 of the Education Code and dismissed the appellant. It did not reemploy her for the following school year. The board had the right under the statute to reconsider her employment the following year and again employ her as a probationary teacher if it saw fit.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER, TRAYNOR and SCHAUER, JJ., dissenting.

125 Cal.App.2d 135

In re THOMAS' GUARDIANSHIP et al.

DUDLEY v. THOMAS.

Civ. 20284.

District Court of Appeal, Second District,
Division 2, California.
May 11, 1954.

Hearing Denied July 7, 1954.

Motion to dismiss grandmother's appeal from an order of the District Court, Harris County, Newcomb Condee, J., granting custody of her two minor grandchildren to their father. The District Court of Appeal, Moore, P. J., held that inasmuch as the children had, after entry of the order in question, become residents of Texas, and a Texas Court had likewise granted custody to their father and appointed him as their guardian, the appeal was now moot.

Appeal dismissed.

1. Judgment 🔑822(1)

Final judgment of court of sister state which had jurisdiction must be accorded same effect as that of final judgment of California court. Code Civ.Proc. § 1915.

2. Judgment 🔑815

Foreign judgment is presumed final until contrary appears.

3. Judgment 🔑815

When foreign decree is relied upon and record shows compliance with law of such jurisdiction, validity is presumed and, in absence of successful attack upon it on jurisdictional grounds, foreign decree will be recognized.

4. Guardian and Ward 🔑13(7)

Where petition alleges all facts essential to court's jurisdiction and order recites all such allegations are true, order appointing guardian when duly made and entered becomes a court decree.

5. Appeal and Error 🔑781(4)

To rule on moot question is contrary to established judicial procedure, and pending appeal will be dismissed, if event occurs which makes effectual relief impossible, though court might agree with appellant.

6. Parent and Child 🔑2(4)

Where California court granted custody of minor children to their father who took them to Texas where they became residents and Texas court, while grandmother's appeal from order of California court was pending, likewise granted custody to father and appointed him as children's guardian, appeal became moot and would be dismissed.

7. Parent and Child 🔑2(4)

Court which rejected grandmother's claims that children's father was unfit to have their custody did not err in refusing to require that children remain in state pending grandmother's appeal from order granting custody to father. Civ.Code, § 197.

* * *

Hahn, Ross & Saunders and Allan L. Leonard, Los Angeles, by Allan L. Leonard, Los Angeles, for petitioner.

Brown & Rognes, and Edward L. Butterworth, Los Angeles, by Walton Brown, Los Angeles, for respondent.

MOORE, Presiding Justice.

This is a motion to dismiss an appeal from an order denying the appellant custody of her two minor granddaughters.

In support of the motion to dismiss, respondent contends that the questions raised by the appeal are now moot in that the District Court of Harris County, Texas, has, since the order herein was made, granted permanent custody of the minors to respondent and at the time of such order, the minors resided and now reside in Texas.

The minor children, to wit, Sherry Ellen Thomas and Kathy Delene Thomas, had been placed in the custody of their mother upon the granting of a decree of divorce in the state of California, but on March 15, 1953, she was killed in an accident. Catherine E. Dudley, the maternal grandmother, commenced proceedings two days later to be appointed guardian of the children. Herman A. Thomas, respondent, is father of the children. He filed his objection to the grandmother's petition for guardianship. The court awarded temporary custody to the grandmother until June 19, 1953; temporary custody to the father from June 19 to September 11, 1953. Temporary custody of the children then returned to the grandmother until September 14 when the court directed that they be delivered to the father, and by the same order appointed him guardian. The final order was signed November 2, 1953.

A stay of execution of the order was denied by the court so that the father might take the children back to Texas with him. A notice of appeal herein was filed November 30, 1953. Thereafter, the Texas court awarded permanent custody to the father. The present motion to dimiss the appeal was filed April 12, 1954.

The first question before this court is, Does the decision of the Texas court make the questions on appeal moot?

[1-4] The law requires that a final judgment of a court of a sister state having jurisdiction be accorded the same effect as that of a final judgment of a California court. Code Civ.Proc. sec. 1915. The finality of a foreign judgment is to be presumed until the contrary appears. 164 East 72nd Street Corporation v. Ismay, 65 Cal. App.2d 574, 576, 151 P.2d 29. When a foreign decree is relied upon and the record shows compliance with the law of such alien jurisdiction, a presumption of validity arises, and in the absence of a successful attack upon it on the grounds of want of jurisdiction, the foreign decree will be recognized. Delanoy v. Delanoy, 216 Cal. 27, 34, 13 P.2d 719, 86 A.L.R. 1321. Where a petition alleges all the facts necessary to give the court jurisdiction and it is recited in the order that all such allegations are true, then the order appointing a guardian when duly made and entered becomes a decree of the court. In re Guardianship of Kimball, 80 Cal.App.2d 884, 886, 182 P.2d 612. The jurisdiction of the Texas Court is not controverted by appellant.

[5, 6] It is contrary to established judicial procedure to rule on questions that are moot. In accordance therewith, when an appeal is pending, and an event occurs that makes effectual relief impossible, even if the court agrees with the appellant, the appeal will be dismissed. It is the duty of every court to decide only actual controversies by a judgment which can be carried into effect and not to render opinions upon moot questions or abstract propositions, or to declare principles, doctrines or rules which cannot affect the pending issue. If, when an appeal is pending, an event occurs which makes it impossible for this court to grant the appellant any effectual relief, the appeal should be dismissed. Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293; In re Estate of Tierney, 63 Cal.App. 2d 295, 299, 146 P.2d 700; California Pac. Title & Trust Co. v. California Mining & Dredging Syndicate, 17 Cal.App.2d 353, 354, 61 P.2d 1181. There being no subject matter upon which this court can rule, the appeal must be dismissed.

[7] Although not necessary to this decision, it is not amiss to refer to appellant's main contention, namely that the court below was guilty of "judicial misconduct" in not granting her request that the children be required to remain in California until after judgment herein. To grant such a demand would have tended to operate an injustice. The court's act in making its final order of November 2, 1953, was in all respects judicious and regular. It had made ex parte orders for their temporary custody on the former occasions to safeguard their welfare and to share their custody between their grandmother and their father and to keep surveillance over the children. But when confronted with the law and fact that the surviving parent is entitled to the custody of his minor children, Civ.Code, sec. 197, after the claims of respondent's unfitness had been rejected by the court, there was no escape from awarding the custody of his children to respondent. See In re Pinnell, 184 Cal. 270, 272, 193 P. 574.

The appeal is dismissed.

McCOMB and FOX, JJ., concur

125 Cal.App.2d 41

BEELER v. BEELER.

Civ. 20081.

District Court of Appeal, Second District, Division 1, California.

May 4, 1954.

Hearing Denied June 30, 1954.

Action by a wife against her husband to quiet title to plaintiff's alleged community property interest in realty transferred to defendant under a property settlement agreement between the parties. From a judgment of the Superior Court of Los Angeles County, Ellsworth Meyer, J., for defendant after sustaining a demurrer to plaintiff's third amended complaint without leave to amend, plaintiff appealed. The District Court of Appeal, Doran, J., held that the third amended complaint, alleging that plaintiff would not tender return to defendant of property received by plaintiff under such agreement and claimed all such property as her separate property, notwithstanding allegations of such complaint that the agreement was cancelled because of the parties' reconciliation and that each party agreed, at the time of such reconciliation, to keep and maintain property taken by them under the agreement, was demurrable as inconsistent.

Judgment affirmed.

See also 268 P.2d 1074.

Husband and Wife 🔑270(7)

In wife's action against her husband to quiet title to plaintiff's alleged community property interest in realty transferred to defendant under parties' property settlement agreement, third amended complaint, alleging that plaintiff would not tender return to defendant and claimed as her separate property all property received by her under agreement, notwithstanding allegations that agreement was canceled because of parties' reconciliation and that parties then agreed to keep all property taken by them under agreement, was demurrable as inconsistent. Civ.Code, § 1691, subd. 2.

Christin & Davis, Charles A. Christin, San Francisco, for appellant.

Schauer, Ryon & McMahon, Robert W. McIntyre, Santa Barbara for respondent.

DORAN, Justice.

The appeal herein is from a judgment entered after the sustaining of a demurrer to the Third Amended Complaint, without leave to amend.

Plaintiff's original complaint, denominated a Complaint to Quiet Title, and the succeeding three amended complaints, allege in varying terms, as stated in appellant's brief, "that matrimonial difficulties had existed between the parties and that a contract had been made settling their property rights. * * * that the parties reconciled and that at the time of said reconciliation, and after said reconciliation * * * plaintiff and defendant intended to and orally agreed that presumption of the said matrimonial relationship and cohabitation * * * would abrogate the said agreement and render the same null and void and of no effect; that by reason of said reconciliation, the terms, conditions and provisions of said property settlement agreement were cancelled and annulled, and are now cancelled and annulled", etc.

The complaint seeks to quiet title to plaintiff's alleged community property interest in and to certain real property which was transferred to defendant under the terms of the agreement. As pointed out in respondent's brief, the Third Amended Complaint here involved, "fails to describe any property whatever, either directly or by reference, to which title is sought to be quieted", although the original complaint had definitely described several parcels.

Respondent's brief also notes that the Third Amended Complaint alleges that the parties became reconciled on August 8, 1951, the day of trial, on which date the settlement agreement is stated to have been both executed and mutually cancelled, and that an interlocutory decree of divorce was granted on August 24, 1951.

A further inconsistency is pointed out in that although it is alleged that the property settlement was "executory", the complaint states that "the plaintiff herein received things of value under and by virtue of the terms of said property settlement agreement", and that "by agreement made at the time of said reconciliation each of the parties was to keep and maintain his and her property all that they had taken under and by virtue of the terms of said agreement", which property plaintiff "does not intend to return to the defendant".

The principal defect in the Third Amended Complaint is stated as follows in respondent's brief: "With refreshing frankness, plaintiff states that she herself received property of value under the terms of the property settlement agreement she seeks to have set aside and that she intends to keep this property as her separate property and does not intend to tender it back to be restored to its status of community property; at the same time she wishes to have the property which defendant received under the contract declared to be community property. This theory might be called the 'Eat your cake and have it, too' theory or perhaps the 'What's yours is mine and what's mine is my own' theory. Defendant has insisted and still insists that this theory, while interesting, is not legally tenable".

In support of the claim that appellant wife was not obliged to "tender the return of all things of value received" from respondent, as a condition precedent to the present action, appellant cites Locke Paddon v. Locke Paddon, 194 Cal. 73, 83, 227 P. 715, 718, where it is said, "It is not an invariable rule that a rescission of a contract on the ground of fraud will be denied merely because the parties cannot be placed in statu quo. * * * It would be manifestly unjust to require of the wife * * * the moneys received by her under the agreement and used for living expenses and to which under the law she would have been entitled to so receive and use notwithstanding the agreement". This case, which involves rescission for fraud, and money received by the wife and used for living expenses, bears no resemblance to the present controversy, and cannot be deemed authority for appellant's position.

While it is doubtless true, as said in the Locke Paddon case just cited, that in certain situations there may be rescission without an offer to return the property which plaintiff has received under the agreement, the general rule is expressed in Section 1691, subd. 2, of the Civil Code which provides that "He must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so". In the instant case there would appear to be no valid reason why this rule should not apply.

Not only has the complaint failed to make any offer to restore the property received to its community status, but the pleading specifically alleges that "The plaintiff herein does not intend to and will not tender the return of any and all property which she received by reason of said real property agreement to the defendant herein and the plaintiff alleges that all of the property received by her as a result of said property settlement agreement as modified be claimed as her separate property". Although this matter was made a specific ground for demurrer, plaintiff continued to maintain the same position in the four complaints filed.

The Third Amended Complaint, therefore, presented the anomalous situation of a plaintiff seeking judicial aid to increase property interests granted in a settlement agreement, by permitting the wife to retain as separate property whatever had been received thereunder, but, inequitably, and in addition thereto, giving to the wife a community interest in that which had been granted to the husband as separate property. And in this connection it should be borne in mind that there is no claim of fraud or mistake in the execution of the property settlement agreement. Obviously the law should not lend its aid by permitting the plaintiff to litigate such an issue.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., not participating.

125 Cal.App.2d 122

JACQUEMART v. JACQUEMART et al.

Civ. 19919.

District Court of Appeal, Second District,
Division 1, California.

May 11, 1954.

Rehearing Denied June 7, 1954.

Action by wife to impress a trust upon a home purchased in the name of another woman with husband's earnings following a decree of separate maintenance. From adverse judgment of Superior Court, Los Angeles County, Otto J. Emme, J., husband and other woman appealed. The District Court of Appeal, Drapeau, J., held that home purchased from husband's earnings after a decree of separate maintenance, but prior to statute making husband's earnings after separate maintenance decree his separate property, was community property.

Judgment affirmed as modified.

1. Husband and Wife 🔑299(1)

A decree of separate maintenance does not end the marriage, it only regulates the extent of support to be awarded to the wife.

2. Husband and Wife 🔑247

The time of acquisition of property fixes its community status, and legislation changing the respective rights of husband and wife in community property will not be given retroactive effect. Civ.Code, §§ 169, 169.1.

3. Husband and Wife 🔑247

Under statute providing that husband's earnings after a decree of separate maintenance is his separate property, a home purchased after a separate maintenance decree in the name of another woman with earnings of husband, but before the effective date of the statute, was community property. Civ.Code, § 169.1.

4. Appeal and Error 🔑1011(1)

Reviewing court may not reverse finding of trial court where there was a conflict in the evidence on the fact found.

5. Husband and Wife 🔑272(1)

Although a husband may not give community property away without his wife's consent, he has the right to control and manage it after a decree of separate maintenance. Civ.Code, § 172.

6. Husband and Wife 🔑299(4)

In action by wife to impress a trust upon a home purchased in name of another woman with money furnished by husband after a decree of separate maintenance had been entered, trial court erred in impressing a trust upon the home to secure delinquent support payments, ordering its sale, and otherwise impairing husband's power to manage and control the property. Civ. Code, § 172.

7. Husband and Wife 🔑295

Attorney's fees may be allowed a wife in action to impress a trust upon a home purchased by husband's earnings after a decree of separate maintenance.

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Beardsley, Hufstedler & Kemble, Los Angeles, for appellants.

Walter H. Young, Los Angeles, for respondent.

DRAPEAU, Justice.

Mr. and Mrs. Eugene A. Jacquemart were married June 17, 1919. In 1942 a judgment of separate maintenance was granted to Mrs. Jacquemart. Her husband was ordered to pay $125 per month for her support, and for the support of a then minor child. The court divided the community property of the parties equally between them.

After that the order for support was modified from time to time. Mr. Jacquemart complied with all of the orders, except that at the time of this action he owed his wife $396 for the period December 15, 1950 to March 1, 1951.

After 1942 Mr. Jacquemart lived with Mrs. Pearl Cox. June 13, 1950 he gave Mrs. Cox $11,300 that he had earned in the automobile business. Mrs. Cox used the money to purchase a home that she and Mr. Jacquemart thereafter occupied. The purchase price was $20,500. Title to the property was taken in the name of Mrs. Cox, subject to a mortgage indebtedness for the balance of the purchase price.

Mrs. Jacquemart named Mr. Jacquemart and Mrs. Cox defendants in this action to impress a trust upon the property as community property.

The trial court adjudged that, subject to the mortgage lien, the property was held by defendant Pearl Cox as trustee for the husband and wife; that it was community property; that defendant husband pay the wife $350 attorney's fees; that plaintiff have a lien on the community property interest of defendant for $396; that said property "shall secure the payment of any other moneys which have heretofore or may hereafter be ordered to be paid by the husband to the wife for her support and maintenance"; and that a writ of execution issue for the sale of the property to enforce the terms of the judgment.

Mr. Jacquemart and Mrs. Cox appeal.

Since the adoption of Section 169 of the Civil Code in 1872 our law has provided that after a decree of separate maintenance the wife's earnings and accumulations are her separate property. Until 1951 no corresponding right was given to the husband. In 1951 Section 169.1 was added to the Civil Code, providing that the husband's earnings after a decree of separate maintenance are likewise separate property.

Appellants suggest that the amendment of 1951 merely codified what had always been the purpose and intent of the law: that the earnings of both husband and wife were separate property after a decree of separate maintenance, especially when, as the law requires, the decree of separate maintenance in this case divided the community property between them. This would seem to be a fair and equitable view of the law of community property, at least as it should have been. And fairness and equity would seem to have been the motivating purpose of the Legislature in enacting the new code section.

But this Court finds itself unable to agree with the suggestion, because of the effect such a decision would have upon the general scheme of community property as it has been established by constitutional, statute, and case law in California.

[1, 2] That Section 169 of the Civil Code does make the earnings and accumulations of the wife her separate property while living apart from her husband was commented upon in the early case of Spreckels v. Spreckels, 116 Cal. 339, 48 P. 228, 36 L.R.A. 497. A decree of separate maintenance does not end the marriage; it only regulates the extent of support to be awarded to the wife; and the decree may always be modified. Monroe v. Sup. Ct., 28 Cal.2d 427, 170 P.2d 473. The general rule is that the time of acquisition of property fixes its community status. And legislation changing the respective rights of husband and wife in community property will not be given retroactive effect. 10 Cal.Jur.2d 666, Sec. 5, and authorities and legal reviews there cited.

[3] The property here in question was acquired after marriage, before the enactment of Civil Code Section 169.1 in 1951, comes within none of the exceptions specified in our law, 10 Cal.Jur.2d 670, and is community property.

[4] Appellants argue that the $11,300 was owed by Mr. Jacquemart to Mrs. Cox; that he just paid off his indebtedness to her. But there was a conflict in the evidence as to this fact, and under familiar rules of appellate procedure the trial court's finding that it was a gift may not be reversed by this Court.

So in this case the judgment fixing the status of the property as community, and making Mrs. Cox trustee for the husband and wife, must stand.

But the judgment should not go further than that.

[5] Although a husband may not give community property away without his wife's consent, Sec. 172, Civil Code; Spreckels v. Spreckels, supra, 116 Cal. 339, 48 P. 228; Ballinger v. Ballinger, 9 Cal.2d 330, 70 P.2d 629, after a decree of separate maintenance he has the right to control and to manage it. Johnson v. Johnson, 33 Cal. App. 93, 164 P. 421.

[6] It follows then that in the circumstances of this case it was error to impress a trust upon specific community real property to secure the indebtedness of $396; to charge the property with a lien, to order its sale, or to trammel the husband's power

to manage and control it. Mr. Jacquemart's record in keeping up the payments due to his wife merits no condemnation.

[7] Defendants contend that the award of attorney's fees was improper. Attorney's fees may be allowed in such a case as this, at least so far as the husband is concerned. Blache v. Blache, 78 Cal.App.2d 168, 177 P.2d 345.

The judgment is modified as follows: the real property, subject to the mortgage indebtedness, is community property; Mrs. Cox holds title to it as trustee for Mr. and Mrs. Jacquemart; plaintiff is awarded $350 for attorney's fees against Mr. Jacquemart only; the property is subject to no liens, except that of the mortgage; and Mr. Jacquemart shall have the right to manage and control it in conformity with the community property laws of this state. As so modified the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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125 Cal.App.2d 146

NELSON et ux. v. DANGERFIELD.

Civ. 19899.

District Court of Appeal, Second District, Division 3, California.

May 12, 1954.

Action by vendors to quiet title with counterclaim by purchaser alleging fraud and requesting general relief. The Superior Court, Los Angeles County, James G. Whyte, J., rendered judgment for vendors and purchaser appealed. The District Court of Appeal, Parker Wood, J., held that where purchaser had paid about $7,000 upon purchase price of $18,000 home under 1948 contract, court erred in denying purchaser restitution of any part of the payments made in view of the pleadings and prayer for general relief.

Reversed in part and affirmed in part.

1. Quieting Title 🔑44(3)

Vendor and Purchaser 🔑44

In action by vendors to quiet title against purchaser, who counterclaimed alleging fraud and requesting general relief, evidence was sufficient to support findings that defendant was in default under terms of the contract and that purchaser had not relied on alleged misrepresentations.

2. Vendor and Purchaser 🔑334(2)

Where purchaser had paid about $7,000 on purchase price of $18,000 home under 1948 contract, and where purchaser counterclaimed in vendors' quiet title action, alleging misrepresentation and requesting general relief, court erroneously rendered judgment in 1952 denying purchaser restitution of any part of the payments made by her.

3. Appeal and Error 🔑1178(6)

Where court, in quiet title action by vendors against purchaser, found that purchaser was in default under contract but failed to determine whether purchaser was entitled to restitution for any part of payments made, new trial would be granted but limited to issue as to damage suffered by vendors as result of purchaser's failure to make payments.

Halverson & Halverson, and George Halverson, Los Angeles, for appellant.

Wolford, Johnson & Pike, and George Pike, El Monte, for respondents.

PARKER WOOD, Justice.

Defendant appeals from judgment quieting plaintiffs' title to real property.

Defendant Mrs. Dangerfield and her husband saw an advertisement in a newspaper which stated that "a fine modern home" in El Monte "On full acre" and "in first class condition" was for sale. The property was owned by plaintiffs. The Dangerfields went to the property and saw Mr. Nelson who told them that the property was for sale but they should see the Wierman Realty Company at San Bernardino which was the exclusive agent for the sale. On August 28, 1948, at the office of that company, the Dangerfields signed an offer to purchase the property and made a deposit of $250. On August 30, 1948, they and the plaintiffs entered into a written agreement whereby the plaintiffs agreed to sell and the Dangerfields agreed to buy said property for $18,000 to be paid as follows: $4,000 at the time of executing the agreement, $125 when the buyers obtained possession, $125 a month thereafter for two years, and $100 a month thereafter. The buyers paid $4,000 and moved to the property about November 3, 1948. Mrs. Dangerfield testified that about May, 1949, they discovered that the land they had bought was not an acre of land but was "only a little over a third of an acre." The land was 80 feet in width and 250 feet in length (20,000 sq. ft.) or about .4591 of an acre. Within two or three days after such discovery the buyers told the sellers that they had found that the land was about one-third of an acre and that they wanted an adjustment to be made. The sellers replied that they (Nelsons) had purchased it as a full acre and that they would not do a thing about an adjustment. At that time the buyers also told the sellers that a wood furnace, electric logs for the fireplace, a window box, some screens, and plants, which belonged with the house had been removed by the sellers and that the buyers wanted an adjustment regarding those matters. The sellers replied to the effect that those things did not belong with the house. The buyers continued to make payments until July, 1950, although at times the full monthly payment was not made. On June 9, 1950, an attorney for the sellers notified the buyers by letter that they were delinquent in payments to the extent of $575; that they were delinquent in payment of taxes; and that unless the delinquent payments and taxes were brought up to date before July 15, 1950, the buyers' rights under the contract would be forfeited and an action to quiet title would be filed.

Mr. Dangerfield died in September, 1950, and Mrs. Dangerfield became the owner of the buyers' interest in the property. She will be referred to herein as the defendant.

On November 27, 1950, the attorney for defendant sent a letter to the plaintiffs enclosing a check for $721.42 and stating that it was to be applied on the contract. The check was accepted by plaintiffs. On April 2, 1951, the attorney for plaintiffs notified defendant by letter that she was delinquent in payments to the extent of $728.58; and that unless the payments were made and all taxes and insurance were paid her rights under the contract would be forfeited. On May 18, 1951, the attorney for plaintiffs wrote another letter to her stating that after he had written to her previously she stated that she would come to his office; that she had not come, and he had heard nothing from her; and that unless he heard from her by May 22, he would file an action. On May 20, she wrote a letter to said attorney requesting an extension of time to June 1, 1951, and stating that she did not have enough money but she thought she would have it by June 1. About June 3, 1951, the attorney and defendant talked by telephone—she said that she did not have the money; and he said that he would file a quiet title action. Thereafter and until the present action was filed on July 18, 1951, the attorney did not hear from her.

Defendant filed an answer and counterclaim. She denied the allegation of the complaint that her claim of an interest in the property was without right; and she denied the allegation that she had no right, title or interest in the property. In her counterclaim she alleged that representations made by plaintiffs and their agent that the premises constituted a full acre, and that the place was a modern home in first-class condition, were false; that the representations were known by plaintiffs to be false and were made for the purpose of inducing the buyers to enter into the agreement; that the representations did induce them to enter into the agreement to the damage of defendant in the sum of $4,500, which amount should be applied in abatement of the purchase price of the property. She also alleged that by reason of said representations the plaintiffs "should be estopped from attempting to forfeit said agreement." She prayed that plaintiffs take nothing; that $4,500 be applied as a credit on said agreement and that it be determined that the agreement is in good standing; and for such further relief as may be agreeable in equity.

The court found, among other things, that adequate notice of intention strictly to enforce the payments and the right of forfeiture was given to defendant; that when this action was commenced, on July 18, 1951, the amount due under the contract was $1,217.75; that at the time of judgment (October 6, 1952) the amount due was $2,717.75, plus taxes for two years.

The court also found that the real estate agent of the plaintiffs misrepresented, by a newspaper advertisement, the size of the lot as one full acre, whereas in fact the lot was less than one acre, being "80 feet wide by 250 feet"; that the agent represented that the place was "modern in first-class condition"; that plaintiffs had no knowledge of such representations; that the buyers, before entering into the agreement, undertook an independent investigation of the property as to dimensions, quantity, and quality, and by several detailed inspections of the property ascertained the true dimensions, boundaries, and quality of the lot; and that the buyers did not rely upon said misrepresentations as to the quantity or quality but relied upon their independent knowledge of the lot; and that under the circumstances the misrepresentations did not influence the buyers in making the agreement of sale. The court also found that the wood furnace, electric logs, window box, and screens were not fixtures; and that a camellia plant (taken by sellers) was excepted from the agreement, and there was no evidence of removal of other plants. Those findings were supported by substantial evidence.

The judgment quieting plaintiffs' title provided that if within 60 days from the date of judgment the defendant paid said delinquent payments and taxes and any payments which might fall due after judgment, then the title of plaintiffs would be quieted subject to said agreement of sale as valid and existing, but if she failed to pay said amounts then the title of plaintiffs should be quieted.

[1] The evidence was sufficient to support the findings that defendant was in default under the terms of the contract. There was evidence that the buyers had paid $6,946.42 on the purchase price of the property ($4,000 as down payment; $1,725 payment shown in book of installment credits [Exhibit C]; $500 and $721.42 not shown in that book).

[2] In view of the evidence that about $7,000 had been paid upon the purchase price of $18,000, and in view of the issues presented by the counterclaim, and in view of the prayer for general relief, the court should have considered and determined the question as to whether a forfeiture of the money paid would result in unjust enrichment of plaintiffs. The court made no finding concerning the damages allegedly resulting from the failure to make the payments, nor did it find that it would be impracticable or extremely difficult to ascertain such damages. At the time the action was filed the defendant had occupied the property about three years; and at the time of judgment she had occupied it about four years. The court did not find that $7,000 (approximately) would be just compensation for the use of the property for said period of time. In Freedman v. Rector, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R. 2d 1, the plaintiff, who agreed to buy real property for $18,000, paid $2,000 down and agreed to pay $16,000 into escrow within 30 days. About 50 days later plaintiff repudiated the agreement and demanded the return of his deposit. About 20 days after the repudiation, plaintiff wrote defendant that he would take title and pay the balance. About 8 days later defendant sold the property for $20,000. The action was for specific performance or for damages for breach of contract. The judgment of the trial court insofar as it denied specific performance or damages for breach of contract was affirmed, but the judgment was reversed insofar as it denied plaintiff restitution of any part of his down payment. It was said therein at pages 19 and 20 of 37 Cal.2d, at page 631 of 230 P.2d: "If defendant is allowed to retain the amount of the down payment in excess of its expenses in connection with the contract it will be enriched and plaintiff will suffer a penalty in excess of any damages

he caused." It was also said therein at page 23 of 37 Cal.2d, at page 633 of 230 P.2d: "Since a commission of $900 was retained by the broker from the down payment it is clear that defendant received from plaintiff at most $1,100. Defendant contends, however, that there were other expenses incurred in connection with the escrow that reduced the amount of the down payment received. Since the trial court erroneously concluded that plaintiff could recover no part of his down payment, no finding was made as to the fraction that accrued to the net benefit of defendant. Accordingly, a new trial limited to that issue is appropriate." In the present case, a new trial limited to the issue as to the damage suffered by the plaintiffs as a result of the failure to make the payments is appropriate.

[3] The judgment is reversed insofar as it denies defendant restitution of any part of the payments made by her, and the trial court is directed to try that issue only. In all other respects the judgment is affirmed. Each party to bear his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

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125 Cal.App.2d Supp. 877

PEOPLE v. LAMBE.

C. A. 23.

Appellate Department, Superior Court,
Fresno County, California.
April 23, 1954.

Prosecution of accused for purchasing farm products without obtaining an agent's license. From adverse judgment of Municipal Court, Fresno Judicial District, George W. Huffman, J., accused appealed. The Superior Court, Fresno County, Kellas, J., held that the evidence was insufficient to sustain the conviction.

Judgment reversed.

1. Principal and Agent ⇨22(1)

Declarations of an agent are inadmissible to establish agency even when made as part of the res gestae.

2. Criminal Law ⇨1169(12)
Principal and Agent ⇨22(1)

In prosecution of accused for purchasing farm products without obtaining an agent's license, admission of oral and written extrajudicial statements of accused for purpose of establishing his status as an agent was prejudicial error. Agricultural Code, § 1263.

3. Licenses ⇨42(4)

Evidence was insufficient to sustain conviction of accused, who was charged with purchasing farm products without first obtaining an agent's license. Agricultural Code, §§ 1261(i), 1262, 1263, 1263(b).

◆

L. Nelson Hayhurst, Wallace G. Quinlisk, Fresno, for appellant.

E. Clark Savory, Dist. Atty., Fresno, Carl Evans, Fresno, Deputy Dist. Atty., for respondent.

Frank Lambe was convicted by the Court, sitting without a jury, of having violated Section 1263 of the Agricultural Code of the State of California, under a complaint charging him in two counts with violation thereof as follows. Count One:

> "The said defendant, on or about the 9th day of December, 1952 at and in the said County of Fresno, State of California, did act as an agent in the purchasing of farm products, from Randall Lutz to-wit: turkeys; without first obtaining an agent's license as provided by Section 1263 of Agriculture Code of State of California."

Count Two is couched in exactly the same language except the alleged offense involves a different party at a different date.

Appellant contends:

1. That there is no competent evidence showing that at the time of the alleged offenses defendant was an agent as that term is employed in Section 1263 of the Agricultural Code.

2. That it was error for the trial court to receive in evidence the extrajudicial

statements of the defendant, both oral and written, for the purpose of establishing his status as an agent.

We will consider the last point first.

The law in regard to the admissibility of extrajudicial statements or admissions of an alleged agent is accurately stated by appellant in his Opening Brief. Agency cannot be established by such offered evidence. Quoting from the case of Scott v. Los Angeles Mountain Park Co., 92 Cal.App. 258, 267 P. 914, the Court said in the case of Whiteside v. United Theatres, 106 Cal. App.2d 471, 472 at page 477, 235 P.2d 261 at page 265:

> "* * * 'That the witness Lloyd might have been placed upon the witness stand and asked as to all the facts tending to show his authorization to act as an agent for the defendant is really what is supported by the rule just stated, and not what he may have told somebody in relation thereto. This action being between the plaintiffs and the defendant, the witness Lloyd could have testified directly as to his agency by stating whatever there was, if anything, tending to show his appointment or authorization to act as agent, but to put a witness on the stand to testify to what she had heard Mr. Lloyd state or what representations he had made was an entirely different matter and not in anywise supported by the authorities cited, but absolutely contrary thereto.' ";

the Court going on to say:

> "As hereinbefore pointed out, the agency of Lytle cannot be proved in this manner * * *."

That the statements or admissions are made in writing does not alter the rule. Champlin Refining Co. v. Gasoline Products Co., 1 Cir., 29 F.2d 331 at page 336.

[1] Even though the admission be admissible as part of the *res gestae,* it would not serve to establish the fact of agency. Stouffer-Bowman v. Webber, 18 Wash.2d 416, 139 P.2d 717 at page 722:

> "In Ennis v. Smith, 171 Wash. 126, 18 P.2d 1, 2, we stated: 'We are committed to the rule that the mere declarations of an alleged agent, made out of court, are not competent testimony to establish the fact of his agency; that where there is no evidence from which the fact of agency may be inferred, the declarations of the agent as to facts tending to establish the agency, even when made as a part of the res gestae, are inadmissible.' "

This case was tried by the respondent upon the theory that the defendant Lambe was the agent of one Ralph Smith.

> "Mr. Evans: The testimony he is about to give will indicate motive, scheme and design on the part of the Defendant, Frank Lambe, in the purchase of turkeys pursuant to him acting as an agent for one Ralph Smith." (Reporter's Transcript, page 34, lines 7 to 10, inclusive)

> "Mr. Evans: * * * We are trying Mr. Lambe for acting as an agent for Mr. Smith." (Reporter's Transcript, page 47, lines 14 and 15.)

For an agent to exist, there must be a principal. We have searched the record in vain to find any competent evidence to establish a principal for the defendant, whether it be Mr. Smith or someone else, except by the extrajudicial statements of the defendant and some hearsay testimony which was permitted to come in over defendant's persistent objections. The Court was apparently of the opinion that the written statements of the defendant (People's Exhibits 1 and 2), solely by reason of the fact that they were in writing, took such offered evidence out of the rule above quoted and were admissible for the purpose of making out a *prima facie* case.

> "The Court: There is a definite distinction between the conversation and a writing, in this particular act that you are talking about can't be proved by the extrajudicial statements." (Reporter's Transcript, page 8, lines 23 to 25, inclusive)

> "The Court: Yes. Well, the Court already ruled that there is prima facie evidence that because of this exhibit that Ralph Smith sold—let's see.

> Ralph Smith purchased birds from Lutze. There is a written statement to that effect. As long as there is a prima facie showing has been made, I can't see where your objection is good." (Reporter's Transcript, page 17, lines 21 to 26, inclusive)

The Court, however, received the evidence subject to motion to strike.

> "The Court: In order to continue this trial without too much interruption the Court will take judicial notice of the law as to admissions made by a party setting up an agency, and I will allow the testimony in evidence subject to a motion to strike in the event that the law reads that a written statement is also considered as a statement under this particular law which would exclude such evidence in court. So with that in mind we will continue on this particular case." (Reporter's Transcript, page 18, lines 15 to 22, inclusive)

[2] Defendant's several motions to strike such testimony apparently were never ruled upon and the evidence remains in the record. The objections were good and the motions to strike should have been granted. The error is prejudicial to the defendant and requires a reversal of the judgment of conviction.

A further question has been raised by Appellant which we believe deserves comment. He contends that the transactions complained of fall within the exception of Section 1262 of the Agricultural Code of the State of California. This Section provides as follows:

> "§ 1262. Exemptions from chapter. This chapter does not apply to or include:
>
> * * * * * *
>
> "(b) (Processors.) Any person or exchange buying, receiving, or otherwise handling farm products as a processor, as that term is defined in Chapter 9, Division 6, of this code."

Respondent showed that Mr. Smith, the alleged principal, was, in fact, a processor. Mr. Kachadorian, a District Supervisor, Bureau of Marketing Enforcement, Department of Agriculture of the State of California, called as a witness for the People, testified as follows:

> "Q. Mr. Smith is a processor? A. Mr. Smith is an individual, he is licensed as a processor.
>
> "Q. I see. And this Mr. Leuschner he is a processor too? A. He is licensed as a processor too also, that is Yosemite Creek Company is licensed as a processor.
>
> "Q. Yosemite Creek Company is licensed as a processor, that is what their business is as far as you know, is that right? A. Yes." (Reporter's Transcript, page 43, lines 13 to 20, inclusive)

Mr. Smith, called as a witness by the defense although he had been subpoenaed by the People and not called by the People, testified as follows:

> "Q. And what is your business or occupation? A. Rancher, processor.
>
> "Q. And by processor you mean a licensed processor under the Agricultural Code of the State of California? A. Yes, poultry."; (Reporter's Transcript, page 45, lines 12 to 16, inclusive)

and the witness, Randall Lutze, one of the alleged victims called as a witness for the People, testified as follows:

> "The Witness: He is a processor sure.
>
> "Mr. Quinlisk: Q. Mr. Smith is the processor? A. Sure." (Reporter's Transcript, page 21, lines 24 and 25, inclusive)

Harry Collett, the other alleged victim, called as a witness for the People, testified as follows:

> "Q. Now on this document, Mr. Collett that you have identified here, the names appearing on the top thereof, to your knowledge they are all processors of turkeys? A. Yes, sir. I was up to the plant there afterward, and seen the plant.
>
> "Q. They take the birds in and they— A. Kill them and dress them and oven-ready them and put them in

> boxes and quick freeze them, pack them and ship them." (Reporter's Transcript, page 30, lines 19 to 26, inclusive)

The record also discloses that some of the poultry involved, particularly that of Mr. Collett, was, in fact, ultimately handled by parties other than the defendant. Appellant was prevented from eliciting such facts from the witness, Lutze.

It will be borne in mind that the defendant is charged under Section 1263, which is a part of Chapter 6 of Division 6 of the Agricultural Code, and that being charged as an agent, he necessarily is charged with having acted as an agent of a "commission merchant, dealer, broker, or cash buyer". This is the definition given not only under Section 1263(b) of said Code but also under Section 1261(i) of the same Chapter which should be read therewith. It would, therefore, appear that any evidence received and appearing in the record relative to whether or not the transactions concerned processing would be material only to show that the transactions fell within the above exception of Section 1262 and could not be treated as proof of another possible offense with which the defendant was not charged.

[3] With the objectionable evidence removed from the record, there does not appear to be sufficient evidence remaining therein to support the judgment. It is, therefore, the order of this Court that the judgment of conviction of the defendant be, and the same is reversed.

SHEPARD, P. J., and CONLEY, J., concur.

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42 Cal.2d 767

STAFFORD v. SHULTZ et al.

L. A. 22926.

Supreme Court of California.
In Bank.
May 11, 1954.

Action against physicians for allegedly negligent treatment of wounded leg. The Superior Court, Los Angeles County, Philbrick McCoy, J., sustained demurrers to amended complaint and entered judgment of dismissal, and plaintiff appealed. The Supreme Court, Carter, J., held that complaint alleged fraud and misrepresentation as to the extent of the injury and the adequacy of the treatment given sufficient to toll statute of limitations.

Judgments reversed.

Prior opinion 259 P.2d 494.

1. Physicians and Surgeons 🔑18(4)

Complaint against physicians for damages for allegedly negligent treatment of wounded leg was sufficient to allege the existence of a patient and physician relationship, the duty flowing therefrom, and the breach of that duty.

2. Limitation of Actions 🔑31

Absent other considerations, an action for damages for negligent or unskilled treatment by a physician is barred one year after commission of the acts. Code Civ.Proc. § 340, subd. 3.

3. Appeal and Error 🔑919

On appeal from judgment of dismissal, allegations of the complaint would be taken as true.

4. Limitation of Actions 🔑55(4)

In a malpractice case, statute of limitations does not commence to run until the plaintiff discovers his injury, or by use of reasonable diligence, should discover it. Code Civ.Proc. § 340, subd. 3.

5. Limitation of Actions 🔑95(1)

The fiduciary relationship between doctor and patient excused plaintiff, who was undergoing treatment for a wounded leg, from exercising greater diligence in discovering injury from allegedly negligent treatment, and plaintiff was not put on notice by information that his leg would be amputated, that cause of the amputation was negligent treatment.

6. Limitation of Actions 🔑179(2)

Complaint for damages for allegedly negligent treatment of plaintiff's wounded leg alleged fraud and misrepresentation as to the extent of the injury and the adequacy of the treatment given sufficient to toll statute of limitations. Code Civ.Proc. §§ 338, 340, subd. 3.

7. Limitation of Actions 🔑13

A physician who is alleged to have been negligent in treatment and to have made fraudulent representations and to have concealed the fact of negligence is estopped from taking advantage of the statute of limitations. Code Civ.Proc. §§ 338, 340, subd. 3.

8. Limitation of Actions 🔑95(1)

Where plaintiff underwent treatment for a wounded leg, but physicians in charge misrepresented the extent of the injury and the adequacy of the treatment, and plaintiff was informed that his leg would be amputated, plaintiff was not put on notice of the allegedly negligent treatment, and statute of limitations on malpractice action did not begin to run, until plaintiff was served with notice in workmen's compensation proceeding, of the medical reports of his injury. Civ.Code, § 19, Code Civ.Proc. §§ 338, subd. 4, 340, subd. 3.

9. Pleading 🔑52(2)

Complaint against physicians for allegedly negligent treatment of plaintiff's wounded leg and for withholding information concerning extent of injury and adequacy of treatment, was not subject to claimed infirmity of uniting several causes of action not separately stated.

10. Physicians and Surgeons 🔑18

Complaint for damages for allegedly negligent treatment of plaintiff's wounded leg properly joined several groups of physicians who separately and successively treated plaintiff.

11. Physicians and Surgeons 🔑18(4)

Complaint for damages for allegedly negligent treatment of plaintiff's wounded leg was not required to allege in what respect the treatment given might have been deficient, so long as the allegations charged the breach of a legal duty, proximate causation, and resulting damage.

12. Pleading 🔑35

Matter in a pleading which is not essential to the claim is surplusage.

13. Pleading 🔑364(6)

Probative facts in a pleading are surplusage and may be stricken out or disregarded.

14. Physicians and Surgeons 🔑18(4)

Negligence may be pleaded in general terms in malpractice cases as well as in other types of negligence.

15. Records 🔑19

Physician's reports to the State Compensation Insurance Fund are not "public records" and plaintiff, who sought damages for allegedly negligent treatment of wounded leg, was not put on notice of the alleged negligence by the filing of reports by his physicians. Civ.Code, § 19; Code Civ. Proc. §§ 338, subd. 4, 340, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Records".

16. Physicians and Surgeons 🔑18(4)

In action for damages for allegedly negligent treatment of wounded leg, defendants' contention, asserting the limitations upon a doctor's duties, bore only upon evidence and could not be considered in determining sufficiency of complaint.

17. Physicians and Surgeons 🔑18(4)

Defendants' contention, in action for damages arising from alleged negligent treatment of wounded leg and defendants' alleged misrepresentations of the extent of the injury and the adequacy of the treatment, that the alleged misrepresentations were in nature of prophecy rather than relating to existing facts, was a matter of evidence and could not be considered in determining sufficiency of complaint.

18. Appeal and Error 🔑878(3)

Where misjoinder of parties is not interposed as a ground for demurrer, defendants may not raise the issue on plaintiff's appeal from order sustaining demurrer.

Elsan H. Stafford, in pro. per.

Fulcher & Wynn, Highsmith & Allen, and Bauder, Gilbert, Thompson & Kelley, Los Angeles, for respondents.

CARTER, Justice.

Plaintiff appeals from judgments[1] of dismissal entered upon the sustaining without leave to amend of all defendants' demurrers to his fifth amended complaint.

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[1] The following matter is not raised by any of the parties but appears from the record. On *November 19, 1952*, judgment of dismissal was entered for defendants Shultz and Meier whose demurrer had been sustained without leave to amend on *November 12, 1952*.

On *January 5, 1953*, judgment of dismissal was entered in favor of defendant Arthur Ferree whose demurrer had been sustained, without leave to amend, on *December 3, 1952*.

On *January 7, 1953*, judgment of dismissal was entered in favor of defendants William Kelpien and Elizabeth Kelpien whose demurrer had been sustained, without leave to amend, on *October 31, 1953* [sic].

On *January 7, 1953* (by the same judgment as that which related to defendants Kelpien) judgment of dismissal was entered as to defendant John D. Gillis whose demurrer had been sustained, without leave to amend, on *October 31, 1953* [sic].

In other words, there are three separate judgments of dismissal in this case. Plaintiff's single notice of appeal was

Plaintiff, Elsan H. Stafford,[2] in his fifth amended complaint ("For damages occasioned by Malpractice and Because of False representations") alleges, substantially, as follows:

Statement of Facts: Plaintiff alleges that on or about February 25, 1949, during the time when he was a deputy sheriff of the County of Los Angeles and while acting in the line of duty, he was wounded in the left leg by the accidental discharge of his pistol. He states that the bullet pierced his left leg about eight inches above the knee; that he was taken to the Angeles Emergency Hospital and placed under the care of defendants Ellwood L. Shultz, Woodrow Meier and Arthur Ferree for treatment; that prior to that time he was in good health and all his body members and functions were intact and unimpaired.

First cause of action against defendants Shultz, Meier, and Ferree.

Plaintiff alleges that from the time of the injury until about March 6, 1949, he was under the care of the above-named defendants; that on the day of the injury, his injured leg was X-rayed; that he did not know, but that defendants did know, the extent of his injuries; that plaintiff is informed and believes that after the bullet pierced his left leg, it coursed downward and lodged on the exterior side thereof about six inches above the ankle; that in its course, the bullet damaged a section of the popliteal (knee area) artery about one inch in length but did not completely sever it; that the bullet severed the sciatic nerve. He alleges upon information and belief that while under anaesthetic these defendants removed the bullet, severed and removed the damaged section of the popliteal artery and ligated (tied or bound) the severed ends but that said defendants "then made no effort to repair either said damaged artery or said severed Sciatic Nerve." He states that the care and treatment given him consisted of blood transfusions, sedatives, penicillin injections, ice packs, and occasional dressing of the wound and incision; that during the ten days these defendants treated him, the calf of his left leg remained considerably extended "by reason of neglect of said defendants to remove said accumulated blood." He alleges that in order to effect a cure, defendants should have repaired the artery and nerve; should have removed the accumulated blood. He alleges that defendants had the means to obtain knowledge as to whether or not his leg was infected whereas he had no such knowledge or means of obtaining the same. He then alleges that defendants neglected to take any additional X-ray pictures of his left leg.

Plaintiff further alleges that on April 12, 1949, he was again placed under the care of defendants Shultz, Meier and Ferree for treatment which consisted of sedatives, penicillin injections and occasional dressing of the wounds; that from April 12, 1949 until September 15, 1949, only one X-ray was taken which was on May 5, 1949. He alleges that during this time, considerable pus drained from the incisions; that he was almost continually confined to his bed; that he ran a temperature and had chills and was delirious; that during this time his health became impaired and the incisions did not heal. He alleges that defendants should have repaired the artery and nerve, cleansed the infection from the leg and combatted the infection of the bones which was present on May 5, 1949 and thereafter.

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filed on January 8, 1953 and specifically noticed an appeal from each of the three judgments.

[2] Plaintiff appears in propria persona. His complaint is rambling and inartistically drawn. It shows a lack of knowledge of the legal principles involved in this type of action. I have endeavored to set forth the facts, as he alleges them, in somewhat more logical order so as to facilitate understanding of the principles involved. The complaint itself is set up in two causes of action as to each defendant, or group thereof. The allegations of the first cause concern the alleged negligent acts of the various defendants with separate paragraphs for each defendant, or group thereof; the second cause of action incorporates, by reference, the allegations of the first and, in addition, contains allegations of fraudulent representations and concealment on the part of each defendant, or group thereof.

Second cause of action against defendants Shultz, Meier, and Ferree.

Plaintiff alleges that during the three weeks these defendants treated him, they represented to him that they had severed and ligated only one of the two arteries into which the popliteal artery branches; that it was not then necessary to repair or restore either the damaged artery, or the severed sciatic nerve "in order to effect a cure" of the left leg; that the accumulated blood in the injured leg would be absorbed by natural process; that plaintiff believed said representations to be true and relied thereon.

First cause of action against defendants William Kelpien and Elizabeth Kelpien.

Plaintiff alleges that about March 6, 1949, he was removed to the Beverly Hospital in Montebello and placed under the care of these defendants where he remained for about three weeks; that the treatment given him by these defendants consisted of sedatives, penicillin injections and the occasional dressing of his wounds. He alleges that in order "to have insured a cure" of his leg, these defendants should have repaired the damaged popliteal artery and sciatic nerve; should have removed the accumulated blood from the injured leg and should have kept the leg free from infection; that they neglected to take any X-ray pictures of the leg; that they had means of obtaining the knowledge as to whether the bones of the leg were infected whereas he had no such knowledge or means of obtaining the same.

Second cause of action against defendants William Kelpien and Elizabeth Kelpien.

That during the three weeks these defendants treated him, they represented that they knew the facts of his case; that they would effect a cure of the left leg; that it was not necessary to repair the artery which defendants Shultz, Meier and Ferree had severed and ligated, or to repair the severed sciatic nerve in order to effect a cure; that the accumulated blood would be absorbed by natural process; "that they knew the condition of said left leg without taking X-ray pictures thereof; that the proper measures were being taken to guard against infection of said left leg"; that plaintiff believed said representations to be true and relied thereon.

First cause of action against defendant John D. Gillis.

That about March 29, 1949, plaintiff was removed to the Good Samaritan Hospital and placed under the care of defendant Gillis for treatment where he remained for about two weeks; that during this time an anaesthetic was administered to him for the purpose of making skin grafts over the incision in the popliteal space of his left leg. He alleges on information and belief that while he was under the anaesthetic, defendant Gillis made the skin grafts and several other incisions and drained therefrom "fully five hundred cubic Centimeters of old blood clots and pus matter." He alleges that when he was discharged from the hospital on April 12, 1949, considerable pus matter was still draining from the incisions and that he was not then cured; that to have insured a cure, defendant should have repaired the damaged artery and the severed nerve and should have thoroughly cleansed the leg of all accumulated old blood clots and pus matter and "to have taken proper measures to guard against infection" and to "combat any infection"; that plaintiff had no way of knowing whether infection had developed in the bones of the leg but that defendant had the means of obtaining such information; that defendant neglected to take X-ray pictures of the injured leg.

Plaintiff further alleges that about September 2, 1949, defendant Gillis informed him that the condition of the left leg was seriously endangering plaintiff's general health; that the left leg would never be of "any material use and benefit"; that the left leg should be amputated; that plaintiff believed and relied on these representations and "became interested in saving his life and lost interest in saving his left leg."

Second cause of action against defendant John D. Gillis.

Plaintiff alleges that during the time he was under this defendant's care, the defendant represented to him that it was reasonable to expect a cure of his left leg; that it was not necessary to repair and restore the severed and ligated artery in "order to effect a cure"; that he knew the condition of the leg without taking X-rays thereof; that all the old accumulated blood and pus would adequately drain from the incisions in the calf; that no infection was then present; that plaintiff believed these representations to be true and relied thereon.

Plaintiff alleges that his leg was amputated by defendant Gillis on September 22, 1949, at about mid-thigh; that he is informed and believes that with the application of the proper knowledge and skill the left leg could have been saved.

Plaintiff alleges that during all the time defendants were caring for him, he was in no condition to make an investigation and had no means of discovering why his left leg was not cured; that the defendants led him to believe at all times prior to September 2, 1949, that his leg would be cured.

Plaintiff alleges that on August 2, 1950, the State Compensation Insurance Fund of California served upon him copies of reports made by certain of these defendants (Shultz, Meier, Ferree and Gillis) which showed that the popliteal artery, and not one of the branches, had been damaged; that the X-ray taken on May 5, 1949, disclosed that ostitis, periostitis, "possibly approaching the Osteomyelitis stage" had developed in the left leg and had infected the bones thereof; that on September 16, 1949, the infection had spread throughout the tibia and fibula of the left leg as far as the knee joint and that the knee joint and lower part of the femur were infected.

As to all defendants, it is alleged that plaintiff had no information or belief as to when his leg became infected; or as to which defendant was treating him at the time; that all defendants contributed to his infection and neglected to combat or cure the same; that none of the defendants ever consulted him concerning his case or the treatment thereof; that all the defendants were "careless, negligent and unskillful in diagnosing plaintiff's case and in prescribing for and treating him and his left leg; that all the defendants lacked the necessary knowledge and skill to properly diagnose plaintiff's case and properly prescribe for and treat him and his left leg"; "that the acts and omissions of the defendants were the direct and proximate cause of great and irreparable loss and damage unto plaintiff."

As to all defendants it is alleged that their representations were made by them without reasonable grounds upon which to base them and that said representations were false; that had he known the falsity thereof, he would have required the services of competent physicians and surgeons to care for him; that had he known the facts disclosed by the reports, he would have "commenced this action for damages well within one year of the commission by the defendants of the acts and omissions complained of."

All defendants demurred, either singly, or in groups, on the grounds that no cause of action had been stated; that several causes of action were not separately stated; that the complaint was uncertain, ambiguous and unintelligible in specified particulars; and that plaintiff's cause of action, if any, was barred by the provisions of section 340(3) of the Code of Civil Procedure.

Cause of action.

All defendants demurred to plaintiff's fifth amended complaint on the ground that it did not state facts sufficient to constitute a cause of action against each of them.

In Greninger v. Fischer, 81 Cal.App.2d 549, 552, 184 P.2d 694, 696, a malpractice case, defendants' general and special demurrers were sustained without leave to amend. The court reversed the judgments entered thereon. It was held there that "It is quite obvious that these allegations set forth a legal duty, breach thereof, proximate causation and resulting damage. That is all that is required. In this state negligence may be pleaded in general terms, and that is as true of malpractice cases as it is of other types of negligence cases. Moreover, in a malpractice case, it is sufficient, at least as far as a general demurrer is concerned, to aver that certain treatment was negligently administered by defendant to plaintiff's damage without alleging in what respects the treatment may have been deficient. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1; Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1; Criss v. Angelus Hospital Ass'n, 13 Cal.App.2d 412, 56 P.2d 1274; Abos v. Martyn, 31 Cal.App.2d 705, 88 P.2d 797; Smith v. Beauchamp, 71 Cal.App.2d 250, 162 P.2d 662; see notes 33 Cal.L.Rev. 248, 264; 35 Cal.L.Rev. 267, 269."

[1] Plaintiff here has alleged that he was under the exclusive care of each defendant, or group thereof, for certain specified periods of time; that these defendants were at all times practicing as physicians and surgeons in the County of Los Angeles. These allegations are sufficient to show the relationship of patient and physician between plaintiff and defendants and the legal duty flowing therefrom. Plaintiff alleged in detail the negligent acts and omissions of all defendants and that as a direct and proximate result thereof, he was injured and suffered damage thereby. While inartistically phrased and set forth, it appears clearly that the allegations of the complaint are sufficient to state a cause of action (without reference to the statute of limitations) against all defendants. As is hereinafter set forth, plaintiff's second cause of action, which incorporated the allegations of the first, was also sufficient in alleging facts adequate to toll the statute of limitations.

Statute of Limitations.

[2] All defendants demurred to plaintiff's complaint on the ground that it was barred by the provisions of section 340 (3) of the Code of Civil Procedure. In Huysman v. Kirsch, 6 Cal.2d 302, 306. 57 P.2d 908, we held that an action by a patient against a physician for injuries sustained by the former, by reason of the negligent or unskilled treatment of the latter, is an action sounding in tort and not upon a contract. Such an action is therefore barred by the provisions of subdivision 3 of section 340 of the Code of Civil Procedure one year after the date of the injury. It is apparent from the allegations in plaintiff's complaint so far as his first cause of action is concerned, that the negligent acts and omissions complained of took place more than one year prior to the commencement of the action with the filing of the original complaint on *September 12, 1950*. The demurrers, with the exception of that of defendant Gillis, were, without more appearing, well taken to the first cause of action.

In the second cause of action, however, plaintiff alleges that defendants made certain misrepresentations to him concerning the treatment necessary to "effect a cure" of his leg; that they misrepresented the extent of his injury; that they neglected to repair the injured artery and nerve and represented to him that such repair was not necessary to "effect a cure"; that they represented to him that they knew the condition of his leg without taking X-ray pictures; that all of these representations were made without reasonable grounds upon which to base them; that the representations were false and that had he known the falsity thereof, he would have required the services of competent physicians to care for him and, further, would have brought his action well within the one-year period. As heretofore noted, plaintiff is appearing in propria persona and his complaint is most awkwardly drawn. From the allegations thereof, it appears that he is charging all defendants with negligent treatment and care and with the failure to make a correct diagnosis by reason of a failure to take X-ray pictures of his leg as well as with a fraudulent concealment from him of his true condition while assuring him that they knew the condition of his leg without taking X-ray pictures thereof; that he is charging all defendants with falsely representing to him that it was reasonable to expect a cure of his leg.

[3] Taking the allegations of the complaint as true as we are bound for the purpose of this appeal to do, it would appear that plaintiff's leg was amputated on *September 22, 1949* and that he first knew of the necessity therefor on *September 2, 1949*. He further alleges, however, that defendants Shultz, Meier and Ferree had made reports to the State Insurance Com-

pensation Fund, based on X-rays taken by them on *May 5, 1949,* which disclosed that "Ostitis, Periostitis, possibly approaching the Osteomyelitis stage, had developed in said left leg and infected the bones thereof"; and that "on or about August 2, 1950, the State Compensation Insurance Fund of California, served copies on plaintiff of [these] reports made by certain defendants of plaintiff's case. That plaintiff had no reason to believe and did not know said reports had been made or existed, before said time." The essence of these allegations is that while plaintiff knew his leg would have to be amputated and that it was later amputated, he did not know that the amputation was necessary because of the negligent care given him by the defendants until on August 2, 1950, he received the reports made by them.

[4] The rule has been stated, Pellett v. Sonotone Corp., 55 Cal.App.2d 158, 160, 130 P.2d 181, that the statute of limitations does not commence to run until the plaintiff discovered his injury, or through the use of reasonable diligence, should have discovered it, Bowman v. McPheeters, 77 Cal.App.2d 795, 798, 176 P.2d 745; Sears v. Rule, 27 Cal.2d 131, 147, 163 P.2d 443. We must then determine whether the knowledge received by plaintiff on September 2, 1949 that his leg must be amputated put him on notice that defendants had been guilty of negligence in the treatment and care thereof. See, also, Agnew v. Larson, 82 Cal.App.2d 176, 182, 185 P.2d 851; Faith v. Erhart, 52 Cal.App.2d 228, 230, 126 P.2d 151; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 562, 111 P.2d 421; Marsh v. Industrial Accident Comm., 217 Cal. 338, 18 P.2d 933, 86 A.L.R. 563.

In Bowman v. McPheeters, 77 Cal.App.2d 795, 800, 176 P.2d 745, 748, the court said: "Perhaps the most significant feature in the present case which makes inapplicable the doctrine of constructive notice is the existence of the relationship between the parties of physician and patient, which in contemplation of law is a fiduciary one. 20 Cal.Jur. p. 1072, sec. 20. As fiduciaries it was the duty of defendants to make a full and fair disclosure to plaintiff of all facts which materially affected his rights and interests. This principle has been applied and expressed in one form or another in several recent decisions dealing specifically with the question of fraudulent concealment of a cause of action in its relation to the statute of limitation. Hansen v. Bear Film Co., Inc., 28 Cal.2d 154, 178–179, 168 P.2d 946; Sears v. Rule, 27 Cal.2d 131, 148, 163 P.2d 443; Bollinger v. National Fire Ins. Co., 25 Cal.2d 399, 411, 154 P.2d 399; Pashley v. Pacific Elec. Ry. Co., supra, 25 Cal.2d [226] at page 235, 153 P.2d 325."

In Hobart v. Hobart Estate Co., 26 Cal. 2d 412, 440, 159 P.2d 958, 973, it was said that it was recognized in cases involving a fiduciary relationship that "facts which would ordinarily require investigation may not excite suspicion, and that the same degree of diligence is not required" of the injured person. See, also, Rutherford v. Rideout Bank, 11 Cal.2d 479, 486, 80 P.2d 978, 117 A.L.R. 383; Bainbridge v. Stoner, 16 Cal.2d 423, 430, 106 P.2d 423. In Pashley v. Pacific Elec. Ry. Co., 25 Cal. 2d 226, 235, 153 P.2d 325, 329, we said: "As determined in those cases, the confidence growing out of the relationship of doctor and patient imposed upon the physician the duty of refraining from fraudulent concealment, that is, the duty of disclosure when he had knowledge of the facts. * * * Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud sufficient to entitle the party injured thereby to an action. Kimball v. Pacific Gas & Elec. Co., supra, 220 Cal. [203, at] page 219, 30 P.2d 39; Vance v. Supreme Lodge, supra, [15 Cal.App. 178, 114 P. 83]. Since its voluntary undertaking placed upon the defendant the duty to disclose to the plaintiff the full extent of his injuries and the probable future disability to be expected therefrom, its false representation designed to conceal facts known to it and intended to prevent plaintiff's consulting other physicians and thus hinder him from bringing action until after the running of the statutory period of limitations, must be deemed to amount to fraud upon the plaintiff and to excuse any greater diligence on his part under the facts disclosed by the complaint. No fact as to the plaintiff's condition is alleged which could be deemed to have put him on earlier notice."

[5] It would appear from the foregoing, that the fiduciary relationship of physician and patient excused plaintiff from greater diligence in determining the cause of his injury and that he was not, therefore, put on notice by the knowledge received by him on September 2, 1949 that his leg was to be amputated, that the cause thereof was negligence on the part of these defendants.

[6] In Kimball v. Pacific Gas & Elec. Co., 220 Cal. 203, 210, 30 P.2d 39, 42, this court said: "We are of the opinion, however, that independent of statute, a fraudulent concealment by the defendant of the facts upon which a legal common-law action is based, under the proper circumstances, tolls the statute until discovery, and that upon discovery the statute applicable to that particular action (in this case section 340, subd. 3, of Code Civ. Proc.) then commences to run." And held in 220 Cal. at page 215, 30 P.2d 39, 44, "We, therefore, hold that the better view and the one supported by the cases in this state and by the weight of authority elsewhere is that as far as a legal action for personal injuries is concerned, the fraudulent concealment by the defendant of the facts upon the existence of which the cause of action depends tolls the statute, and such statute does not begin to run until the discovery by plaintiff or until by reasonable diligence the plaintiff should have discovered the facts." It was held there that even though plaintiff pleaded fraud and concealment to toll the statute, the same rules should apply as if section 338, subdivision 4, of the Code of Civil Procedure[3] were relied upon. The court, quoting from Original Mining & Milling Co. v. Casad, 210 Cal. 71, 75, 290 P. 456, 457, said: "It will be discovered upon an analysis of the above cases that there are three major allegations that must be contained in the complaint before it will be held sufficient: (1) the complaint must allege when the fraud was discovered; (2) the circumstances under which it was discovered; and (3) facts must be alleged to show that plaintiff is not at fault for failing to discover the fraud sooner, and that the plaintiff has no actual or presumptive knowledge of facts sufficient to put him on inquiry."

Plaintiff alleged that on August 2, 1950, he discovered that defendants Shultz, Meier and Ferree had knowledge of the seriousness of his condition, through reports theretofore made by them to the State Compensation Insurance Fund. As we have heretofore seen, the confidential relationship existing between a patient and his physician or physicians would excuse plaintiff from any greater diligence on his part. It would appear, therefore, that plaintiff's second cause of action alleges sufficient facts to toll the statute of limitations.

[7] As to defendant Gillis, plaintiff alleges that his leg was amputated by this defendant on *September 22, 1949*, and that "plaintiff is now informed and believes and placing his allegations on that ground alleges that with the application of the proper knowledge and skill said left leg could still been [sic] saved and have been of use and benefit to plaintiff." While, again, the phraseology of the allegations leaves much to be desired, it is apparent that the gravamen of the complaint against defendant Gillis is that the amputation could have been avoided by proper, skillful care and treatment. A further allegation charges that as a "direct and proximate result" of the "careless, neglignece [sic] and unskillful acts * * * [and] omissions * * *" of all defendants, plaintiff suffered the amputation of his leg, etc. It is also apparent that this first cause of action against defendant Gillis is not barred by the statute of limitation in-

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[3] "An action for relief on the ground of fraud or mistake. The cause of action in such case not to be demed [sic] to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." Code Civ.Proc. § 338(4).

asmuch as plaintiff's original complaint was filed on September 12, 1950. Defendant Gillis is also charged with fraudulent misrepresentations and concealment and from what has been heretofore said, it appears that defendant Gillis is estopped from taking advantage of the statute of limitation. We said in Pashley v. Pacific Elec. Ry. Co., supra, 25 Cal.2d 226, 231, 153 P.2d 325, 328, "In reality the ground of relief is that the defendant, having by fraud or deceit concealed material facts and by misrepresentations hindered the plaintiff from bringing an action within the statutory period, is estopped from taking advantage of his own wrong."

[8] There is an additional reason why the demurrers as to the second cause of action were not well taken. Plaintiff alleged that his leg was amputated on September 22, 1949. If, as has been said, Kimball v. Pacific Gas & Elec. Co., supra, 220 Cal. at page 214, 30 P.2d at page 44: "* * * the rule is well settled that in a malpractice case the statute starts to run from the *date of the injury* * * *" (emphasis added), then plaintiff's action was within the period limited for the commencement of such an action inasmuch as the original complaint was filed *September 12, 1950.* If he is deemed to have acquired knowledge of the negligence of these defendants at the time his leg was amputated, then his action was commenced in time. It appears, however, that he should not be deemed to have acquired such knowledge, or notice, until he received the copies of the reports of defendants Shultz, Meier and Ferree on August 2, 1950, for until that time he did not have knowledge, or notice, that defendants knew, and concealed from him, the seriousness of his condition.

Demurrer of defendants Shultz and Meier.

[9, 10] These defendants also demurred on the ground that several causes of action were united but not separately stated. Plaintiff's complaint as heretofore noted, sets forth in numbered, separate paragraphs the allegations as to each defendant, or group thereof, and consists of two causes of action as to each defendant, or group thereof. It has been pointed out that the allegations of the first cause of action are sufficient to state a cause of action for negligence and those of the second to toll the statute of limitations. This ground of demurrer is not well taken. Each cause of action against each defendant or group thereof is stated separately not only as to defendants but as to the period of time during which plaintiff was under the care and treatment of such defendant, or defendants. If the demurrer was meant to be on the ground that causes of action against these defendants were improperly joined, that contention is answered adversely to defendants by reason of the rule set forth in Kraft v. Smith, 24 Cal.2d 124, 129, 130, 148 P.2d 23, 26, a malpractice case. We said there: "Although the complaint before us is far from being a model of clarity, conciseness, or consistency, it does fairly appear therefrom that plaintiff Wanda Kraft sustained certain severe physical injuries, that the defendants were severally and successively employed to treat such injuries, that each defendant was negligent in the treatment he administered, and that as a proximate result of the negligence of one or the other or both of the defendants the plaintiff Wanda Kraft sustained further injury * * *. Certainly neither defendant is liable for any injury caused by the independent tort of his codefendant, to which he himself did not proximately contribute. If upon the trial it develops that neither defendant was guilty of negligence then no prejudice will have been occasioned by their joinder in the one action. If it develops that only one defendant was negligent in his treatment the assessment of the verdict will be simple. If, on the other hand, it appears that negligence of both defendants contributed proximately to cause an injury for which plaintiff is entitled to recover, it may be a matter entailing great difficulty of proof as to the amount in which each defendant is responsible." And: "The facts that defendants are not joint tort feasors but independent wrongdoers, and that their negligence operated successively rather than concurrently in time to produce the injury,

are not vetitive of the right of joinder. The salutary procedure afforded by sections 379a, 379b and 379c of the Code of Civil Procedure is clearly intended to be available upon a showing *either* that the negligence of two or more persons, whether joint, independently concurrent, or successive, contributed proximately to cause the injury for which recovery is sought, *or* that the injury for which recovery is sought was proximately caused by the negligence of one or another or several of two or more persons and, as to each person who is not charged absolutely, that a reasonable uncertainty, requiring determination of some factual or legal issue, exists in respect to alternative or quantitative liability." 24 Cal.2d at pages 130, 131, 148 P.2d at page 26.

It appears then that this ground of demurrer was not well taken and should not have been sustained.

These defendants also demurred upon the ground that the complaint was uncertain, unintelligible and ambiguous in that it could not be ascertained whether the negligence on their part consisted of a failure to keep the leg free from infection or negligence in prescribing for and treating the leg; and that it cannot be ascertained whether they are charged with negligence in failing to repair the artery and nerve and in failing to remove accumulated blood and, if so, whether plaintiff is charging that any damage resulted; and that it cannot be ascertained what acts defendants are charged with failure to perform in order to have properly combatted an infection.

[11] The gravamen of plaintiff's complaint is that defendants neglected properly to care for his leg as a result of which the leg was amputated, to his damage and loss. As was said in Greninger v. Fischer, supra, 81 Cal.App.2d 549, 552, 184 P.2d 694, it was not necessary for plaintiff to allege in what respect the treatment given him might have been deficient so long as the allegations of the complaint charged the breach of a legal duty, proximate causation and resulting damage.

[12, 13] Matter in a pleading which is not essential to the claim is surplusage; probative facts are surplusage and may be stricken out or disregarded. 21 Cal.Jur. p. 24, § 11; Brea v. McGlashan, 3 Cal. App.2d 454, 460, 39 P.2d 877; Kidwell v. General Petroleum Corp., 212 Cal. 720, 723, 300 P. 1, 76 A.L.R. 830; Morlock v. Fink, 81 Cal.App. 686, 690, 254 P. 578.

It follows, therefore, that the demurrer of defendants Shultz and Meier should have been overruled.

Demurrer of defendant Ferree.

[14] In addition to the grounds of demurrer heretofore set forth on which all defendants demurred and which have been discussed, defendant Arthur Ferree demurred on the ground that plaintiff's first cause of action was uncertain, ambiguous and unintelligible because it could not be ascertained "how or in what manner it is contended that this demurring defendant was careless, negligent and unskillful" so far as the treatment of plaintiff was concerned. As heretofore noted, it was unnecessary for plaintiff to allege in detail the facts on which the alleged negligence of the defendant rested. Negligence may be pleaded in general terms in malpractice cases as well as in other types of negligence, Greninger v. Fischer, supra, 81 Cal. App.2d 549, 552, 184 P.2d 694.

Contentions of defendants.

[15] All defendants contend that plaintiff was put on notice of the extent of his injury because the proceedings under the Workmen's Compensation Act were "public record[s]. The plaintiff, was, therefore, put upon inquiry as to everything that it disclosed and, therefore, cannot hide behind his indolence in failing to pursue that which he was bound to inquire about and thus base his claim to an extension of the statute." All defendants rely upon Crabbe v. White, 113 Cal.App. 2d 356, 248 P.2d 193; Sonbergh v. MacQuarrie, 112 Cal.App.2d 771, 247 P.2d 133 and Huysman v. Kirsch, 6 Cal.2d 302, 57 P.2d 908, in support of this contention. Crabbe v. White, supra, involved a will

which had been filed for probate and the court held that a will, when filed, became a matter of public record and that means of knowledge, especially where it consisted of public records, was deemed in law to be knowledge. Sonbergh v. MacQuarrie, supra, is not in point. The court there held that a complaint not filed until two years and ten months after the alleged assault was not filed in time *in the absence of any allegation of fraud, concealment or duress on the part of defendant which would have prevented the plaintiff from ascertaining earlier that he had suffered injury at the hands of the defendant.* Huysman v. Kirsch, supra, holds, as heretofore set forth, that the statute of limitations should not run against a plaintiff's cause of action until that plaintiff had knowledge thereof, or should, in the exercise of due care and diligence, have acquired knowledge thereof. No authority has been cited, nor can any be found, which provides that physicians' reports to the State Compensation Insurance Fund of California shall constitute "public records" so as to give constructive notice as provided for by section 19 of the Civil Code ("Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.") It would appear, therefore, that there is no merit to this contention of defendants.

[16] All defendants, with the exception of Dr. Ferree, contend that plaintiff's complaint does not state a cause of action because "[I]t is fundamental that a surgeon does not undertake to perform a cure, nor does he contract to use the highest degree of care, but will use ordinary care and skill as tested by the practice of responsible members of his profession in his community." This, it would appear, is a matter of evidence and not a valid contention upon an appeal from a judgment entered after the sustaining, without leave to amend, of a demurrer to a complaint. As we said in Huysman v. Kirsch, supra, 6 Cal.2d 302, 313, 57 P.2d 908, 913: "However, statements of counsel in their briefs relative to the evidence which may be produced at the trial have no bearing upon the question of the sufficiency of a complaint, and cannot be considered by the court in passing upon that question. Stone v. Imperial Water Co., 173 Cal. 39, 43, 159 P. 164."

[17] Defendant Ferree contends that plaintiff's allegations concerning the allegedly false representations made to him did not concern existing facts "but were in the nature of a prophecy as to the events to happen in the future." It is argued that the question, in such a case, is whether the belief was actually and honestly entertained by those making the representations. This, too, would appear to be a matter of evidence, Huysman v. Kirsch, supra, and not a valid objection to the sufficiency of the complaint. It is said that this contention has even more merit when considered in view of the fact that a physician does not insure and guarantee cures. Rasmussen v. Shickle, 4 Cal.App.2d 426, 41 P.2d 184, cited in support of this contention involved the granting of a motion for a nonsuit, and the court was concerned with the *evidence* produced by the parties.

[18] Defendants' argument as to misjoinder of parties defendant found in their briefs has no merit in view of the fact that no demurrer was interposed on that ground, Code Civ.Proc. § 430, and in view of the discussion heretofore set forth.

For the foregoing reasons the judgments are and each of them is reversed.

TRAYNOR and SPENCE, JJ., and BRAY, J. Pro tem., concurs.

EDMONDS, J., concurs in the judgment.

42 Cal.2d 795

STAFFORD
v.
LOS ANGELES COUNTY EMPLOYEES' RETIREMENT BOARD et al.

L. A. 23091.

Supreme Court of California.
In Bank.

May 11, 1954.

Rehearing Denied June 9, 1954.

Mandamus proceeding to compel County Employees' Retirement Board to pay pension to deputy sheriff retired for disability resulting from injury in line of duty. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment of dismissal. Retired deputy appealed. The Supreme Court, Schauer, J., held that retired deputy who had received no retirement payment but who had right to future allowance was a "beneficiary" within statute modifying retirement benefits when workmen's compensation has been paid and was not entitled to retirement payments until total amount which would have been paid equalled amount received under Workmen's Compensation Act.

Judgment affirmed.

Carter, J., dissented.

Prior opinion, 264 P.2d 577.

1. Sheriffs and Constables ⟹32

Under County Peace Officers' Retirement Law, where other definition would render provision meaningless, retired deputy sheriff who had received no retirement payments but who had right to future allowance was a "beneficiary". Government Code, §§ 31908, 32081.

See publication Words and Phrases, for other judicial constructions and definitions of "Beneficiary".

2. Counties ⟹69(3)

County Peace Officers' Retirement Law which becomes effective in a county upon its acceptance by ordinance of County Board, and which provides that it shall not be construed as a local measure, is of equal sanction as other enactments of the Legislature. Government Code, § 31900 et seq.

3. Counties ⟹69(3)

Any conflict between provisions of the Labor Code enacted in 1913 and the County Peace Officers' Retirement Law enacted in 1931 would be resolved in favor of the later enacted law. Labor Code, § 3751; Government Code, §§ 32080, 32081.

4. Counties ⟹69(3)

Provisions of particular and specific law, dealing with retirement benefits of county peace officers, must prevail over allegedly conflicting general workmen's compensation provision expressed in the Labor Code. Labor Code, § 3751; Government Code, §§ 32080, 32081.

5. Counties ⟹69(3)

Workmen's Compensation ⟹905

Provision of County Peace Officers' Retirement Law that beneficiary shall not receive retirement payments until total of such payments which would otherwise be paid equals total amount of any lump sum workmen's compensation benefits paid, fixed period during which retirement payments are suspended, and withholding of retirement payments did not constitute violation of statute prohibiting contribution by employee to cost of workmen's compensation award. Labor Code, § 3751; Government Code, §§ 32080, 32081.

6. Sheriffs and Constables ⟹32

Where provisions of County Peace Officers' Retirement Law, requiring modification of retirement payments when workmen's compensation award had been made, were in effect when deputy sheriff took office and when he was retired, deputy's pension rights were neither altered nor impaired by compliance with provisions. Government Code, §§ 32080, 32081.

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Elsan H. Stafford, in pro. per.

Harold W. Kennedy, County Counsel and Edward H. Gaylord, Dep. County Counsel, Los Angeles, for respondents.

SCHAUER, Justice.

Petitioner, a retired deputy sheriff of the County of Los Angeles, seeks mandamus to compel respondent County Employees' Retirement Board to pay him a pension. A general demurrer to his amended petition for the writ was sustained without leave to amend, and he appeals from the ensuing judgment of dismissal. We have concluded that the trial court correctly determined that petitioner is not entitled to the payments he seeks, and that the judgment should be affirmed.

Petitioner alleges that he entered the service of the county as a deputy sheriff in August, 1946. He was injured in line of duty, and in January, 1950, was retired by reason of resulting disability. In May, 1950, the Industrial Accident Commission awarded him $5,603.53, which was paid in a lump sum by State Compensation Insurance Fund, the workmen's compensation insurance carrier for the county. Petitioner thereafter applied to respondent board for payment of a pension. Acting assertedly pursuant to, and in reliance upon, the provisions of section 32081 of the Government Code, hereinafter (p. 3) quoted in all material parts, the board refused to make any payment on account of the pension until (using the language of subdivision (a) of section 32081) "the total amount of the retirement payments which would otherwise be paid equals the total amount received [by petitioner] under the workmen's compensation act."

Petitioner's pension rights are set forth in the County Peace Officers Retirement Law (now codified as §§ 31900–32082 of the Government Code), passed by the state in 1931, and adopted by Los Angeles County pursuant to the provisions of section 31930.[1] Section 32055 provides that "Upon retirement of a member for service connected disability, he shall receive an annual pension, payable in monthly installments, equal to one-half of his terminal salary, not to exceed two hundred fifty dollars ($250) a month." Section 32080 declares that "It is the intention of this chapter [the Retirement Law] that pensions allowed for injury incurred in line of duty shall not be cumulative with the benefits under workmen's compensation awarded for the same injury or disability." Section 32081, hereinbefore referred to and relied upon by respondent board, provides that "If any beneficiary receives compensation under any workmen's compensation act or by virtue of any judgment obtained against the county * * * for disability arising out of and in the course of the employment of a member or pensioner, the benefits shall be modified as follows:

"(a) If the amount is paid in one sum * * * the beneficiary shall not receive any retirement payments until the total amount of the retirement payments which would otherwise be paid equals the total amount received under the workmen's compensation act or by virtue of the judgment * * *."

[1] Petitioner first contends that section 32081 does not apply to him because section 31908 states that "'Beneficiary' means any person in receipt of a pension, or other benefit provided by the retirement system." Since, says petitioner, he has not yet received a pension he is not a beneficiary as that term is used in section 32081. However, section 31903 declares that "Unless the context otherwise requires, the definitions and general provisions contained in this article govern the construction of this chapter." It seems clear that the context of section 32081 requires that petitioner be included within the term "beneficiary," as otherwise the entire section would appear to apply to no one and to be meaningless. It is not to be assumed that the Legislature indulged in an idle act. (Scheas v. Robertson (1951), 38 Cal.2d 119, 129, 238 P.2d 982; see also Stafford v. Realty Bond Service Corp. (1952), 39 Cal.2d 797, 805, 249 P.2d 241.) Moreover, a contrary view would defeat the declared policy of section 32080 that disability pensions shall not be cumulative with workmen's compensation benefits awarded for the same disability. In addition, as pointed out by respondent, the right to a future retirement allowance has been held to be a "benefit" (see Palaske v. City of Long Beach (1949), 93 Cal.App.2d 120, 124–127,

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1. Government Code, section 31930: "This chapter shall become effective in any county upon its acceptance by ordinance passed by four-fifths vote of its board of supervisors, and becomes operative in the county on January 1st or July 1st following the expiration of three months after the passage of the ordinance."

208 P.2d 764), thus bringing petitioner within the section 31908 definition of "beneficiary" as one who is in receipt of some "other benefit provided by the retirement system."

[2–4] Petitioner also contends that because he contributed to the fund from which his pension is to be paid, the result of the withholding of pension benefits from him until such benefits, otherwise payable, equal the amount of his workmen's compensation award is to cause him to contribute to the cost of such award, in violation of the provisions of section 3751 of the Labor Code.[2] This contention likewise is untenable as applied to the facts of this case. In the first place, both section 3751 of the Labor Code and sections 32080 and 32081 of the Government Code (pursuant to which the pension payments are being withheld) are basically of equal sanction as enactments of the Legislature. Section 31902 of the Government Code expressly declares that the Retirement Law "shall not be construed as a local measure." The Workmen's Compensation Act, including the provisions upon which Labor Code section 3751 is based, was enacted in 1913. The Retirement Law, including the provisions of Government Code sections 32080 and 32081, was enacted in 1931. Therefore, if it be deemed that a conflict exists between the provisions of the Labor Code section and those of sections 32080 and 32081, the latter sections, being later in time, must be held to prevail. (Nelson v. Reilly (1948), 88 Cal.App.2d 303, 306, 198 P.2d 694.) Also, since the Retirement Law is a particular and specific law, dealing with the retirement benefits of county peace officers, its provisions must be held to prevail over the general workmen's compensation provisions expressed in section 3751 of the Labor Code. (See Board of Supervisors v. Simpson (1951), 36 Cal.2d 671, 673, 227 P.2d 14; Rose v. State of California (1942), 19 Cal.2d 713, 723–724, 123 P.2d 505; Whittemore v. Seydel (1946), 74 Cal.App.2d 109, 120, 168 P.2d 212; 23 Cal.Jur. 762–763, and cases there cited.)

[5] It appears, however, that there is no conflict between the two statutory provisions, and that compliance with section 32081 of the Government Code will not constitute an exaction or receipt by the employer from the employee of a contribution, in violation of Labor Code section 3751. Rather, section 32081 may be construed as fixing or defining a period during which pension payments will be suspended. "[E]very statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. [Citations.]" (Stafford v. Realty Bond Service Corp. (1952), supra, 39 Cal.2d 797, 805, 249 P.2d 241; see also Rose v. State of California (1942), supra, 19 Cal.2d 713, 724, 123 P.2d 505; 23 Cal.Jur. 784–785, and cases there cited.) Although this construction may be considered to result in a reduction in the amount of pension payments which the retired officer would otherwise receive, it may be noted that under the terms of section 32064 of the Government Code a reduction (even complete termination, prior to amendment of the provision in 1947) may also occur if the officer engages in public employment other than service in the armed forces of the United States.

Cases relied upon by petitioner are neither compelling nor persuasive to a contrary holding. Larson v. Board of Police, etc., Com'rs (1945), 71 Cal.App.2d 60, 62, 162 P.2d 33; Johnson v. Board of Police, etc., Pension Com'rs (1946), 74 Cal.App.2d 919, 921, 170 P.2d 48; and Holt v. Board of Police, etc., Com'rs (1948), 86 Cal.App.2d 714, 719–720, 196 P.2d 94 all deal with a section of the Long Beach City Charter which stated that "This provision is intended to be in lieu of and take the place, in so far as it applies, of the Workmen's Compensation, Insurance and Safety Act * * * and any person who would be entitled to a pension under the provisions of this amendment and who applies for a pension hereunder shall be deemed to have waived all provisions under the Workmen's Compensation, Insurance and Safety Act * * *." (See p. 62 of 71 Cal.App.2d, p. 34 of 162 P.2d.) It was held that the charter provision, a matter of local concern, could not constitute the pension provisions a substitute for workmen's compensation. As pointed out in the Holt case (p. 719 of 86 Cal.App.2d, p. 97 of 196 P.2d), however, the charter did not provide that workmen's compensation was to be in lieu of and take the place of the pension provisions, and none of the cited cases passes upon such a situation. Healy v. Industrial Accident Comm. (1953), 41 Cal.2d 118, 121, 258 P.2d 1, concerns a Los Angeles City Charter provision that if an employee entitled to a pension because of injury is granted workmen's compensation, then his pension should be construed as such compensation and applied in payment of the award. The city was permissibly uninsured for workmen's compensation. It was held that the general workmen's compensation law must prevail over the local charter provision in case of conflict between the two, and that "the validity of" any credit given the city against the workmen's compensation award "depends upon whether Healy contributed to the pension for which the credit was allowed and whether as a result of the credit he was required, directly or indirectly, to pay part of the cost of his compensation in violation of section 3751" of the Labor Code. However, as already noted, in the case presently before us the retirement law provision under which defendant acted is a part of general state law rather than a local charter provision, and the payments which are deferred or reduced are those of the pension rather than of the compensation award. An Alameda city ordinance which was construed to likewise require reduction of pension payments in case of payment of workmen's compensation was upheld against a similar contention of conflict with the workmen's compensation act, in Foster v. Pension Board (1937), 23 Cal.App.2d 550, 554–555, 73 P.2d 631.

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[2] Labor Code, § 3751: "No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this section is a misdemeanor."

[6] Other contentions by petitioner are without merit and appear to have been abandoned by him. For example, it was suggested that his vested rights in his pension were in some manner impaired by defendant's compliance with the provisions of section 32080 and 32081 of the Government Code. However, those provisions were in effect both when petitioner first became a deputy sheriff and when he was retired; consequently his pension rights were neither altered nor impaired during or after his service for the county.

For the reasons above stated the judgment is affirmed.

SHENK, EDMONDS, and TRAYNOR, JJ., and BRAY, J. pro tem., concur.

SPENCE, J., concurs in the judgment.

CARTER, Justice (dissenting).

I dissent.

The majority holding requires an employee to contribute to workmen's compensation payable to him contrary to the constitutional and statutory policy of this state. It is of little consequence that the payments of disability pension are to be withheld up to the amount of the workmen's compensation received by the employee rather than that the pension was credited against the compensation as was the case in Healy v. Industrial Accident Comm., 41 Cal.2d 118, 258 P.2d 1. That involved merely a matter of time and method of accomplishing the illegal result. Under the pension law the county employee was required to and did contribute to the pension fund. Now that contribution is taken from him because he has received workmen's compensation, that is, payment of his pension to which he contributed is withheld because he received workmen's compensation. He is, in effect, and for all practical purposes, paying part of the workmen's compensation to which he is entitled without contribution by him.

The policy of this state envisions no such contribution. The Constitution provides for a complete system of workmen's compensation. "The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workmen's compensation, by appropriate legislation, and in that behalf to create and enforce a *liability on the part of any or all persons to compensate any or all of their workmen for injury or disability,* and their dependents for death incurred or sustained by the said workmen in the course of their employment, irrespective of the fault of any party. A complete system of workmen's compensation includes adequate provisions for the comfort, health and safety and general welfare of any and all workmen and those dependent upon them for support to the extent of *relieving from the consequences of any injury* or death incurred or sustained by workmen in the course of their employment, irrespective of the fault of any party; also full provision for securing safety in places of employment; * * * full provision for adequate insurance coverage against liability to pay or furnish compensation; * * * all of which matters are expressly declared to be the *social public policy of this State, binding upon all departments of the State government."* Cal.Const. art. XX, § 21; emphasis added. The Legislature has implemented this policy by providing that: "No employer shall exact or receive from any employee any contribution, or make or take any deduction from the earnings of any employee either directly or indirectly, to cover the whole or any part of the cost of compensation under this division. Violation of this section is a misdemeanor." Labor Code, § 3751. And: "Liability for compensation shall not be reduced or affected by any insurance, contribution or other benefit whatsoever due to or received by the person entitled to such compensation, except as otherwise provided by this division." Labor Code, § 3752. Nothing could be more specific than the last quoted provision. Contrary to the majority opinion it is more specific than the pension law, Government Code, §§ 31900 et seq. and if there is a conflict it controls.

California Jurisprudence, after referring to sections 3751 and 3752 of the Labor Code, states: "Accordingly contributions or benefits received from a labor union during a strike may not be deducted from the disability indemnity payable under the act. And when the employer takes out accident insurance in favor of the employee, out of whose wages the premiums are eventually payable, such workman is entitled to the benefits under the policy in addition to those to which he is entitled under the statute, and the employer may not set off against compensation due from him any amounts paid under the policy." 27 Cal. Jur. 513. The rule is settled that the payment of salary or wages does not prevent an award of workmen's compensation for disability and the salary is not to be deducted from the compensation unless there is express provision therefor. Department of Motor Vehicles v. Industrial Accident Comm., 14 Cal.2d 189, 93 P.2d 131.

The pension act cannot, under the Constitution, art. XX, § 21, supra, require that the employee contribute toward the payment of his compensation. As seen, that constitutional provision states that it is the policy of this state that there shall be a *liability* on the part of *employers* to pay compensation to their employees; that the *employee* shall be *relieved* of the consequences of an industrial injury. If the employee has to contribute to the payment of his workmen's compensation the employer is to that extent not liable and the employee to that extent has not been relieved of the consequences of the injury. The underlying principle of a complete system of workmen's compensation which is the constitutionally declared policy of this state is that compensation for injuries shall be borne by industry as a part of the cost of production. Union Iron Works v. Industrial Accident Comm., 190 Cal. 33, 210 P. 410; Employers' Liability Assurance Corp. v. Industrial Accident Comm., 179 Cal. 432, 177 P. 273; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491; Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 151 P. 398. It must necessarily follow that no contributions to the payment of workmen's compensation can be required of the employee. Therefore the pension act cannot constitutionally require such contribution. If it is argued that there is no contribution but only less pension payable to the employee, then what becomes of the contribution to the pension fund by the employee? Either the portion he supplied is taken away from him or he is required to help pay the workmen's compensation which he is entitled to receive without contribution and in either case he has been deprived of at least a portion of that to which he is lawfully entitled under the workmen's compensation law. It seems clear to me that if the Legislature may provide, in the face of Article XX, § 21, of the Constitution, that an injured employee who receives workmen's compensation may be barred from receiving a pension from a fund to which he has contributed, it may also bar him from receiving payments under a policy of health and accident insurance on which he has paid all the premiums, or from receiving other benefits from welfare agencies to which he has made contributions in order to secure such benefits. Under the majority holding here such legislation would be upheld. In my opinion it would violate the above cited constitutional mandate.

I would, therefore, reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

125 Cal.App.2d 340

GIBSON v. STUCK.

Civ. 19903.

District Court of Appeal, Second District, Division 3, California.

May 19, 1954.

Action involving collision of defendant's automobile with rear of plaintiff's automobile while both automobiles were proceeding in same direction. The Superior Court, San Luis Obispo County, Ray B. Lyon, J., granted plaintiff's motion for new trial after verdict for defendant and defendant appealed. The Court of Appeal, Vallée, J., held that, under the evidence, it was reasonable to conclude the defendant had not used ordinary care to avoid collision and that he had not operated his vehicle at a reasonable or prudent speed or in a reasonable and prudent manner in that he was unable to retard the speed of his automobile sufficiently to avoid hitting the rear of plaintiff's automobile traveling in the same direction as defendant's.

Affirmed and $300 awarded plaintiff, as damages for a frivolous appeal, to be assessed as costs.

1. Appeal and Error 🔑1015(1)

An order of the trial court granting a new trial will be reversed only when it can be said as a matter of law that there is no substantial evidence to support a contrary judgment.

2. Automobiles 🔑244(12, 35)

Under the evidence, in action involving collision of defendant's automobile with rear of plaintiff's automobile while both automobiles were proceeding in same direction, it was reasonable to conclude that defendant had not used ordinary care to avoid collision and that he had not operated his vehicle at a reasonable or prudent speed or in a reasonable or prudent manner in that he was unable to retard the speed of his automobile sufficiently to avoid hitting the rear of plaintiff's automobile traveling in the same direction as defendant's.

3. Costs 🔑260(4)

Defendant's appeal from court's order granting plaintiff's motion for new trial in action involving collision of defendant's automobile with rear of plaintiff's automobile while both automobiles were proceeding in same direction, was frivolous, in view of evidence justifying a verdict for plaintiff, and, obviously having been taken for purpose of delay, called for assessment of a penalty.

Mack, Bianco & King, and Robert E. King, Bakersfield, for appellant.

Kaetzel & Kaetzel, San Luis Obispo, for respondent.

VALLÉE, Justice.

Appeal by defendant from an order granting plaintiff's motion for a new trial in an action for damages for personal injuries and injury to property allegedly caused by the negligence of defendant in the operation of his automobile. Defendant denied negligence and alleged contributory negligence on the part of plaintiff. No evidence was introduced on the issue of contributory negligence and the question was not submitted to the jury. Verdict and judgment were for defendant.

The court granted the motion on the grounds: 1. Insufficiency of the evidence to justify the verdict. 2. The verdict was against law.

The accident occurred on November 16, 1951, between 5:30 and 6:00 p. m., on U.S. Highway 101, on an incline of a hill approximately one mile north of the town of Arroyo Grande in San Luis Obispo county. The highway runs generally north and south. North of the point where the accident took place, there is a gradual curve; and for a quarter of a mile north of the curve, the road is straight. Visibility from the curve to the point where the accident occurred, looking south, was about 300 feet.

Earlier in the evening an automobile had overturned south of the curve, but it was not a barrier to traffic; it was lying nearly nine feet to the west of the west edge of the pavement. A highway patrol officer had placed two warning flares north of the scene of the accident.

Plaintiff was driving south on the highway, traveling approximately 55 miles an hour. When he reached a point on the straight stretch of the highway north of the curve about two-fifths of a mile from the scene of the accident, he saw a flare and observed numerous vehicles parked on the side of the road, the headlights of parked cars, and silhouettes of people darting about. As he started around the long curve, he noticed the overturned car and saw the officer directing traffic. When he was about 100 or 150 feet from the officer who was standing at the edge of the highway a little north of the overturned vehicle, he gave a hand signal to slow down, although he had looked in the rear vision mirror and had seen no automobile behind him at the time. He gradually decreased his speed until he was going about 10 or 15 miles an hour. Traveling at this rate, he passed the officer and the overturned automobile. After he passed the car, he saw in his rear vision mirror headlights overtaking him; he accelerated his speed until he was traveling about 30 miles an hour, but at a point about 30 feet past the overturned car defendant's automobile struck the rear of his car. At the time of the impact, a portion of plaintiff's automobile was off the highway on the shoulder to his right. Defendant told a highway patrolman that he estimated his speed to have been about 60 miles an hour.

Defendant was proceeding south on the highway in the same direction as plaintiff. He testified he was unaware of any danger in front of him until he rounded the curve and saw the overturned car when it was only 150 feet in front of him; he immediately applied his brakes and tried to stop, but he did not have time.

[1] The rules which govern a reviewing court in the determination of an appeal from an order granting a new trial are so well known they need not be repeated. The order of the trial court will be reversed only when it can be said as a matter of law there is no substantial evidence to support a contrary judgment. Brattain v. Pacific Elec. Ry. Co., 98 Cal.App.2d 678, 680, 220 P.2d 747.

[2] We cannot say, as a matter of law, that there was no substantial evidence to support a verdict for plaintiff. It was reasonable to conclude that defendant did not use ordinary care to avoid the collision; that had he exercised ordinary care he would have seen the flares, the headlights of the parked cars, the overturned automobile, and the highway patrol officer, and would have been aware of plaintiff's car in front of him and of the speed that it was traveling; that he did not operate his vehicle at a reasonable or prudent speed or in a reasonable or prudent manner in that he was unable to retard the speed of his car sufficiently to avoid hitting the rear of an automobile traveling in the same direction as he.

The jury could readily have found that defendant was negligent and a verdict for plaintiff would have been justified.

[3] The appeal is frivolous, obviously taken for the purpose of delay, and calls for the assessment of a penalty.

Order affirmed. Respondent is awarded $300 as damages for a frivolous appeal, the same to be assessed as costs on appeal.

SHINN, P. J., and WOOD, J., concur.

125 Cal.App.2d 171

SCHREIBER et al.
v.
SAN JOAQUIN EXPLORATION CO. et al.
Civ. 4901.

District Court of Appeal, Fourth District, California.

May 13, 1954.

Hearing Denied July 7, 1954.

Action by payees against corporation and others to foreclose chattel mortgage and assignment of oil and gas lease given as security for the payment of a note for $24,000 wherein corporation filed cross-complaint seeking cancellation of note and security instruments. The Superior Court, Kern County, R. B. Lambert, J., entered judgment for payees limiting amount of recovery on principal of note to $16,000. Payees appealed from judgment insofar as it failed to award them the additional $8,000 and corporation appealed except from that portion of judgment denying payees the right to recover the additional $8,000. The District Court of Appeal, Mussell, J., held that where corporation executed note for $24,000 in consideration of payees' assumption of corporation's obligation on a note for $16,000 and payees' agreement to sell to corporation, for $8,000, shares of corporation's capital stock pledged to payees as security for personal notes executed by one of corporation's officers, consideration of $8,000 given by payees was invalid and payees could recover from corporation $16,000 only.

Judgment affirmed.

Corporations 🔑465

Where corporation executed note for $24,000 in consideration of payees' assumption of corporation's obligation on note for $16,000 and payees' agreement to sell to corporation, for $8,000, shares of corporation's capital stock pledged to payees as security for personal notes executed by one of corporation's officers, consideration of $8,000 given by payees was invalid and payees could recover from corporation $16,000 only. Corporations Code, §§ 1705, 1706(a), 1707, 1707(b).

◆

Dorris, Fleharty & Phillips, Conron, Heard & James, Bakersfield, for appellants.

Siemon & Siemon, Bakersfield, for respondents.

MUSSELL, Justice.

This is an action to foreclose a chattel mortgage and an assignment of an oil and gas lease given as security for the payment of a promissory note in the sum of $24,000 payable to the plaintiffs and executed by the defendant corporation. The execution and nonpayment of the note was admitted by defendant and special defenses of failure of consideration and usury were alleged. Defendant also filed a cross-complaint in which it sought a cancellation of the note, mortgage, lease and assignment of an overriding royalty agreement.

The trial court limited the amount of recovery on the principal of the note to $16,000, holding that there was a failure of consideration for the sum of $8,000 included in the amount sought to be recovered.

Plaintiffs appeal from the judgment only insofar as it fails to award them the $8,000 deducted and defendant appeals from the whole of the judgment except that part thereof denying plaintiffs the right to recover the said sum of $8,000.

Plaintiffs each owned 7,500 shares of stock in defendant corporation. On December 6, 1948, they and each of them transferred this stock to Albert Sanders, who became president of defendant corporation on or about said date. The consideration for each of these transfers was the sum of $5,000. Each plaintiff received $1,000 in cash and a promissory note executed by Sanders in the sum of $4,000. Apparently these notes were dated November 20, 1948, were payable on or before May 20, 1949, and were secured by pledge of 15,000 shares of stock in defendant corporation. The record shows that this stock was transferred to Sanders, with consent of the Division of Corporations in December of 1948.

On April 27, 1950, the defendant corporation executed a promissory note in the sum of $16,000, payable to the Bank of America National Trust and Savings Association. On October 1, 1950, a special meeting of the defendant corporation was held to discuss the financing of the operations of the company. At this meeting Sanders, who was president, stated that the corporation did not have sufficient funds to pay its note to the bank and that this obligation would have to be refinanced; that plaintiffs had offered to take up said note for the company and give the company until May 31, 1951, to pay the same, providing the company would repurchase from them the stock which they held in the company for the sum of $8,000; that plaintiffs each held 7,500 shares in the company stock which he, Sanders, had agreed to purchase and that he had defaulted in the purchase contract. The following resolution was then adopted by the defendant corporation:

> "Resolved: That the President and Secretary be, and they are hereby, authorized to execute on behalf of the corporation a promissory note in the sum of $24,000.00 bearing interest at 5% per annum and payable on May 31, 1951 in favor of Samuel L. Schreiber in consideration of said Samuel L. Schreiber and/or Joseph M. Thomas assuming and paying the obligation of the corporation in the principal sum of $16,000.00 payable to the Bank of America, Bakersfield, California and in further consideration of the agreement of said parties to sell to the corporation 15,000 shares of the capital stock of the corporation for the sum of $8,000.00."

It was further resolved that a chattel mortgage be executed by the corporation to secure payment of the corporate note. Pursuant to this resolution, the corporation executed a promissory note to plaintiff Schreiber for $24,000, payable on or before May 31, 1951, and secured by a chattel mortgage on the corporation's personal property. Plaintiffs paid $16,000 to the Bank of America on the corporate note. The Thomas note was sent into escrow and canceled and the Schreiber note was surrendered at the trial.

On May 31, 1951, another special meeting of the corporation was held to discuss obtaining an extension of time for the payment of the $24,000 note which the company was then unable to pay. The defendant corporation agreed to and did convey to plaintiffs an interest in an oil lease in consideration of an extension of the time of payment of the $24,000 note to August 30, 1951. The note was not paid and this action in foreclosure followed.

It is apparent from the record before us that the defendant corporation attempted to purchase the corporate stock of the plaintiffs for the sum of $8,000, if plaintiffs would assume and pay its obligation to the Bank of America in the sum of $16,000 and the note for $24,000 was executed for that purpose. The trial court correctly found that the $8,000 consideration given for the execution of the $24,000 note was invalid and deducted $8,000 from the principal due on the note.

Section 1705 of the Corporations Code provides:

> "A corporation shall not purchase directly or indirectly any shares issued by it or by any corporation of which it is a subsidiary, except as authorized by Section 1706 or Section 1707. * * *."

Plaintiffs argue that the purchase of stock in this action was authorized as an exception to the rule stated in sections 1706 and 1707 of the Corporations Code, particularly subdivision (a) of 1706, which provides that the corporation may purchase out of stated capital or out of any surplus shares issued by it or by a corporation of which it is a subsidiary to collect or compromise in good faith a debt, claim or controversy with any shareholder. Section 1707 provides in part:

> "A corporation may also purchase shares issued by it, or by a corporation of which it is subsidiary, in any of the following cases:
>
> * * * * * *
>
> "(b) From surplus resulting from reduction of stated capital, subject to the provisions of Chapter 5 of this part."

Plaintiffs argue that there is nothing in the quoted sections which would have prohibited the corporation from making a purchase by taking the proper steps authorized by the section to create a surplus by a reduction of stated capital. In this connection they cite Stewart v. Stewart Hotel Co., 33 Cal.App. 167, 164 P. 620. In that case the court held that, beyond the exceptions declared by statute, a corporation has no power to purchase its own stock, since the result of such a transaction would be to illegally withdraw and pay to a stockholder a part of the capital stock of the corporation. See also Stevens v. Boyes Hot Springs Co., 113 Cal.App. 479, 483, 298 P. 508.

In Goodman v. Global Industries, 80 Cal. App.2d 583, 587, 182 P.2d 300, 303, the court, in commenting on the language used in section 342 of the Civil Code (now sections 1705–1709 of the Corporations Code) said:

> "The words 'directly or indirectly' indicate the intention to comprehend and include all types of repurchases however devised, and when the section is read in its entirety it is clear * * * that it was designed to prohibit any purchase by a corporation of its own shares except under conditions prescribed within the section's own four corners."

In the instant case plaintiffs failed to bring themselves within the exception stated in section 1706(a) and 1707(b) because they were not shareholders in the defendant corporation, having a claim against the corporation or a debt due them from it. The two promissory notes for $4,000 each were personal notes of Sanders and the corporation was not obligated to pay them. The defendant corporation had no surplus resulting from reduction of its stated capital. Hence the provisions of section 1707 (b) are not applicable.

As noted, defendants' appeal is from the whole of the judgment except insofar as it denied plaintiffs the right to recover the $8,000 which the corporation agreed to pay for the Sanders' stock. However, defendant corporation has filed no brief nor has it presented arguments or authorities in support of its appeal.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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125 Cal.App.2d 285

McINTYRE v. DOE & ROE et al.

Civ. 19948.

District Court of Appeal, Second District, Division 1, California.

May 18, 1954.

Action against owners and manager of theater for injuries sustained by elderly lady when children playing tag in theater lobby bumped against her as she stood in ticket line in lobby before doors of theater had been opened. From an adverse judgment of the Superior Court of Los Angeles County, Walter R. Evans, J., plaintiff appealed. The District Court of Appeal, Drapeau, J., held that the evidence sustained finding that defendants were not negligent.

Judgment affirmed

1. Negligence ⚷62(3)

Conduct which a reasonably prudent man would have foreseen would probably result in injury is wrongful and intervening wrongful acts of children do not necessarily break the chain of causation.

2. Appeal and Error ⚷996

Where opposing inferences may reasonably be drawn from the facts, reviewing court is without power to substitute its deductions for those of trial court and findings of trial court will not be set aside.

3. Theaters and Shows ⚷6(33)

In action against owners and manager of theater for injuries sustained by elderly lady when children playing tag around box office in theater lobby bumped against her as she stood in ticket line in lobby before doors of theater had been opened, evidence sustained finding that defendants were not negligent.

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A. J. O'Connor, George J. Hider, Los Angeles, for appellant.

James V. Brewer, Los Angeles, for respondents.

DRAPEAU, Justice.

Plaintiff, Jessie C. McIntyre, was standing in the ticket line in the lobby of the La Mar Theatre in Manhattan Beach. It was about 2 o'clock on a Sunday afternoon. The theatre doors had not been opened.

Boys and girls were playing in the lobby. A boy who was there testified: "Well, he (the manager) came out and he said that we should stop pushing and running around and yelling and playing sort of tag around the box office as somebody might get hurt."

Asked what the manager did then, the boy said "Then he went back in."

Then the boy told what happened to Mrs. McIntyre, "Well, I was over there by the curb and after he went back in they started running around and pushing and these two boys started to play a game of tag around the box office and one of them bumped Mrs. McIntyre and she fell down."

For a woman of Mrs. McIntyre's age —82 at the time of the trial—this accident had serious consequences. Her hip was broken, and she was in the hospital for weeks, and in bed at home for months, attended by a nurse.

Mrs. McIntyre brought this action for damages against the owners of the theatre and the manager. She appeals from a judgment rendered against her upon findings by the judge of the trial court that defendants were not negligent.

It is plaintiff's theory that defendants knew, or by the exercise of reasonable care should have known, of the acts of the youngsters, but that defendants nevertheless carelessly and negligently continued to operate the theatre, and failed and neglected to protect plaintiff in her enjoyment of the invitation they had given her to attend the theatre. In short, plaintiff's appeal is based upon the ground that the finding of non-negligence of the defendants is not supported by the evidence, and that upon the evidence the findings and judgment should have been in her favor.

Plaintiff relies upon the case of Katz v. Helbing, 215 Cal. 449, 10 P.2d 1001, 1002. In that case a man who was riding on a street car in San Francisco lost an eye. Boys were throwing quicklime at passing cars. They had scooped the lime out of a box left by defendants on the sidewalk. One of the missiles hit Mr. Katz in the eye.

[1] In that case the basic principles involving negligence when the acts of children are the cause of injury are stated: "It would be the duty of courts and juries to declare such conduct wrongful [leaving the lime exposed in the street] if a reasonably prudent man would have foreseen that injury would probably result". And where children are the actors their intervening wrongful acts do not necessarily "break the chain of causation".

But the problem for decision in this case was one of fact. Were defendants negligent? Was that negligence, if any, the proximate cause of plaintiff's injuries? It is to be presumed that counsel for plaintiff argued the rules in the Katz case to the trial judge as forcefully as they have been argued to this Court, and that the trial judge had them in mind when he made his decision.

[2, 3] In this case the trial judge determined that defendants were not negli-

gent. Even if this Court were of the opinion that that determination was wrong, it would not have the power to substitute its deductions for those of the trial court. For, as has so often been said, when opposing inferences may reasonably be drawn from the facts in a case, the findings of the trial court will not be set aside. In re Estate of Bristol, 23 Cal.2d 221, 143 P.2d 689; In re Estate of Teel, 25 Cal.2d 520, 154 P.2d 384; Jackson v. Burke, 124 Cal.App. 519, 269 P.2d 137.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

CARROLL v. BEAVERS.

Civ. 8328.

District Court of Appeal, Third District, California.

May 19, 1954.

Rehearing Granted June 17, 1954.

Wife's action for personal injuries to herself and for wrongful death of husband in automobile accident involving automobile which husband was driving and in which wife was a passenger. The Superior Court, San Joaquin, Buck, J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that deceased husband's alleged contributory negligence could not be imputed to wife to bar her action for her own personal injuries.

Judgment reversed.

1. Negligence 🔑93(2)

Where husband was killed and his wife injured in accident involving automobile which husband was driving and in which wife was a passenger, husband's alleged contributory negligence could not be imputed to wife to bar her action for personal injuries.

2. Witnesses 🔑216

No disclosures may be made of information contained in accident reports to highway patrol, other than those disclosures authorized by statute declaring such reports to be without prejudice to individual reporting. Vehicle Code, §§ 139.38, 484, 488.

◆

James I. Harkins and Albert E. Cronin, Jr., Stockton, for appellant.

Smith & Zeller, Stockton, for respondent

VAN DYKE, Presiding Judge.

Plaintiff and appellant brought this action for damages for personal injuries which she claimed to have sustained and for the wrongful death of her husband. Said injuries and death occurred while husband and wife were riding in an automobile driven by the husband. The car came into collision with a car operated by defendant and respondent at the intersection of a through highway, on which appellant and her husband were driving, with a highway on which respondent was driving. A full statement of the evidence is unnecessary to the determination of this appeal.

Appellant assigns error in the giving of an instruction concerning the effect of contributory negligence on the part of the husband of appellant and in certain rulings on evidence. There are other assignments of error which need not be discussed.

[1] This case was tried in early June of 1952. As the jury was being impanelled counsel for the respondent called the attention of prospective jurors to the effect under the law of contributory negligence of appellant's husband, indicating that the law was such that if he had been guilty of negligence, proximately contributing to her injuries and his death, plaintiff could not recover. On argument counsel stressed considerably the facts which according to him proved that appellant's husband had been guilty of such contributory negligence. He stated to the jury that the court would instruct them as indicated in his voir dire examinations and that following such instructions they ought to return a

verdict for defendant. At the close of argument the court instructed the jury that defendant had pleaded the defense of contributory negligence on the part of plaintiff's husband and that if this defense was proven it constituted a total and complete defense to the action. Further, the court told the jury the evidence showed that at the time of the accident in question the automobile in which the plaintiff was riding was being driven by her husband and if they found the husband to have been guilty of negligence, proximately contributing in any degree to the injury of plaintiff and the death of her husband then she could not recover even though she herself took no part in the operation of the automobile and was not herself negligent. In October, 1952, following the trial, the Supreme Court handed down its decision in Flores v. Brown, 39 Cal.2d 622, 630, 631, 248 P.2d 922, 926, in which that court declared as follows:

> "In the absence of an agreement to the contrary, it is settled that a cause of action for injuries to either the husband or the wife arising during the marriage and while they are living together is community property * * *, and the same rule is applicable to a cause of action for the wrongful death of a minor child, or for damages suffered by the parents because of injury to such a child. * * * Accordingly, in all of these situations it is ordinarily necessary to impute the negligence of one spouse to the other to prevent the negligent spouse from profiting by his own wrong. * * * When the marriage is dissolved, however, the interests in any of these causes of action become separate property, and it becomes possible to segregate the elements of damages that would, except for the community property system, be considered personal to each spouse. Under these circumstances the objective of preventing unjust enrichment may be accomplished by barring only the interest of the negligent spouse or his estate.
>
> "Mr. Flores died in the same accident in which his wife was injured. To allow her to recover for her personal injuries will in no way enrich Mr. Flores or those who might take through him. Similarly, there will be no unjust enrichment if Mrs. Flores is allowed to recover for the wrongful death of her son. * * *
>
> "When the husband is dead, not only is the reason for the rule imputing his negligence to his wife gone, but to apply it defeats its own purpose. It is but a windfall to a defendant who negligently injures a wife or causes the death of a minor child that recovery may be barred because the wife's husband was also negligent. Although allowing the negligent defendant to escape liability has been considered a lesser evil than allowing the negligent spouse to profit from his own wrong, surely the former evil may not be balanced by the latter when the latter is no longer present."

We do not know how often trial courts have in circumstances similar to those presented in this case instructed juries just as did the trial court herein, nor how often such instructions have been approved on appeal. Nevertheless, in theory these instructions have been wrong and in view of the declarations of the Supreme Court in the cited case the instructions given on this matter of contributory negligence of the husband were wrong in this case. That the error was prejudicial cannot be gainsaid in view of the emphasis placed throughout the trial upon the defense of the husband's contributory negligence. The judgment must be reversed for this error.

[2] It appears from the record that there was present in the courtroom and in the possession of counsel for the plaintiff a report made by defendant to the California Highway Patrol pursuant to and required by the provisions of Section 484 of the Vehicle Code. The report was not introduced in evidence, although marked for identification. It has not been transmitted to this Court in connection with the appeal. Assuming that the document was a report so required by the statute, we think it proper to comment upon the situ-

ation. It is made the duty of the Department of Motor Vehicles and of the California Highway Patrol to investigate accidents resulting in personal injuries or death and to gather evidence for statistical purposes and for the purpose of prosecuting the person or persons guilty of any violation of law contributing to any such accident. Veh.Code, Sec. 139.38. By Section 484 of the Vehicle Code drivers involved in accidents are required to make or to cause to be made a written report of such accidents to the patrol, unless an accident occurs within a city, in which case the report is to be made to the police of such city. To aid in obtaining such reports, the State has declared that all required accident reports and supplemental reports "shall be *without prejudice* to the individual so reporting and shall be for the confidential use of the departments of Motor Vehicles and California Highway Patrol, except that the California Highway Patrol shall disclose the names and addresses of persons involved in, or witnesses to, an accident, the registration numbers and descriptions of vehicles involved, and the date, time and location of an accident, to any person who may have a proper interest therein, * * *." (Italics added.) Sec. 488, Veh.Code. By thus particularizing the disclosures which may be made, the legislature has, in effect, stated that there shall be no other exceptions to the confidential use of these reports. It is further provided that such a report shall not be used as evidence in any trial, civil or criminal, arising out of an accident. Sec. 488, Veh.Code. It is obvious that these protective provisions are in the nature of immunities granted to those upon whom the law lays its command. In exchange for the information contained in the reports the legislature plainly declares that these required reports shall be without prejudice to the individual so reporting and shall be used and kept in confidence. If, therefore, in this case the department or the patrol permitted the required report made by the defendant under the compulsion of the statute to be taken from their files and to be presented in the courtroom when the trial was in progress there was involved a violation of the rights of defendant and an abuse of the confidence which the law compelled the defendant to repose in the State and its agencies. The record here discloses how easily it may happen that a required report will prejudice the individual reporting if the report is permitted to be used and displayed in the courtroom where an action arising out of the accident reported on is being tried. The use of these required confidential reports in court is a direct violation of the State's promise that the reports shall be without prejudice to those who make them. These reports are confidential, should be kept confidential, and so guarded that no prejudicial use can be made of them.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, J., concur.

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125 Cal.App.2d 236

MOLLIS

v.

JIFFY-STITCHER CO., Inc. et al.

Civ. 20014.

District Court of Appeal, Second District,
Division 1, California.
May 17, 1954.

Proceeding wherein the Superior Court of Los Angeles, Vickers, J., appointed a receiver to take possession of a liquor license which belonged to a judgment-debtor. The judgment-debtor appealed. The District Court of Appeal, Doran, J., held that appointment was within jurisdiction of the trial court.

Order affirmed.

Intoxicating Liquors 🔑103

A receiver was properly appointed to take into his possession for sale a liquor license standing in name of judgment-debtor, and such appointment did not exceed jurisdiction of court. Gen.Laws, Act 3796, §§ 7, 7.2.

Martin S. Ryan, Los Angeles, for appellant.

William Douglas Sellers, William A. Tookey, Pasadena, for respondent.

DORAN, Justice.

This is an appeal from an order appointing receiver to take possesion of a liquor license belonging to the judgment-debtor Mildred Lucey and to sell the same to satisfy a judgment which had become final.

It is contended on appeal, "That a receiver could not be appointed to take into his possession a liquor license standing in the name of the judgment debtor, and the court exceeded its jurisdiction in so appointing a receiver for that purpose." and that, "The appointment of a receiver is not entirely uncontrolled, and must be made only with great caution and circumspection, and in this case amounts to an abuse of discretion."

Appellant argues that the "Provision for the transfer of liquor licenses are contained in Sections 7 and 7.2 of Deerings California General Laws, Act 3796.

"Section 7 of Deerings Act 3796 sets forth under the heading of Transfers, as follows:

"'Each license issued under this act is separate and distinct, shall be transferrable from one person to another upon approval by the Board and the payment of a transfer fee of $10.00, and upon such conditions as the Board shall prescribe * * *; provided, that the privilege of applying for a transfer of a license shall be exercised by the surviving partner of a deceased licensee, or by the executor, administrator or guardian of the estate of a licensee, or, in the event that a deceased licensee leaves no estate to be administered, by the surviving spouse of the deceased licensee, and may be exercised by a *trustee of the bankrupt estate of a licensee,* or by an assignee for the benefit of the creditors of a licensee with the consent of the assignor.'

"Section 7.2 of the same act, under the heading, 'Applicability of section,' sets forth the same provisions, and therein uses the word, 'receiver.'

"It is respectfully submitted that Section 7 is the governing section of these two, and when the Legislature used the phraseology, 'and may be exercised by a trustee of the bankrupt estate of a licensee, 'they, the Legislature, by not including a receiver, limited the power of transfer to a trustee in bankruptcy, or by a receiver in bankruptcy as set forth by Section 7.2 of the act."

Respondent, to the contrary, argues that, "It is clear under the California law that a liquor license may be transferred by the owner and reference is made in this connection to Deering's California General Laws, Act 3796, subsections 7 and 7.2. Accordingly in California such a license should be viewed as a property right."

Section 7 also provides that "Each license issued under this act * * * may be transferred by or to * * * a receiver of the estate of a licensee, or an assignee for the benefit of creditors of a license with the consent of the assignor." Respondent argues that, "The words, 'a receiver of the estate of a licensee,' are reasonably to be interpreted to include a receiver appointed by a court to enforce a judgment or to do any of the other things which a receiver may do pursuant to law in the State of California.

"Section 7.2 provides the procedure under which a liquor license may be transferred. In the third paragraph, entitled 'Applicability of the Section,' it states that the provisions of the section relative to giving notice of transfer and to the establishment of an escrow for transfer need not be complied with by 'an executor, administrator, guardian, trustee, *receiver or other person* acting in the legal or proper discharge of official duty.' (Emphasis added.) It is the contention of respondent that by including this provision in Section 7.2 the Legislature has clearly disclosed its intention that a receiver may be appointed to sell a liquor license and apply the proceeds for the satisfaction of a money judgment."

It appears from the record that appellant had no property or interest of value other than the liquor license.

The fact that the approval and consent of the Board of Equalization is necessary is beside the issue so far as respondent's efforts to collect the judgment is concerned.

It is common knowledge that liquor licenses are bought and sold in the open market notwithstanding the necessity of the board's approval.

It appears that the order appointing a receiver to take possession of and to sell the liquor license to satisfy the judgment is a valid order. It is therefore affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

125 Cal.App.2d 288

SAREUSSEN v. LOWE et al.

Civ. 19886.

District Court of Appeal, Second District, Division 2, California.

May 18, 1954.

Action against civil engineer for negligently designing and supervising construction of a sea wall, and against contractor for constructing sea wall at variance with specifications. The Superior Court of Los Angeles County, Harry J. Borde, J. pro tem., entered judgment of dismissal after sustaining, without leave to amend, a demurrer to plaintiff's complaint, and plaintiff appealed. The District Court of Appeal, McComb, J., held that plaintiff who had retained a civil engineer to design a sea wall, and a contractor to construct the sea wall, could properly join separate causes of action against the engineer for negligently designing and supervising the construction and against the contractor for failing to construct in accordance with specifications, to plaintiff's damage, in that the causes arose on either joint, independently concurrent, or successive acts of each defendant.

Judgment reversed, with instructions as to third cause of action; judgment affirmed as to other causes of action.

1. Action 🔑50(4)

Provision of Code of Civil Procedure that a plaintiff may unite several causes of action in same complaint, if they are claims arising out of same transaction, or transactions connected with same subject of action, with specific exceptions, is qualified by the provisions of section declaring that all persons may be joined as defendants against whom right to any relief is alleged to exist, whether jointly, severally or in the alternative, and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities. Code Civ.Proc. §§ 379a, 427, subd. 8.

2. Action 🔑50(6)

Where the acts of independent wrongdoers operate successively rather than concurrently to produce a given injury, the independent causes of action thus arising may be joined in same complaint, and, on showing either that wrongful act of two or more persons, whether joint, independently concurrent or successive, contributed proximately to cause injury for which recovery is sought, or that such injury was proximately caused by wrongful act or one or another or several of two or more persons, and that reasonable uncertainty exists in respect to alternative or quantitative liability, causes of action thus arising may be joined in same complaint. Code Civ. Proc. §§ 379a, 427, subd. 8.

3. Action 🔑50(4)

Plaintiff who had retained a civil engineer to design a sea wall, and a contractor to construct the sea wall, could properly join separate causes of action against the engineer for negligently designing and supervising the construction, and against the contractor for failing to construct in accordance with specifications, to plaintiff's damage, in that the causes arose on either joint, independently concurrent or successive acts of each defendant.

Newell & Chester, Los Angeles, for appellant.

Edward B. Freed, Inglewood, for respondent.

McCOMB, Justice.

Plaintiff appeals from a judgment of dismissal entered after the sustaining without leave to amend of a demurrer to plaintiff's complaint.

Facts: Plaintiff filed a complaint in three counts. Count I alleged that plaintiff entered into a contract with defendant Lowe, a civil engineer, to design a sea wall, including plans and specifications, and to supervise the construction of such wall on waterfront property which she owned. In count II it was alleged that defendant Lowe had negligently designed and supervised the construction of the sea wall to plaintiff's damage, and in count III plaintiff alleged that defendant Didier had entered into a contract with plaintiff to construct the sea wall in accordance with certain plans and specifications which he had failed to do with resulting damage to plaintiff.

Defendant Didier filed a special demurrer to plaintiff's complaint on the ground of misjoinder of causes of action. This demurrer was sustained without leave to amend.

Question: Did the trial court err in sustaining defendant Didier's demurrer on the ground that independent causes of action against different defendants were improperly joined in the same complaint?

Yes. Defendant Didier argues that the trial judge's action was correct since section 427, subsection 8 of the Code of Civil Procedure, provides that a plaintiff may unite several causes of action in the same complaint, if they are "Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section."

[1] This argument is invalid for the reason that section 427 of the Code of Civil Procedure is qualified by the provisions of section 379a of the Code of Civil Procedure, which reads as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

[2] Applying the rule in the foregoing section we find that the law is now established in California that where the acts of independent wrongdoers operate successively rather than concurrently to produce a given injury, the independent causes of action thus arising may be joined in the same complaint. On a showing either that the wrongful act of two or more persons, whether joint, independently concurrent or successive, contributed proximately to cause the injury for which recovery is sought, or that such injury was proximately caused by the wrongful act of one or another or several of two or more persons, and that a reasonable uncertainty exists in respect to alternative or quantitative liability, the causes of action thus arising may be joined in the same complaint. Cf., Kraft v. Smith, 24 Cal.2d 124, 127 [1] et seq., 148 P.2d 23; 23 Cal.Law Review, No. 3, March, 1935, page 327.

[3] The foregoing rule is here applicable. Plaintiff's alleged injury arose on either joint, independently concurrent or successive acts of each defendant. Therefore she was entitled to join the separate causes of action in the same complaint.

The judgment is reversed with instructions to the trial court to overrule the demurrer of defendant Didier as to the third cause of action allowing such defendant a reasonable time to answer if so advised. The judgment is affirmed as to the other causes of action.

MOORE, P. J., and FOX, J., concur.

125 Cal.App.2d 302

DEAN v. KRAUSE.

Civ. No. 8300.

District Court of Appeal, Third District,
California.

May 18, 1954.

Suit to recover amount due on sale of lumber. The Superior Court, San Joaquin County, M. G. Woodward, J., entered judgment from which defendant appealed. The District Court of Appeal, Peek, J., held that where buyer of lumber through commission salesman subsequently recognized the particular seller as creditor, by buyer's conversations with salesman and letter to him, such conduct of buyer was a ratification of sales agreement, making seller thereafter the real party in interest, entitled to sue for indebtedness.

Judgment affirmed.

Principal and Agent ⚿170(2), 188

Where buyer of lumber through commission salesman subsequently recognized the particular seller as creditor, by buyer's conversations with salesman and letter to him, such conduct of buyer was a ratification of sales agreement, making seller thereafter the real party in interest, entitled to sue for indebtedness. Civil Code, § 2307.

◆

Blewett, Blewett, Macey & Garretson, Stockton, for appellant.

Forrest E. Macomber & Gordon J. Aulik, Stockton, for respondent.

PEEK, Justice.

This is an appeal by defendant Krause from a judgment in favor of plaintiff Dean arising out of an alleged sale of lumber by plaintiff to defendant.

Plaintiff's complaint alleged four causes of action. The first three were the usual common counts and the fourth alleged a written contract. Defendant's answer denied generally the allegations of the complaint, and as an affirmative defense alleged that defendant had instituted bankruptcy proceedings which were then pending and that the claim was dischargeable in said proceedings.

The record shows that Krause operated a lumber yard in the City of Lodi. During the month of November, 1949, two carloads of lumber were delivered to him by Dean pursuant to an order placed by Krause with one Medock, who in turn had placed the order with Dean. Medock was a dealer in wholesale lumber with whom Krause had done business previously. Medock acted as a commission salesman and buyer for Dean as well as for a number of other lumber companies.

When defendant placed the order with Medock he was told that the lumber might come from any one of the companies represented by Medock. Thereafter on several occasions Medock, according to his testimony, talked to Krause on the phone as well as personally at the lumber yard as to when payment would be made to Dean, but Krause always stalled for time. At no time however did defendant deny his responsibility for the lumber so purchased. Subsequently Krause wrote a letter to Medock wherein he stated in part, "* * * I am trying to put a loan on my yards so I can pay off Dean soon." Krause was adjudicated a bankrupt, subsequently, and his business was transferred to his son. Approximately six months after the delivery of the lumber the son was likewise adjudicated a bankrupt, and in his schedule of debts he listed the amount here in issue as a debt owing by him to Dean.

Upon the evidence so summarized the court found that Krause was indebted to Dean in the amount alleged and that said sum was not a claim discharged in the bankruptcy proceedings of defendant. The sole contention on appeal is that Dean was not a proper party to the action since the sale, if any, was made by Medock acting in his own capacity and not by Dean.

The record discloses ample evidence to sustain the finding and judgment of the trial court. Not alone was there direct evidence that Medock was acting as agent for Dean, but also there was substantial evidence that Krause recognized Dean as creditor—his conversations with Medock, and his letter to him. Even if it be assumed that at the outset Dean was not the real party in interest, the subsequent conduct of Krause ratified the alleged agreement. Civil Code, § 2307.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 308

PEOPLE v. WILSON

Cr. 2499.

District Court of Appeal, Third District, California.

May 18, 1954.

Hearing Denied June 16, 1954.

Defendant was convicted of the crime of incest committed with his sister. The Superior Court, Tuolumne County, Warne, J., rendered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence sustained the conviction.

Affirmed.

1. Incest 🔑14

Evidence sustained conviction of defendant for incest committed with his sister. Pen.Code, § 285.

2. Criminal Law 🔑641(1)

Record on appeal from incest conviction would not sustain defendant's contention that he had not been properly represented by counsel.

3. Criminal Law 🔑938(2)

Letters written to defendant by his sister after he had been charged with crime of incest committed with such sister and in which she made statements to effect that there was no real case against defendant did not constitute newly discovered evidence upon which to predicate new trial.

Milton L. Baldwin, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen. by Doris H. Maier, Dep. Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Defendant was convicted of the crime of incest committed with his sister. Section 285 of the Penal Code provides that: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, who * * * commit fornication or adultery with each other, are punishable by imprisonment in the state prison * * *." Defendant appeals from the judgment and from an order denying a new trial.

Appellant urges that the evidence is insufficient to support the judgment, that he was not properly represented by counsel and that the court erred in its refusal to grant him a new trial.

[1] The evidence is amply sufficient to support the judgment. Four persons went to a house in which they found the defendant and his sister in bed with each other. The essence of the contention of appellant is that there was no proof of penetration. However, one of the four men testified that he observed that penetration had taken place. There is nothing inherently incredible in his testimony, although it is attacked upon that ground, the argument being that his position at the bedside was such that he could not have seen what he said he saw. The evidence will not sustain such a contention. It was entirely possible that he could have seen what he said he saw and his positive testimony that he did so is sufficient to prove the element claimed to be absent. It is not contended that any other essential element of the crime was not adequately proved.

[2] Likewise insupportable is the contention of appellant that he was not properly represented by counsel. On the contrary, the transcript is replete with proof that he was well represented and that his counsel faithfully brought out every fact and inference that was favorable to him. The People's witnesses were rigorously cross-examined and any weaknesses in

their direct testimony were exposed and commented upon.

[3] Also untenable is the contention that the trial court abused its discretion in refusing a new trial. Principally the motion for new trial was grounded upon a claim that the sister had written two letters to the appellant after he had been charged with the crime of incest in which she made statements that the People had no real case against the appellant. But it appears that these letters were by the appellant exhibited to counsel, and it was counsel's opinion that there was nothing therein which would advantage the appellant's cause had they been introduced in evidence at the trial. Such differences frequently arise and generally counsel has the right of it. At any rate the evidence was not newly discovered and the showing is far from sufficient to warrant a holding that the trial court abused its discretion in denying the motion.

Nothing further appearing, the judgment and the order are affirmed.

SCHOTTKY and PEEK, JJ., concur.

125 Cal.App.2d 184

PEOPLE v. CONRAD.

Cr. 2996.

District Court of Appeal, First District
Division 2, California.
May 14, 1954.

Prosecution for burglary. From adverse judgment and order denying a new trial of Superior Court, City and County of San Francisco, Herman A. Van Der Zee, J., accused appealed. The District Court of Appeal, Nourse, P. J., held that evidence was sufficient to sustain conviction.

Judgment and order affirmed.

1. Burglary 🔑42(3)

A defendant's possession of stolen property immediately following a burglary taken with false and misleading statements regarding his possession, his familiarity with the premises burglarized, and sale of stolen goods for an inadequate price, is sufficient corroboration of the inference of guilt arising out of possession of the stolen goods.

2. Burglary 🔑41(1)

Evidence was sufficient to sustain conviction of accused charged with burglary.

3. Criminal Law 🔑507(3)

In prosecution for burglary wherein it was shown that accused alone committed the burglary and thereafter took the stolen property to the home of another for concealment and disposal, person to whose home the stolen property was taken was an accessory after the fact, and not an accomplice in the theft, and therefore his testimony need not be corroborated. Pen. Code, § 1111.

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J. Maxwell Peyser, San Francisco, Cal., for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond Momboisse, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

Appellant and one Lewis were tried jointly before the court without a jury on a charge of burglary. Both defendants were also charged with, and admitted, a prior felony conviction. The trial court found appellant guilty and defendant Lewis not guilty. The appeal is from the judgment and from the order denying a new trial. Appellant raises two grounds for a reversal of the judgment: (1) that the evidence is insufficient, and (2) that Lewis' testimony lacks proper corroboration.

The appellant was an employee of a construction firm working under a building contract. The company maintained a shed on the premises in which it stored tools, nails and bolts. The shed was locked with a padlock. The shed was closed and locked at quitting time on a Friday. The following day a foreman of the company found that the lock had been broken and on the following Monday it was found that eight cartons of nails had been removed. On the same Friday night Conrad approached Lewis and arranged with him to store the nails in Lewis' basement. This was done and Conrad directed Lewis to arrange for the sale of the nails agreeing to pay him one-half of the profits. Lewis made such a sale and he, Conrad and an employee of the purchaser went to the Lewis basement to make delivery. While Conrad and Lewis were carrying the nails from the basement to the purchaser's truck they were apprehended by the police and placed under arrest. Lewis gave a full statement of the circumstances. Conrad failed to deny any of the facts stated and refused to answer all questions directed to him by the police concerning his participation in the crime.

[1, 2] A defendant's possession of stolen property immediately following the burglary taken with false and misleading statements regarding his possession, People v. Russell, 34 Cal.App.2d 665, 669, 94 P.2d 400, his familiarity with the premises burglarized, People v. Carroll, 79 Cal.App.2d 146, 148, 179 P.2d 75; People v. Stewart, 113 Cal.App.2d 687, 691, 248 P.2d 768, the sale of stolen goods for an inadequate price, People v. Buratti, 96 Cal.App.2d 417, 419, 215 P.2d 500, all of which elements are present here, is sufficient corroboration of the inference of guilt arising out of the possession of the stolen goods.

[3] (2) The argument that Lewis was an accomplice whose testimony must be corroborated under section 1111 of the Penal Code is unsound. The parties were tried on a charge of burglary. All the evidence shows clearly that Conrad alone committed the burglary and that Lewis' connection with the crime was that of an accessory after the fact—in the concealment and disposal of the stolen goods. A thief and the receiver of stolen property are not accomplices in the theft. People v. Lima, 25 Cal.2d 573, 576, 154 P.2d 698; People v. Burness, 53 Cal.App.2d 214, 218–219, 127 P.2d 623.

The clearest statement of the rule is found in People v. Gordon, 41 Cal.App.2d 226, 227, 106 P.2d 208, where Justice McComb said: "The law is established in California that one who receives stolen property is not an accomplice of the thief within the rule set forth in section 1111 of the Penal Code requiring corroboration of the testimony of an accomplice. People v. Williams, 7 Cal.App.2d 600, 46 P.2d 796."

Judgment and order affirmed.

DOOLING and KAUFMAN, JJ., concur.

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125 Cal.App.2d 371

McINTIRE et al. v. WASSON et al.

Civ. 4692.

District Court of Appeal, Fourth District, California.

May 19, 1954.

Action to quiet title to 30 foot strip of land, which was the north 30 feet of the south 130.38 feet of Lot 7, and which was being claimed by each of the parties, who were adjoining landowners. Defendants cross-complained to quiet their title in such strip. The Superior Court, Kern County, W. L. Bradshaw, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that, where, in order to contain 10.09 acres and to have 664.38 feet frontage on east as per plat, part of Lot E, which had been reserved for road purposes, would have to be considered as lying across north 30 feet of Lot 7, vendor, who, by five deeds conveying parts of lot 7 to different individuals, conveyed south 126 feet of north 156 feet, south 126 feet of north 282 feet, south 126 feet of north 408 feet, south 126 feet of north 534 feet (to defendants), and all of Lot 7 except north 534 feet (to plaintiffs' predecessor), would be presumed to have intended that distances in such descriptions would be measured from north, not south, boundary of Lot E.

Judgment reversed.

1. Boundaries ⚷20(1)

In absence of clearly shown contrary intention, half of a street upon which lot abuts is usually considered part of lot.

2. Boundaries ⚷33

Where, in order to contain 10.09 acres and to have 664.38 feet frontage on east as per plat, part of Lot E, which had been reserved for road purposes, would have to be considered as lying across north 30 feet of Lot 7, vendor, who, by five deeds conveying parts of Lot 7 to different individuals, conveyed the south 126 feet of the north 156 feet, the south 126 feet of the north 282 feet, the south 126 feet of the north 408 feet, the south 126 feet of the north 534 feet (to defendants), and all of Lot 7 except north 534 feet (to plaintiffs' predecessor), would be presumed to have intended that distances in such descriptions would be measured from north, not south, boundary of Lot E.

◆

Siemon & Siemon, Bakersfield, for appellants.

J. O. Reavis, Delano, for respondents.

BARNARD, Presiding Justice.

This is an action to quiet title to a 30-foot strip of land in Lot 7 of a certain subdivision. The defendants and the plaintiffs own adjoining properties in said Lot 7, and the dispute is as to the boundary line between them. The plaintiffs are the successors in interest of their mother, Mrs. Kerwin.

On April 3, 1912, a corporation filed a map showing the subdivision of a section into 64 numbered lots of approximately 10 acres each. It also shows several strips reserved for road purposes, and marked as lettered lots. Along the north side of the north tier of lots appears such a strip one mile long and 30 feet wide, which is marked "Reserved for road Lot E". It is admitted that this strip is the south half of a county road, and that the north line of this strip corresponds with the section line. Lot 7 is the second lot from the west in the north tier of lots. There is also a strip reserved for a road on the east side of Lot 7, the width of which is not given. Lot 7 is marked as containing 10.09 acres. Its east and west dimensions are given as 661.85 feet at the north, and 661.44 feet at the south. Its north and south dimensions are given as 664.22 feet at the west, and 664.38 feet on its east line. The map contains the statement "All stakes 4″ x 4″ R.W. All lots are measured to center of stakes. All dimensions are from section lines to center of roads." It also contains the statement "All lots intended for sale are designated by number and all pieces or parcels of land designated hereon as roads are excepted and reserved from sale and are intended for use as private roads until such time when the corporation may dedicate the same to public use."

The common grantor of the parties to this action was Frank E. Green, who acquired title from the corporation by two deeds. The first, dated May 1, 1928, conveyed the south 126 feet of the north 282 feet of lot 7, and the second, dated April 5, 1930, conveyed all of Lot 7 except the south 126 feet of the north 282 feet. Apparently, Green had had a prior contract for the purchase of Lot 7 since he had contracted to sell a portion of that lot to Mrs. Kerwin before he received the first of these deeds.

On February 23, 1928, Green contracted to sell to Mrs. Kerwin "the South One Hundred Thirty and Thirty-eight hundredth (130$^{38}/_{100}$) feet of Lot Seven (7)" of this subdivision for $1100, payable $400 down and the balance in installments. Thereafter, Green gave five deeds conveying portions of said Lot 7, four of them with a frontage of 126 feet on the street to the east of the property and the other conveying the rest of Lot 7 to Mrs. Kerwin. These deeds were as follows:

(1) On May 2, 1928, a deed to Holland conveying the South 126 feet of the North 282 feet.

(2) On May 5, 1930, one to Mrs. Kerwin (plaintiffs) conveying all of Lot 7 except the north 534 feet.

(3) On November 10, 1930, one to the Wassons (defendants) conveying the South 126 feet of the North 534 feet.

(4) On October 23, 1931, one to Marks conveying the South 126 feet of the North 156 feet.

(5) On April 14, 1932, one to Welch, conveying the South 126 feet of the North 408 feet.

The first grantee to enter and occupy his property was Holland, who occupied the second 126 feet south of what may be called the property line, and allowing for the 30-foot strip at the north which was reserved for road purposes. The next was Mrs. Kerwin, predecessor of the plaintiffs, who in 1928 took possession of the south 130.28 feet, including the 30-foot strip in controversy. She built a house, planted a palm tree on the 30-foot strip, used a part of that strip for a driveway, and maintained an oil tank thereon. There is no dispute that she has occupied the strip in question at all times since 1928, and without objection from the Wassons until shortly before this suit was filed. Wasson entered at the time he bought his property and built a house on it, occupying the 126 feet north of the 130.28 feet occupied by Mrs. Kerwin. In 1931, he built a fence on what he "presumed" was the boundary line between his property and Mrs. Kerwin's, having been shown her contract with Green, and ten years later built a more substantial fence along the same line. He testified that he never claimed more than 126 feet prior to 1951, that he now claimed 156 feet, and that he first claimed 156 feet when the tax collector "sold the North Thirty feet of Lot Seven and that was the time I discovered I was Thirty feet too far north." Welch occupied the 126 feet between Holland and Wasson, and Marks occupied the north 126-foot parcel running to what may be called the property line, but not including the 30 feet at the north reserved for road purposes. Marks testified that he had a contract first and later Green gave him a deed; that he wanted to know where the boundaries were in order to locate his house; that he asked Green about this and that Green "told me to measure from the center of the street One Hundred and Fifty-six feet back south"; that Holland helped him to measure it; and that he measured his lot 126 feet from the edge of the road to Holland's lot on the south. One of the plaintiffs testified that she was present, with her mother, in February, 1928, when Green showed them the stakes and pointed out their frontage of 130 feet where they were building a house. No stakes were to be found at the time of the trial.

In 1950, it was discovered that "the north 30 feet of Lot 7" had been assessed for 1930 to Green, and sold to the state for nonpayment of taxes in 1931. In order to straighten out their titles the four then owners of the 126-foot parcels paid the amount necessary to clear up that tax sale, and on March 13, 1951, that 30 feet was deeded by the tax collector to one Tenosa who had purchased Marks' property, the north one of these 126-foot parcels. As a part of this transaction each of the three northerly owners of 126-foot parcels agreed to, and did, deed the south 30 feet of his property to his neighbor on the south. The Wassons were given such a deed by their neighbor on the north. This was only a paper transaction, to straighten out the titles, and it left each of the four owners of 126-foot parcels in possession of the same property he had occupied for years. The plaintiffs, as successors of Mrs. Kerwin, did not participate in this transaction since her deed called for all of the rest of Lot 7 and her original contract called for the south 130.28 feet.

The Wassons then had their property surveyed by a surveyor who took a line 30 feet south of the section line as the northerly line of Lot 7, and thus fixed Wasson's south line at a point 534 feet south of the south line of the county road, leaving only 100.38 feet for the plaintiffs. The Wassons having accepted the deed to 30 feet from their neighbor on the north, then claimed to own an additional 126 feet south of that, based on this new survey, and began the erection of another house which extended about halfway over the disputed 30-foot strip.

The plaintiffs brought this action for an injunction and to quiet their title to that 30-foot strip. The defendants answered and cross-complained, seeking to quiet their title to the disputed strip. The court found that Lot 7 extends south 664.38 feet from the south line of Lot E on said map, which was set apart for road purposes; that the northerly line of Lot 7 was the southerly line of Lot E; "that it was not the intent of any prior grantor of any portion of Lot 7 * * * to grant or convey any portion of said lot north of a point 30 feet south of the center of the road marking the actual Kern-Tulare County line"; that the defendants are entitled to the south 126 feet of the north 534 feet of Lot 7; and that the plaintiffs are entitled to all of Lot 7 except the north 534 feet. As conclusions of law, it was found that the defendants have valid title to the south 126 feet of the north 534 feet of Lot 7, measured from the edge of the county road, and that the plaintiffs "have title only to property within the most southerly 100 feet of said Lot 7." Judgment was entered accordingly and the plaintiffs have appealed.

The first of these findings is obviously erroneous as shown by all of the evidence, including the testimony of defendants' surveyors, and is inconsistent with the conclusion that the plaintiffs own only the most southerly 100 feet of Lot 7. If Lot 7 did extend 664.38 feet south of the south line of this county road the appellants would have their 130.38 feet and there would be no controversy. The controlling question on this appeal is with respect to the intention of the common grantor, Green, with respect to the descriptions set forth in the deeds given by him; whether he intended that the distances set forth in the various deeds should be measured from the section line appearing on the map as the north side of Lot E, or from the south side of Lot E, being the ordinary property line at the south edge of the portion reserved for road purposes.

The court's further finding "that no grantee of any portion of said Lot Seven * * * was granted any portion of said Lot E" may be assumed to be correct for the purposes of this opinion. Assuming that Green was not granted any portion of Lot E, it is also true that he did not attempt to grant any portion of Lot E to any of his grantees. It does not follow that he did not, in granting other portions of Lot 7, intend to describe such portions by starting at the section line and allowing for the first 30 feet which had been reserved for road purposes. He made such an allowance in each of the five deeds, which strongly indicates an intention to follow the measurement given for the east and west sides of Lot 7 by taking the section line as a starting point. He purported to deed four parcels, each with a frontage of 126 feet, and one with a frontage of 130.38 feet, these amounting to 634.38 feet, which is the usable portion of Lot 7 as shown on the map. In each of the four cases, while he deeded 126 feet, he also allowed for an additional 30 feet which could only refer to the road reservation at the top of Lot 7. The five parcels conveyed, plus the 30 feet thus allowed for, equals the 664.38 feet shown on the map as the north-south dimension of Lot 7. Before any of these deeds were made Green had contracted to sell Mrs. Kerwin the south 130.38 feet of Lot 7. When he deeded the property to her two years later, presumably in accordance with his contract, he deeded her all of Lot 7 except the north 534 feet, thus indicating an intention to take the given measurement of 664.38 feet as running to the section line. This is confirmed by the other deeds he gave about the same time. It is unbelievable that he intended to deed Mrs. Kerwin the 130.38 feet which he had agreed to sell her but intended this to be 100.38 feet at the south of Lot 7, and the remaining 30 feet at the north end, which would be the natural result if respondents' theory were to prevail. It also seems unlikely that he would allow taxes for 1930, on the north 30 feet alone, to go delinquent if he had considered that he still owned that property. It is inconceivable that he intended to sell these five parcels, specifying a total of 634.38 feet, without intending to sell the 30 feet immediately south of the road.

The deeds and the map, construed together, clearly disclose that Green intended to follow the distances and directions given on the subdivision map, by using the section line as a starting point. Such evidence as there is, with respect to intention, is entirely to this effect. The grantees in all of the deeds interpreted the descriptions therein in that manner and occupied their properties accordingly for more than 20 years. The evidence of intention thus appearing is largely confirmed by the testimony of two surveyors who testified for the respondents. One of them testified that the map showed the distances on the four sides of Lot 7, and showed that the lot had an area of 10.09 acres; that "the part of Lot E between the east and west portions of Lot 7" would have to be included to give that acreage; that "To get 10.09 acres you have to go north to the section line"; that to get 664.38 feet you have to go from the south boundary of Lot 7 to the section line; that the statement on the map, "All dimensions are from center section lines to the center of the road", indicates that the map maker "was trying to say that all dimensions, where there is a road or a section line bordering the north, that the dimensions do run out to the center of the road or to the section line"; that when the maker of the map put these measurements on the map he measured to the center of the road at the north; that "There are many maps about this vintage where that was the customary practice. We find many maps in Kern County when they gave the dimensions, they showed it out to the center of the road"; and that he believed that was what the map maker was attempting to do. The other surveyor testified that "the dimensions show the entire lot with 664.22 feet on the west side." If that is true, the "entire lot" comes to the section line.

In spite of his testimony of what was customarily done by map makers in 1912 the first of these surveyors used different figures in locating these properties on another map which he prepared for the respondents in January, 1953. He testified that this new map was drawn on the "basis of construction", that the north line of Lot 7 is the line lying 30 feet south of the section line. When asked to "orient" himself by reading the description in the Kerwin deed and tracing that description on his new map he said: "It is my interpretation that the owner of the subdivision intended that Lot 'E' and Lot 7 be separate parcels, and therefore the north line of Lot 7 must be the line that divides Lot 'E' and Lot 7", and that the 534 feet mentioned in the Kerwin deed should be measured south from a point 30 feet south of the section line. It clearly appears that this witness was giving his interpretation of the original owner's intention in 1912 and not of Green's intention when these deeds were given, or even of the grantor's intention when Green acquired the property. This was the witness' opinion in the light of the way things were being done in 1953, and the reasons he gave for that opinion are not convincing. He fixed the north boundary of Lot 7 at a point 30 feet south of the section line, relying on the fact that the subdivision map showed the parcels reserved for road use as lettered lots, and stated that they were not to be sold. He ignored the statement that all dimensions given are from section lines, the custom of map makers in 1912, the area of Lot 7 as given on the map, and the fact that the actual measurements given on the map do not and could not coincide with the opinion he expressed.

[1, 2] Unless a contrary intention clearly appears, the half of a street upon which a lot abuts is usually considered a part of the lot, Anderson v. Citizens Sav. etc. Co., 185 Cal. 386, 197 P. 113. A contrary intent does not clearly appear here, and the evidence does not bring this case within the recognized exceptions. Pierson v. Bradfield, 43 Cal.App.2d 519, 111 P.2d 460.

There is strong evidence that the distances specified in these deeds were intended to be measured from the section line and not from a point 30 feet to the south of that line. There is no substantial evidence to the contrary, with respect to the intention of the grantors when these deeds were executed. The testimony of the surveyors involves an arbitrary selection of a north line of Lot 7 which, as shown by their own testimony, was not justified by the subdivision map as a whole and which necessarily involved taking a different north to south dimension of Lot 7 from that given in the map. One of the court's findings is admittedly erroneous, and the other essential findings are not supported by the evidence. The measurements and area of Lot 7 and the other data, as given on the map, with the distances specified in the deeds, are controlling. The fact that certain narrow strips reserved for roads were called lots, and were not to be sold as such, is no indication that their width was not to be considered as a part of the stated measurements of the lots which were to be and which were sold, and is not sufficient to overcome the effect of the other evidence with respect to the intention of the grantor in executing the deeds here in question.

The judgment is reversed.

GRIFFIN and MUSSELL, JJ., concur.

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125 Cal.App.2d 212

PEOPLE v. MacARTHUR.

Cr. 2980.

District Court of Appeal, First District, Division 2, California.

May 17, 1954.

Hearing Denied June 16, 1954.

Prosecution for sale of and furnishing a narcotic. The Superior Court, Alameda County, Warren Steel, J., entered judgment of conviction. Defendant appealed. The District Court of Appeal, Kaufman, J., held that the defense of entrapment is available only where criminal design originates in mind of an officer and not with the accused.

Judgment affirmed.

1. Criminal Law 🔑1130(5)

Where appellant's opening brief contained no citation of authority other than two statutes, the District Court of Appeal could refuse to consider the brief.

2. Criminal Law 🔑1064(6)

Where defendant in prosecution for sale of narcotic sought, on appeal, to show by affidavit that witness for prosecution committed perjury, and no excuse was shown why earlier report to same effect could not have been investigated and presented to trial court on motion for new trial, affidavit was not sufficient to require reversal of conviction.

3. Criminal Law 🔑382

Materiality of evidence is question of law, and trial judge has wide discretion in determining admissibility.

4. Poisons 🔑9

In prosecution for sale of narcotic wherein witness for state had testified that narcotic sold by defendant would be worth between $600 and $1200 on bootleg market, trial court did not abuse its discretion in sustaining objection to question designed to show defendant's ignorance of narcotics by showing that narcotics sold by defendant for $700 was worth $50,000 on legitimate market. Health and Safety Code, § 11500.

5. Criminal Law 🔑419(2)

In prosecution for sale of narcotic, testimony regarding conversation with defendant designed to secure information, not offered to show truth of statement made in conversation, was not objectionable as hearsay.

6. Criminal Law 🔑338(1), 384

The trial judge has wide discretion in determining relevancy of evidence and question of whether evidence is too remote is for the trial court.

7. Witnesses 🔑330(1)

In prosecution for sale of narcotic, trial court properly sustained objection to cross-examination question of whether state narcotics agent had reported defendant's activities to the United States customs in absence of showing that agent had duty to make such report. Health and Safety Code, § 11500.

8. Criminal Law 🔑720(6)

In argument an attorney may fairly reason from the evidence adduced at trial and express opinions based on deductions or reasonable inferences therefrom.

9. Criminal Law 🔑1037(2)

A reversal of conviction is not warranted where counsel simply assigns remarks as prejudicial, and requests no instruction, where effect of such remarks could be cured by proper instruction of the court.

10. Criminal Law ⚷37

The law does not frown upon entrapment of a criminal, and defense of entrapment is available only where criminal design originates in mind of an officer and not with the accused.

11. Poisons ⚷9

In prosecution for sale of narcotic, wherein two state narcotics agents testified that defendant had sold narcotic to them, evidence supported verdict of guilty. Health and Safety Code, § 11500.

12. Criminal Law ⚷1144(13)

On appeal from conviction, all intendments must be indulged which tend to support judgment.

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Benjamin F. Marlowe, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., Robert H. McCreary, Asst. Dist. Atty., Oakland, for respondent.

KAUFMAN, Justice.

Appellant, Roy E. MacArthur, appeals from a judgment of conviction after jury trial. The information charged him with five violations of Sec. 11500 of the Health and Safety Code, each of the first four consisting of the sale of a narcotic [heroin] two on March 31, 1953, one on April 11 and one on April 22, 1953. The fifth count was for furnishing a narcotic [heroin] on April 11, 1953. A verdict of guilty was returned on all five counts. Motion for new trial was denied and defendant was sentenced to the State Penitentiary on each count, the sentences to run concurrently.

The Bureau of Narcotic Enforcement of the State of California had on March 24, 1953, in its office in the State Building, San Francisco, received information from a narcotic peddler by the name of Jimmy Lee, that appellant MacArthur was his chief source of supply. On that same date at approximately eight o'clock in the evening the informer introduced Inspector Chasten to appellant, the inspector using the alias of "Tony". Appellant stated that he wanted to sell a pound of heroin for $8,000, that he was leaving for the Orient on about April 1st and would return about April 11th with the heroin. Appellant was a pilot for Transocean Airlines and had been making both passenger and cargo flights to Tokyo, Japan, since October 1952.

On March 30, 1953, appellant informed Inspector Chasten as to the procedure that would be used in making their deals. They would both go to a certain hotel and each get a room, and then follow a certain method as to the exchange. Chasten testified that appellant told him that he had been bringing in heroin for a year and a half and had an excellent method of concealing it in a plane, that he considered his chances of getting caught about 1000 to 1. MacArthur said that he would telephone the inspector when he returned from his trip.

On March 31, 1953, the informer, Lee, introduced Inspector Mantler of the State Bureau of Narcotics to appellant under the psuedonym of "Jimmy Allen". Appellant gave Mantler 245 grains of heroin for the sum of $250 in cash in State funds which he received from Mantler. The foregoing transaction is the basis of count one of the information.

The second count for sale of a narcotic resulted from another transaction on the same date when Mantler and MacArthur met again that evening. Appellant said he did not like small deals, that he could go to jail for $250, $2500 or $5000. He told Mantler that he was a pilot, that he flew to Tokyo himself, that "You are dealing right at the top." Appellant said he was going on a "try" the next day and would be back in eight or ten days. The second sale of 200 grains of heroin was made for $250.

Between April 1 and 10, 1953, appellant flew to Tokyo from Travis Air Base and returned.

On April 11, 1953, appellant sold Mantler 190 grains of heroin for $250 which constituted the third count of the information. As in the earlier transactions, State funds were used and the serial numbers recorded.

Upon his arrest some days later two of the fifty dollar bills used in this transaction were found in his wallet. Appellant said he would like Mantler to take more heroin, that he had 3 ounces which he would sell for $1500. Mantler said he would call him at the end of the week.

On April 11, 1953, Inspector Chasten, using the name of Tony telephoned MacArthur, who said that he was just about to call him. They arranged to meet in about one hour at the bar of a certain hotel in Oakland. After they were seated at a table in the bar appellant said he had not been able to procure the pound of heroin because the plane lay over in Japan wasn't long enough for him to make the necessary negotiations for that amount, since the Chinese with whom he dealt would have to travel to Osaka by train to secure it. In order to show that he was able to get good pure heroin he would get him a sample. He left and returned shortly whereupon he and the inspector went to a hotel room where he gave Chasten a small sample from a large package. The sample contained about 2 grains of heroin. [The fifth count, furnishing a narcotic]. Chasten showed him the $8,000 which he had available for a larger purchase, and defendant said he was satisfied.

Appellant and Inspector Chasten met again at the same hotel in Oakland on April 14, 1953. Chasten told appellant that he was worried because some prominent persons had been arrested in San Francisco, and that he had heard that a pilot had been offering heroin for sale in San Francisco, and that there might be a connection. The appellant said that there was no cause for worry, since he was dealing only with Bill, a bartender, and a fellow named Jimmy, and that he had full control of the course in Japan. He said he could send another person to pick up the heroin through the use of a password. He had to eliminate one fellow who had not handled the heroin properly, and Bill and Jimmy were also to be eliminated in the future. Appellant said he would then deal only with Chasten. They had a conversation as to working up a partnership, selling 4 pounds per month and splitting the profits. Appellant thought that the pound of heroin he had not been able to get in Japan might come in on another plane in two or three days, and that it was simple for him to get the heroin off the plane at Travis Air Base because his uniform and credentials permitted him to enter and leave at will.

On April 20, 1953, defendant telephoned Chasten at 2:00 p. m. Chasten arranged to meet him at the same hotel in Oakland. Appellant informed Chasten that the pound of heroin had not come in on the other plane, but that he had received one and one-half ounces. He wanted Chasten to cut this to six ounces and sell it for $500 per ounce, returning the $3000 to appellant who would use it to finance their partnership and pay for the heroin in Japan. When they had arrived at the point where they were making $64,000 from four pounds of heroin per month, they could soon retire as wealthy men.

The following morning Chasten informed appellant by telephone that he had a buyer from Alaska who would take all he could get. Appellant said he had some that was good but not pure. Chasten said for him to get together what he could and he would call him the next morning.

On April 22, 1953, Chasten talked on the telephone with appellant and asked if he was ready. He said that he was and they agreed to meet at Andy's Drive-In at 19th and Harrison Streets, Oakland. Inspector Chasten parked his car in the Drive-In parking lot. Several law enforcement officers were waiting inside the Drive-In, and a photographer was following the movements with his camera from a building across the street. Chasten and appellant got into Chasten's car where appellant sold four packages of heroin containing 950 grains to Chasten and received $700 in state currency, the serial numbers of which had been previously listed. This incident furnished the basis of count four.

Appellant was then arrested and asked where he got the $700 which was found in his shirt pocket. He stated that he was a pilot, a working man, and that is where he got it. The inspector took appellant to his apartment in Oakland where Inspector

Noel of the State Narcotics Bureau asked him if he had been bringing heroin in from Japan, and appellant admitted that he had been picking it up in Tokyo. He told Noel that he had become involved in the traffic through a Chinese girl whom he knew in Tokyo, that she had suggested it as a way of making a lot of money and that she had a friend who had heroin to sell. Later at Oakland City Hall in the prosecuting attorney's office Noel asked appellant in the presence of Chasten if he had peddled heroin to anybody else and he said "No", but when Mantler walked in he said "Well, you know all about him."

Appellant at the trial denied that he had made the statements testified to by Mantler, Chasten and Noel. The defense was entrapment. Appellant admitted the five specific transactions involving narcotics but contended that the idea of selling narcotics had never occurred to him until he was induced to do so by Jimmy Lee, the informer in the case, that he first met Lee in January of 1953, and that later in March he induced him to deliver narcotics for him as he had contacts which he couldn't follow through, that he needed somebody to help him keep in the background. Thus the deals with the inspectors were arranged, and appellant asserted that these were the only narcotic transactions he had ever participated in. Appellant said that he had been averaging $600 per month as a pilot and an additional $125 per month working as bartender.

[1] It is to be noted at the outset that appellant's opening brief containing four arguments for reversal, contains not one citation of an authority other than two sections from the Penal Code. This court could, if it wished, refuse to consider such a brief. See, People v. Gidney, 10 Cal.2d 138, 73 P.2d 1186; People v. Jenkins, 118 Cal.App. 115, 4 P.2d 799; People v. Titus, 85 Cal.App. 413, 418, 259 P. 465. However, we will review the contentions urged.

[2] It is first contended that appellant was not accorded an impartial trial because perjury was committed by Inspector Noel of the State Narcotics Bureau in order to negate the offense of entrapment. On cross-examination Noel testified that he had received information from a United States Customs Officer by the name of McSheehy; that Customs believed they had located the source of MacArthur's supply; and that they had further information with respect to his activities and associates. Attached to the opening brief is an affidavit by Benjamin F. Marlowe, counsel for appellant, in which he avers that he called (presumably telephoned) the United States Customs Office in San Francisco inquiring whether they or any branch of the Federal Government concerned with investigations of narcotics was investigating the activities of Roy E. MacArthur, and whether said Customs Office had given Inspector Louis Noel any information that they had located or believed they had located MacArthur's source of supply in Japan; that he was informed that they had no record that Roy E. MacArthur was being investigated by them or any branch of the Federal Government interested in narcotic cases; that they had not directly or indirectly given Louis Noel information that they had located appellant's source of supply in Japan or that they were investigating him; that the only information they had was that received from the State Narcotics Bureau. Affiant concludes by stating that he received this information at 1:57 p. m. on August 27, 1953 from "as best as can be recalled by affiant" Mr. *Joseph Sheehan* of the United States Customs Office, San Francisco. This affidavit proves nothing as to whether Mr. *McSheehy* of the Customs Service did or did not make a certain statement to Noel. If counsel for appellant believed he had evidence to show perjury, on the part of a witness, he should have presented that evidence to the trial court. On the motion for new trial he presented only a rumor. He then said he had indirect word that Noel had perjured himself, and that if this information could be verified, Noel deliberately committed perjury. At this point, counsel has still not verified the rumor. It is ridiculous to offer an affidavit such as presented here, which is not made by the person alleged to have

made the statement. Furthermore, affiant isn't even positive as to who he received the information from. He does not identify the position of the person named, stating only that "as best as can be recalled" he was Joseph Sheehan of the United States Customs Office, San Francisco. If there is anything in the contention of perjury, no excuse is shown why it could not have been investigated and have been presented to the trial court on the motion for new trial. People v. Lewis, 105 Cal.App.2d 208, 233 P.2d 30; People v. Hall, 25 Cal.App.2d 336, 77 P.2d 244; People v. McCoy, 58 Cal.App. 534, 208 P. 1016.

Appellant contends that the trial court committed prejudicial error in rulings on the admissibility of evidence in certain instances.

The defense attempted to show appellant's ignorance of narcotics and the value thereof by his alleged attempt to sell $50,000 worth of narcotics for $700, that he took that amount for 950 grains because he was so instructed by the operator. Inspector Mantler was asked if he knew of any dealer who knew his business who sold $50,000 worth of narcotics for the sum of $700. The court sustained the objection on the ground that it was not material, saying, "We don't know what kind of a market we have here, whether it is an open market with a reasonable time to find a willing buyer, ready and willing to purchase, or what it is. That is, bootleg materials that way are whatever you can get for them, whatever you think you ought to have."

[3, 4] Materiality is a question of law, and the trial judge has a wide discretion in determining admissibility. Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 247 P.2d 11. It is to be noted that Inspector Mantler was testifying, and he had just stated that in the bootleg market locally heroin had been selling between $300 and $600 an ounce, and an ounce is a little less than 500 grains. On the basis of this testimony then, the 950 grains sold by appellant for $700 would be worth about twice the value of 500 grains, or between $600 and $1200. It cannot be said that the trial court abused its discretion in sustaining this objection. See Jennings v. Arata, 83 Cal.App.2d 143, 188 P.2d 298.

[5] Appellant assigns as error the overruling of his objection to the conversation by Inspector Chasten that he stated to appellant that two prominent narcotic peddlers were arrested in San Francisco and that he had heard something about a pilot offering a pound of heroin for sale. The objection was that it was hearsay. The trial judge agreed that it was, but said that it was a conversation the witness had with defendant, that it might be preliminary to something else. The inspector said he wanted to know if defendant was being careful. It was very clear from the conversation related that the statement was made to secure further information from the appellant by the inspector. It was not offered for the truth of the matter in the statement. It was therefore unobjectionable. Gursey v. Campus Camera Shop, 98 Cal.App.2d 257, 219 P.2d 884.

[6] It is contended that error was committed when on cross-examination objection was sustained to a question of appellant's counsel by which in examining Inspector Chasten, he attempted to show appellant's lack of assets, that he owned an old model car, paid for his TV on the installment plan and did not own any property. The trial judge has wide discretion in determining the relevancy of evidence, Spolter v. Four-Wheel Brake Service Co., 99 Cal.App.2d 690, 222 P.2d 307; Gladstone v. Fortier, 22 Cal.App.2d 1, 70 P.2d 255. Whether or not evidence is too remote is for the trial court which is vested with a wide discretion in making such decisions. Casey v. Casey, 97 Cal.App.2d 875, 218 P.2d 842. Without objection, the witness had just previously been asked "And you found out he owned a very late model of a 1937—withdraw it. It wasn't quite so new. It was a 1935 De Soto, isn't that right?" to which the witness answered "I don't recall." Just following this the court said: "What has that got to do with the issues involved here, whether he had a bicycle or an automobile or traveled on foot or in an air-

plane?" to which appellant takes exception as being facetious and intending to ridicule defendant.

[7] Again appellant alleges error in sustaining objection to a question on cross-examination designed, he says, for the purpose of attacking the *credulity* [probably means credibility] of Inspector Chasten. He was asked if he reported back to the United States Customs, that he had learned that defendant had been dealing in narcotics for a year and a half. Chasten was an inspector with the State Narcotics Bureau. Whether or not he reported this matter to the United States Customs would seem to have no bearing on his credibility as a witness. Chasten was not shown to be the Chief Officer of the San Francisco Branch of the Narcotics Bureau, nor was any duty shown to exist on the part of any state officer to make such a report.

[8] An examination of the arguments to the jury discloses no merit in appellant's claim that the prosecution's argument was calculated to inflame the minds of the jurors against appellant. The claim that perjured testimony was given by one witness for the People has been dealt with previously. It is therefore unnecessary to discuss appellant's claim that improper argument was based on alleged perjury. In argument an attorney may fairly reason from the evidence adduced at the trial and express opinions based on deductions or reasonable inferences therefrom. Rogers v. Foppiano, 23 Cal.App.2d 87, 72 P.2d 239.

[9] A reversal is not warranted in cases where counsel simply assigns remarks as prejudicial and requests no instruction where the effect of such remarks may be cured by a proper instruction of the court. People v. Davidson, 23 Cal.App.2d 116, 72 P.2d 233; People v. Charlie, 34 Cal.App. 411, 167 P. 703. The court in the present case upon motion for new trial was satisfied that appellant had had a fair trial. The trial judge could more accurately determine than can an appellate court, the effect of alleged misconduct of the district attorney. People v. Sarazzawski, 27 Cal.2d 7, 161 P.2d 934.

Appellant criticizes the fact that Jimmy Lee, the informer was not brought in as a witness, and that the testimony as to what Jimmy Lee told the agents is hearsay. There was evidence offered by respondent that Jimmy Lee had disappeared, that the state agents had been looking for him from time to time, but could not locate him. Counsel for appellant brought out the testimony in cross-examining Inspector Noel that Jimmy told the state agents that MacArthur was his chief source of supply for narcotics. He also brought out fully that the agents using Lee as a decoy, had laid a plan to apprehend appellant in order to prosecute him for trafficking in narcotics.

[10] It is only where the criminal design originates in the mind of an officer and not with the accused, that there is entrapment. The law does not frown upon the entrapment of a criminal, but upon the seduction of an innocent person into crime by a law enforcement officer. People v. Roberts, 40 Cal.2d 483, 254 P.2d 501. For other cases where a decoy was used to apprehend criminals, but where the decoy was apparently not a witness in the case, see, People v. Gelardi, 77 Cal.App.2d 467, 175 P.2d 855; People v. Alamillo, 113 Cal.App.2d 617, 248 P.2d 421; People v. Lagomarsino, 97 Cal.App.2d 92, 217 P.2d 124.

[11, 12] There is no merit in appellant's final contention that the verdict is not supported by competent evidence. A review of the record establishes that it is adequately supported, and on appeal all intendments must be indulged which tend to support the judgment. People v. Hatton, 114 Cal.App.2d 195, 196, 249 P.2d 901; People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

There being no prejudicial error in the record the judgment of conviction must be affirmed.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

125 Cal.App.2d 351

TAS-T-NUT CO.
v.
CONTINENTAL NUT CO.
Civ. 8264.

District Court of Appeal, Third District, California.
May 19, 1954.

Hearing Denied July 14, 1954.

Action by buyer against seller for breach of contract of sale. The Superior Court, Butte County, McGregor, J., awarded judgment in favor of plaintiff, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that the record failed to support finding that defendant had ever waived contract provision binding parties to proceed in arbitration if controversies arose between them, and that court erred in refusing defendant's request to stay the action until arbitration was accomplished.

Judgment reversed.

1. Contracts 🔑284(1)

Where contract contains provision binding parties to proceed in arbitration if controversies arise between them, right to arbitrate is possessed by each party, and, notwithstanding one party may impede the normal course of arbitration such conduct cannot dispense with the right of the other party to compel it.

2. Contracts 🔑290

If one party to arbitration agreement has by dilatory tactics or an express refusal to proceed with arbitration placed himself in such position that the other party could accede to abandonment of arbitration clause, utmost effect of such conduct would be to give to such other party an election to either insist upon arbitration or acquiesce in abandonment of arbitration and resort to court action, but such election must be made, for such other party may not keep alive in itself the right to arbitrate and at the same time deny it to its adversary.

3. Contracts 🔑321(1)

If an agreement be breached, party against whom the breach is committed may refuse to accept the breach or terminate the contract, thus keeping the contract alive, but if he does so he keeps it alive both for benefit of himself and for that of the other contracting party.

4. Contracts 🔑284(1)

Where, even if it be assumed that the dilatory tactics of seller would furnish ground for an inference that seller had breached arbitration clause of contract of sale, buyer at no time took position that it was ending the contract for such breach and was abandoning its own rights to arbitrate, buyer, under such circumstances, having kept alive its own right to arbitrate, could not thereafter prevent seller from exercising remedy of arbitration.

5. Contracts 🔑292½

In action by buyer against seller for breach of contract of sale, record failed to support finding that seller had ever waived contract provision binding the parties to proceed in arbitration if controversies arose between them.

6. Contracts 🔑292½

Where parties have agreed to arbitrate their differences, court must enforce performance of that agreement, and when, notwithstanding the agreement, suit has been filed, court must stay the action, if defendant claims right to arbitrate, until arbitration has been accomplished, affording in the meantime ample remedies to either party to compel performance of mutual obligation of the parties. Code Civ.Proc. § 1284.

◆

J. Oscar Goldstein, P. M. Barceloux & Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for appellant.

Peters & Peters, Chico, for respondent.

VAN DYKE, Presiding Justice.

This is an action brought by plaintiff and respondent against defendant and appellant based on a breach of contract and seeking damages therefor. After trial the court awarded judgment in favor of plaintiff and defendant appeals. The subject contract was one for the sale and delivery of California black walnut kernels. Respondent was buyer and appellant was seller. The contract in memorandum form was dated January 19, 1949 and called for the sale of 30,000 pounds of nuts at 53¢ a pound. Appellant delivered all but 10,505 pounds and the failure to deliver that remainder is the breach upon which respondent sued.

The contract contained the following arbitration clause: "Any controversy arising from or concerning the transaction of which this contract is a part shall be settled by arbitration in the usual manner and judgment may be entered on the award in any court having jurisdiction". Although deliveries made were somewhat delayed beyond the dates referred to in the contract, nevertheless those made were accepted, the last delivery being made June 8, 1949. On May 20th appellant had informed respondent that it would not be able to make full delivery under the contract. On July 28th respondent wrote to appellant, referring to the failure of appellant to make full delivery, and said: "With reference to the differences between us arising out of our contract with you * * * it will be necessary to arbitrate both the matter of the freight due us and the failure on your part to fulfill the contract. * * * Please express to us by return Airmail your ideas as to the arbitration organization you prefer to handle this case. Kindly let us have these advices immediately by return Airmail." Appellant did not answer this letter, but contacted the broker who had negotiated the contract, and the broker wrote on August 8, 1949, telling respondent that though appellant had been unable through circumstances which were beyond its control to make complete delivery, nevertheless appellant was proposing to deliver the additional quantity from the first available new crop at the same price as called for in the contract, or at such lower price at which the goods might then be selling. He stated that appellant was not refusing to arbitrate, but preferred not to do so as it felt the matter should be settled amicably without resorting either to arbitration or court action. The letter stated that if respondent insisted on arbitration it was probable appellant would agree, but it might refuse and if it did then respondent would have to force its demands by legal means. Respondent replied directly to appellant, referring to the broker's letter and requesting that appellant answer direct rather than through the broker. It rejected the offer to deliver out of the next year's crop and demanded and asked appellant to state by return mail whether it would arbitrate or not. August 22d appellant answered this letter, regretting the controversy and its inability to complete the order. The letter stated: "Because of your insistence that the matter be arbitrated, we have concluded that Mr. Johnson [the broker] certainly could not have clearly explained the existing conditions to you." The letter then contained a statement of reasons why the delivery had not been made, advanced a contention that amounted to a denial of any breach and then said, "If, after you have considered the above, you insist that this matter must be arbitrated, it would be our suggestion that you notify us of the Arbitration Board you would prefer." Respondent replied that it was not possible for the parties to reach an agreement and said, "Since you have passed the buck back to us regarding the naming of an arbitration board we will skip our preference for a Baltimore group and suggest the New York Food Distributors' Association. * * * Please notify us immediately if we can be in agreement on this procedure so that we can simultaneously apply for arbitration of our dispute before that body." No answer was made to this letter and on September 9th respondent again wrote to appellant, noting that apparently its letter had had no more success in bringing about an arbitration than the previous efforts and it again asked for agreement on arbitration procedure and a definite statement whether appellant would arbitrate or not. The letter closed with a statement that unless it had some word by the 15th of September it would treat it as a refusal to arbitrate and submit the matter to respondent's attorneys for "whatever legal action" the attorneys should recommend. On September 13th appellant replied, stating that it felt that neither arbitration nor legal action would answer the problem, and again proposing to fill the order from the next crop. No answer was made to the specific demand of respondent that appellant either agree to arbitrate or announce its refusal. Respondent committed the matter to the care of its counsel in Baltimore, who on September 26th wrote to appellant, stating that unless appellant was willing to settle the claim or to arbitrate it without further delay they would pass the matter on to counsel in San Francisco with instructions to enter suit at once. On October 15th appellant replied to the Baltimore attorneys, saying they were not in accord with the expressions contained therein concerning their liability, and were doubtful of the validity of the arbitration clause, but were willing to place the matter before an arbitration board in San Francisco if that was satisfactory to the respondent. No reply was made by the attorneys. On December 8th Chico counsel for respondent wrote to appellant, stating the amount of the demand and requesting payment within ten days. They said if their demand was not met they would file suit. On December 9th appellant replied to respondent's Chico attorneys, stating that under the terms of the contract the matter would have to be arbitrated; that they had already stated they were willing to place it before an arbitration board in San Francisco and had had no response thereto. Appellant said that it considered arbitration must necessarily first be exercised before litigation would be in order. There appears to have been no further communication between the parties or their counsel and this action was begun February 16, 1950. All of the communications between the parties were by mail and the foregoing constitutes a condensation of the correspondence placed in evidence.

The complaint contained two counts, the first setting up the contract in substance and containing an allegation of breach with a demand for damages. The second count repeated the allegations of the first count by reference and additionally pleaded that although the contract called for arbitration the appellant's rights to arbitration had been waived. Appellant demurred to the complaint, urging in its points and authorities in support of the demurrer that arbitration was a condition precedent to the right to commence the suit. The demurrer was overruled and appellant answered, again pleading the arbitration clause and denying that its right to arbitration had been waived or that it had ever refused to arbitrate. It asserted its willingness to arbitrate and alleged the action was premature and should be abated until arbitration took place. The answer was filed on June 21, 1950 and on November 13th following appellant filed a petition for an order compelling arbitration and for a stay of proceedings based upon its claim that it was entitled to arbitration and that the action should be abated until arbitration was had. The court denied the petition and proceeded in due course to try the issues presented by the pleadings. It adopted findings to the effect that appellant had waived its rights to arbitration. Whether or not this finding of the trial court is supported by the record is the issue presented by the first contention of appellant on this appeal.

[1, 2] Notwithstanding that it has often been held the right to arbitrate can be waived, Squire's Dept. Store, Inc., v. Dudum, 115 Cal.App.2d 320, 329, 252 P.2d 418; Trubowitch v. Riverbank Canning Co., 30 Cal.2d 335, 339, 182 P.2d 182; Bass v. Farmers Mut. P. Fire Ins. Co., 21 Cal.App.2d 21, 68 P.2d 302; Pneucrete Corp. v. U. S. Fidelity & Guar. Co., 7 Cal.App.2d 733, 46 P.2d 1000; Landreth v. South Coast Rock Co., 136 Cal.App. 457, 29 P.2d 225, and that whether or not waiver has taken place is ordinarily a question of fact, yet we are compelled to hold upon the record here that there is no support for the trial court's finding that the appellant had ever waived the provision of the contract binding the parties to proceed in arbitration if controversies arose between them. The right to arbitrate is of course possessed by each party to the agreement and notwithstanding one party may impede the normal course of arbitration such conduct cannot dispense with the right of the other party to compel it. Our statute affords complete remedies to implement and to specifically enforce this right. If, therefore, one party to an arbitration agreement has by dilatory tactics or an express refusal to proceed with arbitration placed himself in such a position that the other party could accede to the abandonment of the arbitration clause, yet such party

need not do so. The utmost effect of conduct such as is displayed by the correspondence here would be to give to the respondent an election to either insist upon arbitration or, acceding to the implied desire of the appellant, acquiesce in the abandonment of arbitration and resort to court action. But this is an election which it must make for it cannot keep alive in itself the right to arbitrate and at the same time deny it to its adversary. Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 2 Cir., 62 F.2d 1004, 1006. Said the court as to one party to an arbitration agreement who had ignored that agreement and brought action in a state court:

> "* * * The state action was indeed a repudiation of the plaintiff's own promise to arbitrate; it gave the defendant an election, taking the plaintiff at its word, to put an end to the arbitration clause, or to insist upon performance. By its plea in the answer it chose the second course. * * * It is true that it did not follow this up by selecting an arbitrator as it had promised to do. Until it did, it was therefore not in position to enjoin prosecution of the action under section 5 of the New York Arbitration Act * * * and delay to do so might indeed forfeit its recourse to that remedy. * * * But, so far as concerned the plaintiff's repudiation, it had chosen not to call off the clause, not to 'rescind' it; and it could not prevent the plaintiff's resumption of the remedy, while its own position remained unchanged."

[3, 4] The above holding by the Federal court is no more than an application of the familiar rule that if an agreement be breached the party against whom the breach is committed may refuse to accept the breach or terminate the contract, thus keeping the contract alive, but that if he does so he keeps it alive both for the benefit of himself and for that of the other contracting party. Williston on Contracts, Rev.Ed., Sec. 684; Alden v. Drudis, 30 Cal.2d 372, 381, 182 P.2d 195. Here it is clear from the record that even if it be assumed the somewhat dilatory tactics of appellant would furnish ground for an inference that it had breached the arbitration clause, nevertheless at no time did respondent take the position that it was ending the contract for such breach and was abandoning its own rights to arbitrate. Had it, instead of following its threatened course, either agreed on the arbitrator proposed by appellant or had it, deeming appellant was still acting in bad faith and merely pretending willingness to arbitrate, applied to the court in which it later filed its action for an order compelling arbitration, it would have been successful in obtaining arbitration. Under such circumstances, having kept alive its own right to arbitrate, it could not prevent appellant from exercising the remedy of arbitration.

[5] If we now consider the conduct of the parties we find that not long after appellant's breach of its selling contract the respondent stated its desire to arbitrate in accordance with their agreement and asked appellant to suggest an arbitration organization to handle the matter. It is to be noted that the arbitration clause outlined no procedure by which arbitration was to be accomplished save to state that it was to be "in the usual manner". Moreover, the record is barren of any attempt by either party to show what the usual manner was, that is, whether each party would appoint an arbitrator, with these parties choosing a third, as is often done, or whether the parties were to commit their affairs to the more professional services of the various private boards of arbitration which exist in many cities in the United States and which, generally speaking, specialize in arbitrating disputes in the various industries, limiting their efforts to fields in which they possess great skill and knowledge. But nevertheless the position taken by the respondent at that time was clear. It wanted to arbitrate. When the broker replied for appellant he said that appellant was not refusing to arbitrate but wanted to settle the matter in preference either to arbitration or to court action. We cannot reproach it for wanting to settle. There is as much reason why courts should favor the amicable settlement of disputes without arbitration as there is to favor such settlement out of court. Respondent's next letter rejected the compromise offer and again

urged that proceedings in arbitration be commenced. Appellant's reply, it is true, evaded the issue of arbitration and again urged the settlement and sought to justify its breach of the contract. But then it said: "If, after you have considered the above, you insist that this matter must be arbitrated, it would be our suggestion that you notify us of the Arbitration Board you would prefer." There is nothing in the way of a refusal to arbitrate although it could be inferred that the appellant was being dilatory. Respondent then announced the parties could not agree and named a New York board of arbitration and requested that both parties simultaneously apply to that board for arbitration of the dispute. Receiving no answer, respondent wrote again and asked a definite statement whether the appellant would arbitrate or not, but closed by saying that failure to reply would be treated as a refusal to arbitrate and respondent would then submit the matter to its attorneys for "whatever legal action" the attorneys should recommend. This was not an exercise of an election to treat the dilatory tactics of appellant as a repudiation of the arbitration agreement nor a statement that respondent was electing to accede to the abandonment of the arbitration clause. In short, respondent's right to arbitrate still existed. When the attorneys to whom the matter was first referred wrote to appellant they stated no more than that if appellant was not "willing to settle the claim or to have it arbitrated without further delay" they would pass the matter on to counsel in San Francisco with instructions to sue. Clearly there was as yet no election to abandon respondent's right to arbitrate and appellant made its reply that it would arbitrate and that it was willing to place the matter before an arbitration board in San Francisco if that was satisfactory to respondent. Appellant requested the attorneys to inform it if such an arbitration body would be agreeable. The attorneys made no reply but sent the matter on to local counsel at Chico, who likewise made no reply as to arbitration, before a San Francisco board, or at all, and made a money demand with notice of suit if the demand was not met. Promptly the appellant insisted upon the right to arbitrate and again no response was made except that suit was filed. From that time on throughout the proceedings appellant has rigorously sought to enforce its right to arbitration. The record is clear, therefore, that, even if we assume appellant's somewhat dilatory tactics amounted to an implied repudiation of its obligation to arbitrate, yet there was no election on the part of respondent to accept such conduct as a repudiation and, acceding thereto itself, to abandon its own right to arbitrate until long after appellant had indicated its desire to join in arbitration and had itself proposed an arbitration board in San Francisco as the instrumentality of arbitration and asked approval thereof. Election not having been made before that time, the right to elect was gone and so long thereafter as appellant did nothing further justifying a holding that it had again repudiated its obligation to arbitrate the election was not revived.

[6] Where parties have agreed to arbitrate their differences it is the clear intent of the California arbitration statute that courts should enforce the performance of that agreement and when, notwithstanding the agreement, suit has been filed, the statute specially enjoins the court, if the defendant seeks to claim the right to arbitrate, to stay the court action until arbitration has been accomplished, affording in the meantime ample remedies to either party to compel the performance of the mutual obligation of the parties. Says Section 1284 of the Code of Civil Procedure:

> "If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is not in default in proceeding with such arbitration."

Whatever default in proceeding with arbitration the appellant may have been guilty of in the early stages of its controversy with respondent it is clear from the record that well before the action was begun the appellant was the party that was active in the implementation of the arbitration. When, therefore, it applied to the trial court for a stay it was not in default in proceeding with the arbitration and it was error on the part of the trial court to refuse to stay the court action.

Appellant also urges on its appeal that the trial court erred in allowing profits which respondent would have made had it received the goods it bargained for as the measure of damages for the appellant's breach. Since the matter must now go to arbitration, it is unnecessary for us to discuss this contention.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; TRAYNOR and SCHAUER, JJ., dissenting.

125 Cal.App.2d 151

ZALL v. ZALL.

Civ. 19815.

District Court of Appeal, Second District, Division 3, California.

May 13, 1954.

As Modified May 28, 1954.

Suit for divorce. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered an order, pendente lite, making an award of support and maintenance for plaintiff and children and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that the award of requiring payments of about $1,361 per month was not an abuse of discretion.

Order affirmed.

1. Divorce ⚷286

Order, pendente lite, for support and maintenance cannot be disturbed as inadequate unless there was an abuse of discretion on part of trial judge in determining amounts necessary for support of wife and children and ability of husband to pay for their support. Civ.Code, § 137.2.

2. Divorce ⚷211

Award requiring payments of about $1,361 per month pendente lite in divorce suit, to wife of physician earning substantial income, but with personal expenses of $1,000 a month, was not an abuse of discretion.

Brand, Rosenthal, Norton & Miller, Beverly Hills, for appellant.

Levy, Bernard & Jaffe, and Saul J. Bernard, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff sought an order, pendente lite, requiring defendant to pay to her $1,850 a month for the support of herself and three children.

The court made an order that defendant make payments as follows: $50 a week for support of plaintiff; and $75 a week for the support of the children. It was further ordered that defendant keep up the payments on the home, on plaintiff's automobile, on all insurance, and on repairs for the house; and pay necessary bills for doctor and dentist, and pay taxes on the home. It was also ordered that he pay attorneys' fees in the amount of $2,000 and pay costs, including cost of depositions, at the rate of $200 a month; and pay the cost of auditing his books.

Plaintiff appeals from said order. She contends that the amounts awarded for the support of herself and the children were not adequate to maintain them in their accustomed standard of living; and that the court abused its discretion in awarding such inadequate amounts.

At the hearing of the order to show cause, in February, 1953, plaintiff testified that during the years 1951 and 1952 the defendant (a physician) spent an average of $2,700 a month for living expenses of the family. She also testified that some of the items included therein were: $520 a month, paid to her for groceries and maid; about $1,400 a month, paid to her by defendant, which she deposited in a bank so that she could pay by check for family living expenses; about $200 a month (in cash and merchandise), which she received from a pharmacy where defendant had a charge account; about $40 a month as cost of operating her automobile; about $400 a month for recreation for the family (including $200 for recreation at a country club); about $80 a month for payment on her automobile and cost of operating his automobile.

She also testified that the minimum amount necessary per month for the support of herself and the children is $1,850. She testified that some of the items included therein are: $350 for food; $60 for dairy products; $50 for her clothes; $75 for children's clothes; $200 for insurance; $100 for dentist; $50 for laundry; $40 for utilities; $100 for incidentals; $210 for maid and extra housework; $40 for children's dancing lessons; $100 for recreation; $200 for gardener and "a lot of things I have probably forgotten."

Defendant testified that his net income from his practice of medicine (after income taxes) for 1951 and 1952 was $19,645.75; he also received about $1,500 a year from an investment; his average monthly net income is $1,000; during those years it became necessary to cash savings bonds in the total amount of approximately $28,000 in order to pay living expenses; the bank deposits which plaintiff said she made during those years (about $1,400 a month) included the proceeds from the savings bonds and included money she received as an inheritance; some of the extraordinary expenditures during said time were: $4,000 for a mink coat for her, $4,000 on the purchase of two automobiles, $2,000 for office furniture, $3,800 for home furniture, $3,000 as an investment, $500 for country club dues, and $1,000 donation for charity.

Under the order made herein defendant is required to pay about $500 a month for the support of plaintiff and children, and about $581 a month for other items included in the order; making a total of approximately $1,100. In addition to those items he agreed to pay certain unpaid bills in the amount of approximately $1,000 (or about $80 a month). Also under the order he is required to pay $200 a month on the attorneys' fees of $2,000 and the deposition costs of approximately $300. In other words, under the order and his agreement to pay unpaid bills, he must pay about $1,361 a month. The amount to be paid by him (in addition thereto) for auditing was not determined. His personal expenses are approximately $700 a month. Some of the items included therein are: $159 for rent and care of his apartment; $250 for food, laundry, etc.; $50 for recreation; and $280 for furnishings for his apartment. In addition thereto, he will be required to pay income taxes for the year 1953, which he estimates will be $4,000 (or about $333 a month).

[1, 2] Section 137.2 of the Civil Code provides: "During the pendency of any action for divorce * * * the court may order the husband * * * to pay any amount that is necessary for the support * * * of the wife * * * and for the support * * * of the children, as the case may be." In the present case the evidence was conflicting (1) as to the amounts necessary for the support of the wife and children, and (2) as to the ability of the husband to pay for their support. Those questions were, of course, questions of fact for the determination of the trial judge. Unless there was an abuse of discretion on the part of the trial judge in resolving those factual issues, this court will not disturb the order. See Ikuta v. Ikuta, 97 Cal.App.2d 793, 795, 218 P.2d 858. It is clear that no abuse of discretion was committed.

Although the notice of appeal states that the appeal is from the whole order made upon the hearing of the order to show cause, appellant has not discussed in her brief or at all the matters of attorneys' fees, auditor's fees or costs. No discussion of those matters is required in this opinion.

The order is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

125 Cal.App.2d 274

RAKISH et ux. v. VALERGA et ux.

Civ. 15822.

District Court of Appeal, First District,
Division 1, California.

May 18, 1954.

Action by purchasers of real property against vendors for breach of guarantee that road fronting on property would be improved within 30 days so that it would be passable to automobiles throughout the year. From adverse judgment of Superior Court, San Mateo County, R. R. Sischo, J., vendors appealed. The District Court of Appeal, McMurray, J., pro tem., held that the proper measure of damages for vendors' failure to improve the road was the difference in value of property with and without the promised improvement.

Reversed and remanded with instructions.

1. Evidence ⚿455

Words "road fronting on property to be guaranteed to be improved (to permit passage of automobiles throughout the year) within 30 days" were of sufficiently clear meaning without explanation, and court did not err in rejecting evidence to show the meaning of the words.

2. Contracts ⚿322(3)

In action by purchaser for breach of contract for sale of realty which contained a guarantee that road fronting on property would be improved within 30 days to permit passage of automobiles throughout the year, evidence was sufficient to sustain finding that vendors had failed to improve the road as agreed.

3. Contracts ⚿275

Fact that driveway leading to purchasers' home was much steeper and rougher than road fronting the property would not relieve vendors from guarantee in contract of sale that road fronting the property would be improved within 30 days so that it would be passable for automobiles throughout the year.

4. Damages ⚿117

Proper measure of damages for vendors' breach of guarantee that road fronting property sold would be improved within 30 days so that it would be passable to automobiles throughout the year, was difference in value of property with and without promised improvement. Civ.Code, §§ 3300, 3359.

◆

Joseph A. Jackson, San Francisco, for appellants.

Harold C. Brown and Robert I. McCarthy, San Francisco, for respondents.

McMURRAY, Justice pro tem.

Defendants appeal from a judgment awarding plaintiffs $1,500 for breach of contract.

Appellants agreed to sell certain real property to respondents for $3,250. An agreement of sale and deposit receipt dated February 15, 1949 acknowledged receipt of $250, and provided that the balance be paid at $35 per month with interest at 6 per cent. This agreement also contained several conditions of sale. Those here pertinent are numbered (2) and (4). Number (2) provides: "Road fronting on property to be guaranteed to be improved (to permit passage of automobiles throughout the year) within 30 days." This road was not on the property conveyed to the plaintiff. Condition number (4) provides: "Water and electricity to be guaranteed to be available to buyer." Respondents took possession of the property and undertook the construction of a dwelling.

On July 5, 1951, respondents filed a complaint for damages and filed an amended complaint on July 14, 1952. In the complaint it was alleged that the parties entered into the agreement of sale and that appellants failed to construct a road and failed to have water and electricity available to respondents; that respondents had commenced the construction of a dwelling house on the property in reliance upon the appellants' promises to construct a road and have water and electricity available, and that the respondents had been damaged in the sum of $5,000 representing the cost to respondents of constructing the road and the additional cost to respondents in constructing the house. It is also alleged that respondents were required to pay rent for fifteen months at the rate of $40 per month.

At the trial there was testimony that the condition of the road fronting on the property was impassable for automobiles during certain rainy periods in the winter. It was stipulated that the only damages sought in the action were those arising from the failure of appellants to put the road in proper condition and the failure to get electricity to the property in time for respondents to use power tools in building the house. The court found "That the cost of improving the road fronting on the aforementioned property to permit passage of automobiles throughout the year is the sum of fifteen hundred ($1500.00) dollars," and gave judgment for respondents in that amount. No finding was made relative to any damage by reason of the failure to have electricity available or relative to rent.

[1–3] Appellants contend that the court erred in not allowing evidence to be introduced to show the meaning of the words: "Road fronting on property to be guaranteed to be improved (to permit passage of automobiles throughout the year) within 30 days." These words are of sufficiently clear meaning without explanation and the judge correctly excluded the offered evidence. Appellants also state that the judgment is contrary to the evidence. A fair reading of the transcript shows abundant evidence to support the finding that appellants failed to improve the road as agreed, although there is some conflict in the evidence. Appellants next argue that, since the driveway from the road to respondents' house was much steeper and rougher than the road, respondents therefore cannot have been damaged by the condition of the road. This argument is completely without merit. There is no way of ascertaining what the respondents might have done with their driveway had the access road been in the proper condition, and appellants cannot escape their obligation to improve the road by stating that respondents had not a good enough driveway to provide access to their lot throughout the year.

The next point which appellants urge is that the award for damages is excessive and is based upon a statement made by Mr. Rakish upon cross-examination that he thought $1,500 was what it would cost to improve the road to the standard set forth in the agreement. If the cost of the road were the proper measure of damages, this testimony would certainly support the judgment. It seems apparent, however, that both court and counsel adopted a completely erroneous measure of damages.

[4] In Coughlin v. Blair, 41 Cal.2d 587, 262 P.2d 305, a case wherein purchasers sought damages for breach of a reality purchase agreement to install utilities and pave the road leading to the property involved, the measure of damages in such case is clearly set forth at page 600 of 41 Cal.2d at page 312 of 262 P.2d where it is said: "The question remains whether the court applied a proper measure of damages. Unless a statute otherwise specifically provides, the proper measure of damages for the breach of a contract 'is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.' Civ. Code, § 3300. Damages must, however, 'be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.' Civ. Code, § 3359. In the present case the contract called for installation of improvements that would greatly increase the value of plaintiffs' property. The consideration was paid in advance. If the work were to be done on plaintiffs' property the proper measure of damages would ordinarily be the reasonable cost to plaintiffs of completing the work. Taylor v. North Pac. Coast R. Co., 56 Cal. 317, 320; Adams v. Hiner, 46 Cal.App.2d 681, 683, [116 P.2d 630]; cf. Avery v. Fredericksen & Westbrook, 67 Cal.App.2d 334, 336, [154 P.2d 41]; see, Corbin on Contracts, §§ 1089–1091. A different rule applies, however, when the improvements are to be made on property that is not owned by the injured party. In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the

Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived. Knoch v. Haizlip, 163 Cal. 146, 154, [124 P. 998]; South Memphis Land Co. v. McLean Hardwood Lbr. Co., 6 Cir., 179 F. 417, 423–424, [102 C.C.A. 563]; Hyatt v. Wiggins, 178 Ark. 1085, [13 S.W.2d 301, 303]."

Because of the error in adopting the wrong measure of damages the judgment appealed from is reversed and remanded for a new trial in accordance with the views herein expressed. The trial court is instructed to allow the parties to make such amendments to their pleadings as they may be advised in order to properly present the issues involved.

PETERS, P. J., and FRED B. WOOD, J., concur.

OPPENHEIMER v. DEUTCHMAN.

Civ. 20281.

District Court of Appeal, Second District.
Division 2, California.
May 12, 1954.

Proceedings on plaintiff's statement, which alleged bias and prejudice of two members of three-judge appellate court, filed subsequent to decision of appellate court affirming decision of lower court adverse to plaintiff. The District Court of Appeal, McComb, J., designated by Judicial Council to consider question of judges' alleged disqualifications, held that neither judge was biased or prejudiced against plaintiff.

Order in accordance with opinion.

1. Judges 🔑51(4)

In the absence of statutory provision for the receipt of evidence other than a statement of bias and prejudice of judge filed by an objecting party and the answer or answers thereto, or for a formal presentation by motion with or without argument, an ex parte consideration of the evidence presented in the statement of the objecting party and the answer or answers thereto is a proper procedure for determining any issues which may be raised by such documents. Code Civ.Proc. § 170.

2. Judges 🔑51(4)

In proceedings on plaintiff's statement, which alleged bias and prejudice of two members of three-judge appellate court, filed subsequent to decision of appellate court affirming decision of lower court adverse to plaintiff, record established that neither judge was biased or prejudiced against plaintiff. Code Civ.Proc. § 170, subds. 4, 5.

3. Judges 🔑51(2)

A statement alleging bias and prejudice of a judge or judges and seeking their disqualification to determine controversy, filed after rendition of judgment, is too late. Code Civ.Proc. § 170, subds. 4, 5.

John G. Oppenheimer, in pro. per.

Edward M. Raskin, Los Angeles, for respondent.

McCOMB, Justice.

On April 22, 1954, the above entitled court, consisting of Moore, P. J., McComb, J., and Fox, J., dismissed appeals from three orders and affirmed as modified one order of the superior court of Los Angeles County from which plaintiff had appealed. On April 28, 1954, plaintiff filed what purported to be a statement of bias and prejudice of Presiding Justice Minor Moore and Justice W. Turney Fox, which read as follows (omitting the title of the court and cause):

"Affiant, John G. Oppenheimer, appellant herein, states that Moore, P. J. and Fox, J., are, and that each of them is, biased and prejudiced in favor of Edward M. Raskin, counsel for respondent herein, and against affiant, a citizen, war veteran and non-lawyer.

"This statement is made pursuant to the provisions of C.C.P. sec. 170, subds. 4 and 5, and on the authority of Rosenfield v. Vosper, 70 Cal.App.2d 217, 160 P.2d 842.

"Said jurists have permitted said Raskin to jockey for and to change his position, to the loss, damage and injury of affiant.

"Said jurists have required affiant to suffer by the acts and misdeeds of said Raskin.

"Said judicial officers have permitted lawyer Raskin to take advantage of his own wrong, to save face, and to heap insult upon affiant, on top of injury, all in a game of unsavory politics played and indulged in against this appellant, to harass, oppress, injure, discourage and bankrupt him, and to cause him despair.

"No opinion or decision on appeal has been filed by said justices, and particularly, no mention at all has been made even in the mere minute order prepared by them, that their friend and fellow-lawyer, Raskin, had indulged in the chicanery against affiant, of making a wholly baseless, unfounded, frivolous and malicious costs claim for (office) copies of respondent's transcripts on appeal, contending that by reason thereof, he or his client, the respondent herein, were entitled to recover the additional sum of $67.50 from and against affiant and appellant herein, and that plaintiff's motions to strike and to tax said illegal and improper items of cost had been denied in the trial court, by two disqualified judges, to-wit, Rhone and Meyer, who had played along with Raskin's shyster tricks against affiant herein.

"To save more face for Raskin et al., after affiant had duly appealed from the orders denying his motions to tax respondent's costs on a prior appeal to the Supreme Court of this State, and not to the District Court of Appeal, of the Second Appellate District, and also from the order refusing to vacate the order taxing respondent's costs in the sum of $170.12, as venomously claimed by his rascally lawyer, Raskin, said ministers of right and justice permitted Raskin at an hour somewhat later than the eleventh, to prevent, obstruct and frustrate affiant's appeal from the aforesaid erroneous orders and a review thereof, contrary to Reynolds v. Reynolds, 67 Cal. 176, 178, 7 P. 480, by 'waiving' (purportedly with great generosity) said costs of $67.50 for such copies of respondent's own personal transcripts on appeal, bought for convenience and office use of his counsel Raskin, so that the order of denial made by the trial court (Judge Rhone) could be 'modified by *awarding costs* to the respondent in the sum of $96.47,' and then *affirming* it, with affiant bearing all of the costs on this appeal alone, (unless respondent's office copy of the clerk's transcript on this appeal be considered as 'costs' to respondent), including the costs for a copy of the remittitur on the former appeal, designated by Raskin to clutter up the record on this appeal. Nothing is said about a *reversal* of the order *taxing* said costs in the sum of *$170.12,* with directions to *tax* them in the sum of $96.47, much less about appellant's right to costs on this appeal, as the prevailing party, so that affiant must suffer the loss and damage by reason of Raskin's improper claim for 'costs' for office copies of transcripts on appeal, and the party whose fault it is, pays nothing and is allowed to take advantage of his own wrong, by the ruse of mistitling his confession of error as a motion to dismiss and 'limit the issues on appeal.' If the 'issues' had been 'limited' in the trial court, and no claim for 'costs' for office copies of transcripts on appeal had been made by respondent against appellant, there would have been no need to appeal from orders allowing such larcenous claims, and no $31.15 (plus) expense by affiant would have been incurred for a third appeal in this case.

"Under the circumstances, the action of Moore, P. J and of Fox, J., is unfair, unreasonable and arbitrary, and permits Raskin to capitalize with impunity on his repeated making of cost claims for copies of transcripts on appeal, at affiant's expense, and without said Raskin believing in good faith or at all, that such claims for such purported 'costs' are just or meritorious, but on the contrary, the continued making of them is peculiarly designed to vex and oppress affiant, to cause him expense, and for Raskin to get away with such misdeeds and such malicious abuse of process, resorted to without probable cause and for purposes of spite and malice. Said justices are not impartially administering equal justice under the law without regard to personalities, but are rewarding the unjustifiable misconduct of respondent's counsel, to the loss, detriment and prejudice and unlawful property deprivation of affiant, who does not happen to be an officer of the court. That significantly enough, Raskin was not asked by said judges on what, if anything, he was basing the verified claim for costs for copies of transcripts on appeal made by him in the sum of $67.50 against affiant, why he did so, or what his idea (the big idea) in so doing was, and why he should not pay to affiant such costs and expenses proximately caused by reason of and in resisting such unauthorized cost claims, of why any special privileges should be granted him, or on what basis he is entitled to cast the first stone. Affiant was not served with a copy of the trial court clerk's certificate, appearing in respondent's mistitled motion, filed April 2nd; hence, no copy hereof goes to Raskin, either."

Thereafter on April 29, 1954, each of the above mentioned Justices filed affidavits denying any bias or prejudice against plaintiff. On May 10, 1954, pursuant to the provisions of section 170 of the Code of Civil Procedure, the undersigned was requested by The Honorable John W. Shenk, Acting Chief Justice of the Supreme Court and Chairman of the Judicial Council, to hear and determine the alleged bias and prejudice of Moore, P. J. and Fox, J.

[1, 2] Therefore, after due consideration of the affidavit of alleged bias and prejudice filed by plaintiff * and the answers thereto filed by the respective Justices, it is found:

(1) That Presiding Justice Minor Moore was not and is not biased and/or prejudiced against plaintiff (cf. Johnson v. State Bar, 4 Cal.2d 744, 759 [10], 52 P.2d 928);

(2) That Justice W. Turney Fox was not and is not biased and/or prejudiced against plaintiff (see Johnson v. State Bar, supra); and

[3] (3) That plaintiff's objection that the Justices were biased and prejudiced was filed too late. The ruling as to which plaintiff endeavors to disqualify the Justices was made April 22, 1954, while his alleged statement of bias and prejudice was not filed until April 28, 1954. There is a total absence of any showing that the facts set forth in the alleged affidavit of bias and prejudice were not known by plaintiff on and prior to April 22, 1954.

The law is settled that the objection that a Justice is disqualified from hearing a cause must be made before the commencement of a hearing of *any issue of fact;* if made thereafter the objection is deemed to have been waived. It is obvious that this rule was not complied with in the instant case. (People v. Schoonderwood, 72 Cal.App.2d 125, 126[1], 164 P.2d 69.)

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* There being no provision in the statute (Code of Civil Procedure, sec. 170) (1) for the receipt of evidence other than the statement of bias and prejudice filed by the objecting party and the answer or answers thereto, or (2) for a formal presentation by motion with or without argument, an ex parte consideration of the evidence presented in the statement of the objecting party and the Justice's answer or answers thereto is a proper procedure for determining any issues which may be raised by the foregoing documents. (Bixby v. Hotchkis (hearing denied by the Supreme Court) 72 Cal.App.2d 368, 372 [5] et seq., 164 P.2d 808.)

125 Cal.App.2d 201

STATE COMPENSATION INS. FUND et al.
v.
INDUSTRIAL ACC. COMMISSION et al.
No. 15796.

District Court of Appeal, First District,
Division 1, California.
May 17, 1954.

Proceedings on petition for writ of review and annulment of portion of findings and order of Industrial Accident Commission on apportionment of compensation payable to claimant for disability resulting from silicosis. The District Court of Appeal, Bray, J., held that findings of the commission as to apportionment were sustained by the evidence.

Order affirmed.

1. Workmen's Compensation 🔑1820

The Industrial Accident Commission on rehearing, after reviewing the record, has full power to change its previous findings and order without further evidence, and fact that no party has complained of any particular finding of fact does not affect the commission's power to make an entirely new and different decision based upon the evidence. Labor Code, § 5908.

2. Workmen's Compensation 🔑1939

Questions as to the weight of the evidence are for the Industrial Accident Commission, and if there is any evidence, whether direct or by reasonable inference, which will support the commission's finding, reviewing court has no power to disturb it.

3. Workmen's Compensation 🔑1030

In proceedings on application for adjustment of compensation claim for permanent disability resulting from silicosis while claimant was employed by seven employers, wherein one of the four carriers, during whose employment the commission found that the silicosis was contracted, petitioned for contribution or to apportion liability, finding of commission that the claimant had worked 501 weeks for certain employer, which made state fund liable for percentage of employment period of such employer, arrived at by resorting to weekly units and becoming weeks of employment and exposure, was supported by the evidence.

Donald Gallagher, Edward C. Neely and Allan Sapiro, San Francisco, for petitioners.

T. Groezinger, San Francisco, for respondent Industrial Accident Commission.

BRAY, Justice.

Petition for writ of review and annulment of portion of findings and order on apportionment.

Questions presented:

1. May the commission, on rehearing, after reviewing the record, make findings and order differing from its first findings and order, where no additional evidence is introduced?

2. Are the commission's findings supported?

Record.

Respondent George filed an application for adjustment of claim, in which he alleged that while employed as a molder by seven named employers from 1907 through July, 1947, he developed silicosis resulting in permanent disability. Petitioner State Compensation Insurance Fund and other compensation insurance carriers were subsequently joined as defendants. In its findings and award the commission found that the silicosis was due to his employment by four named employers, one of which was petitioner Empire Foundry, insured by State Fund, and awarded temporary total disability indemnity and medical expenses. The award was against the State Fund and two other insurance carriers, jointly and severally. Thereafter one of these carriers filed its petition for contribution or to apportion liability. Two hearings were had on this petition. The report of the referee on the order fixing apportionment was filed in which it was found that of the total employment by the four employers, George was employed by Empire Foundry for 328 weeks, and that of the total liability to George the State Fund be apportioned to pay 79.04 per cent. (This included liability for another employer for which the State Fund is the carrier.)

All three carriers petitioned for a rehearing, which was granted. After further hearing at which no additional evidence was introduced as to the period George worked for Empire Foundry, the trial referee advised the parties of his proposed findings as to apportionment. The period of employment at Empire Foundry he found to be 501 weeks instead of the 328 weeks previously found. Petitioner State Fund filed objections. Thereafter the commission filed its order on apportionment in accordance with the proposed findings, making apportionment of petitioner State Fund's liability accordingly. A petition for reconsideration was denied.

1. Commission's right to change order on reviewing evidence.

[1] Petitioner contends that as no party on rehearing questioned the commission's previous finding of 328 weeks, and as no additional evidence was offered on the subject, the commission had no power to change its findings and order. That the commission on rehearing, *after reviewing the record*, as it did here, has full power to change its previous findings and order without further evidence, is so well settled in California as not to require discussion. See Great Western Power Co. of California v. Industrial Acc. Comm., 191 Cal. 724, 729, 218 P. 1009; Pacific Emp. Ins. Co. v. Industrial Acc. Comm., 58 Cal.App.2d 262, 267, 136 P.2d 633. "After the taking of additional evidence and a consideration of all of the facts the commission may affirm, rescind, alter, or amend the original order, decision, or award." Labor Code § 5908. The rehearing threw the entire record open for review, and if, in a review of the record, the commission believed that its previous order should be changed, the fact that no party had complained of any particular finding of fact would not affect the commission's power to make an entirely new and different decision based upon the evidence.

Merritt-Chapman & Scott Corp. v. Industrial Acc. Comm., 1936, 6 Cal.2d 314, 57 P.2d 501, and Bethlehem Steel Co. v. Industrial Acc. Comm., 1940, 42 Cal.App.2d 192, 108 P.2d 698, cited by petitioners, are not in point. The first case did not deal with a rehearing. The second case dealt with a hearing after petition to reopen the case, where the commission changed the previous findings *without a review of the record.*

2. Were the findings supported?

Petitioners contend that the evidence does not support the finding that George worked 501 weeks for Empire Foundry. On May 20, 1949, petitioner Empire Foundry, which was the only employer to file payroll statements, reported to the petitioner State Fund that its records showed that George worked for it "during the following periods:

"March 22nd 1923	to	Dec. 26th 1924
"May 29th 1925	"	March 12, 1926
"Oct 1st 1926	"	March 22nd, 1927
"Sept 27th 1929	"	Oct 18th 1933
"Jan 12th 1934	"	May 22nd 1936"

Following that was a statement of his earnings each year, from 1923 to 1936, both inclusive (except the year 1928, no part of which he worked, apparently). This document was filed June 6, 1949. At the hearing on apportionment on August 3, 1950 (prior to the first findings and order making apportionment) George was asked if the report above set forth gave "about the time that you worked" for Empire. He said it did. He stated that there were months during that period when he did not work. There was a depression on and he would be off part time. October 5, 1950 (again before the first ruling on apportionment) petitioner Empire Foundry filed what it termed "the original payroll record" of George while employed by them. This consisted of approximately three yards of adding machine tape bound together, containing figures in both handwriting and mechanical impressions of an adding machine. This purports to give the exact days worked by George and his pay on each day worked. The total number of weeks set forth in the May 20th report above mentioned is 501. It is claimed that the total number of weeks shown on the tape is 328, although there was no testimony to that effect or concerning the data shown on the tape. The record fails to show how the referee arrived at his original estimate of that number of weeks. Petitioners claim that we must accept the evidence of what they contend the tape shows, reject the evidence of the first report, and conclude therefrom that George did not work as shown in that first report.

[2] As said in Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102, 114, 115, 251 P.2d 955, questions as to the weight of the evidence are for the commission, and if there is any evidence, whether direct or by reasonable inference, which will support the commission's finding, we have no power to disturb it.

"It is well established that the commission may draw inferences from the evidence, and its conclusion will not be disturbed unless it is wholly unreasonable." F. W. Woolworth Co. v. Industrial Acc. Comm., 17 Cal.2d 634, 637, 111 P.2d 313, 314. While George testified that he worked part time during the depression years, it does not appear how the part time was worked, short periods per day or full weeks with interrupted weeks. The commission might have considered the adding machine tapes as an after-thought. The adding machine tape is not a payroll record, nor either an original record or copy thereof. It is merely a purported summation of what the employer claims its records show.

[3] It is not always an easy task to make an apportionment where, as here, the employee has worked for several employers over a considerable length of time. We cannot say that the method adopted by the commission of resorting to weekly units and determining the weeks of employment and exposure is unreasonable and unsupported by the evidence. As said in Associated Indem. Corp. v. Industrial Acc. Comm., 124 Cal.App. 378, 385, 12 P.2d 1075, 1078, "There may be some difficulty in making the apportionment called for here, but, if so, the difficulty is properly to be solved by the commission. We do not suggest a solution, but shall leave it to the commission to settle the problem."

The order of the commission is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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125 Cal.App.2d 52

TRACY v. FRESNO COUNTY.

Civ. 4690.

District Court of Appeal, Fourth District, California.

May 4, 1954.

Hearing Denied June 30, 1954.

Action by sheriff against county to recover attorneys' fees and costs allegedly incurred in successful defense of grand jury accusation charging him with willful misconduct and seeking his removal from office. The Superior Court, Fresno County, Milo Popovich, J., sustained county's demurrer, ordered judgment in favor of county, and sheriff appealed. The District Court of Appeal, Griffin, J., held that statute providing for public defense of proceedings against county official or payment of fees, costs, and expenses where other counsel is employed, was not intended to include within its scope the cost of defense of a criminal action or of a grand jury accusation, which is criminal in nature, instituted by a body politic in the name of the people.

Affirmed.

1. Counties ⚷73

Statute providing for public defense of proceedings against county official or payment of fees, costs, and expenses where other counsel is employed was not intended to include within its scope the cost of defense of a criminal action or of a grand jury accusation, which is criminal in nature, instituted by a body politic in the name of the people. Government Code, §§ 2001, 2002, 3070; Code Civ. Proc. §§ 22, 23, 1859.

2. Sheriffs and Constables ⚷68

Under statute providing for public defense of proceedings against public officials or payment of fees, costs and expenses where other counsel is employed, mere claimed refusal of county counsel to defend county sheriff charged by grand jury with willful misconduct and his advice to sheriff to obtain private counsel was not sufficient to authorize sheriff to employ such private counsel without any previous authorization obtained from board of supervisors on behalf of county. Government Code, §§ 2001, 2002, 3070.

3. Judgment ⚷735

Where grand jury accusation, which charged sheriff with willful misconduct, did not plead that sheriff had acted in bad faith or with malice, jury verdict that accusations were "untrue" was not res judicata in subsequent proceeding by sheriff to recover fees and costs allegedly incurred in his successful defense on question of whether sheriff had acted in good faith and without malice. Government Code, §§ 2001, 2002, 3070.

4. Officers ⚷74

Malice is not a necessary element in an accusation for willful misconduct in office.

5. Counties ⚷73

Under statute providing for public defense of proceedings against public officials because of action taken or work done by county official in his official capacity, in good faith and without malice, or payment of fees, costs and expenses where other counsel is employed, before such official would be entitled to be represented by public counsel, or to make provisions for other counsel at expense of political subdivision, it would be necessary for official to first show to proper authority that actions taken by him were in good faith and without malice. Government Code, §§ 2001, 2002.

6. Sheriffs and Constables ⚷68

Under statute providing for public defense of proceedings against public officials because of any action taken, or work done, by a county official in his official capacity in good faith and without malice, or payment of fees, costs and expenses where other counsel is employed, county sheriff, who was charged by grand jury accusation with willful misconduct, could not determine for himself that he had acted in good faith and without malice and employ other counsel in any unlimited amount for his own personal defense of accusation without sanction or direction of some other authority. Government Code, §§ 2001, 2002.

7. Officers ⚷111

Statutes ⚷237

Whenever a statute relates to the payment of public money, or is an impairment of the prerogatives of government, any doubt should be resolved in favor of the government.

8. Statutes ⚷190

Courts are authorized to determine the legislative intent as indicated by statute when such statute is not clear, certain and unambiguous

Meux & Gallagher, Fresno, Dinkelspiel & Dinkelspiel, San Francisco, for appellant.

Robert M. Wash, County Counsel, Maurice E. Smith, Asst. County Counsel, Fresno, for respondent.

GRIFFIN, Justice.

This is an action by plaintiff to recover from the County of Fresno attorneys' fees and costs in the sum of $13,413.39, claimed to have been incurred by plaintiff in the successful defense of a Grand Jury accusation charging him with willful misconduct and seeking his removal from the office of sheriff of Fresno County.

The question here presented is the construction of section 2001 of the Government Code, as applied to the facts pleaded in a second amended complaint which are, generally speaking, that plaintiff was the sheriff of that county and on April 30, 1952, the Grand Jury filed an accusation against him charging him with seven counts of willful misconduct. It charged generally that as such sheriff he had knowledge that prostitution and gambling was being practiced in an open, notorious and public manner in certain described parts of the county, and that he willfully, intentionally, and unlawfully failed, refused and neglected to investigate and arrest persons who he knew were practicing prostitution and gambling at said locations, and that he obstructed his deputies from making arrests of such persons. Count 7 charges that the sheriff intentionally appointed a named undersheriff who he knew was and is corrupt and incompetent to perform such duties and accordingly all the acts charged constituted willful misconduct, and the sheriff's removal from office on these grounds was sought. The result of a jury trial was in favor of the accused.

It is then alleged that the district attorney represented the people in said proceeding and that the sheriff requested the county counsel of Fresno County to represent him in defending him against such accusations; that plaintiff acted in good faith and without malice, and that the county counsel "refused" to act and "advised plaintiff to employ counsel" and "that plaintiff thereupon made provision for the employment of private counsel to represent him in defending said accusation"; that he did so and incurred charges for legal fees and costs in the sum of $13,413.39; that on March 18, 1953, plaintiff presented to the Board of Supervisors of Fresno County his claim for said amount and that it was rejected. Judgment is sought in said amount.

Both a general and a special demurrer were filed. The demurrer setting forth the ground that the complaint did not state a cause of action was sustained. The special demurrer was overruled except as to the ground that the amended complaint was ambiguous, and as to that ground it was sustained because it did not appear therefrom how or in what manner plaintiff made provision for the employment of private counsel to represent him. Plaintiff was given ten days to amend. He failed to do so and judgment was ordered in favor of defendant, from which judgment plaintiff appealed.

Section 2001 of the Government Code now reads:

> "Suit against State, district, county or city officer. (a) *(Duty of State, etc. attorney to act as counsel in defense.)* Whenever any action or proceeding, including a taxpayer's suit, is brought against any officer in his official or individual capacity, or both, of the State or of any district, county, or city
>
> "(1) On account of injuries to persons or property resulting from the dangerous or defective condition of any public property or
>
> "(2) On account of any action taken or work done by him in his official capacity, in good faith and without malice, or
>
> "(b) Whenever any action or proceeding is brought against any officer, in his official or individual capacity, or both, including officers as defined in Article 2, of the State or of any school district, county or municipality on account of injuries to persons or property, alleged to have been received as a result of
>
> "(1) The negligence or carelessness of such officer occurring during the course of his service or employment, or
>
> "(2) The dangerous or defective condition of any public property, alleged to be due to the negligence or carelessness of such officer, it is the duty of the attorney for the State, district, county, municipality, or other public or quasi-public corporation, as the case may be, to act as counsel in defense of such suit, unless provision has been made for the employment of other counsel in connection therewith.
>
> "*(Fees and expenses as charge against State, etc.)* In such event the fees, cost and expenses involved in a suit referred to in subdivisions (a) and (b) are a lawful charge against the State, school district, county or municipality, as the case may be."

Counsel for plaintiff argues that when literally interpreted, the accusation of the Grand Jury was an action or proceeding within the meaning of the first paragraph of that section, citing 1 C.J.S., Actions,

§ 1, page 937, and Sections 22 and 23 of the Code of Civil Procedure; that it was brought against the sheriff on account of "action taken or work done by him in his official capacity"; that such alleged misconduct is based on action and not nonaction, whether it constitutes malfeasance, misfeasance or nonfeasance in office, citing People v. Harby, 51 Cal.App.2d 759, 767, 125 P.2d 874; that the actions taken by the sheriff were in good faith and without malice, as established by the result of the verdict; that it was the duty of the county counsel to act as counsel in defense of such suit; that since he refused to act and advised plaintiff to obtain other counsel in connection therewith, plaintiff was authorized to employ other counsel; that accordingly, under the last paragraph of that section, the fees, costs and expenses involved were lawful charges against the county. The argument is used that public interest is involved in any proceeding brought to remove a public official from office; that faithful public officers should be protected from unfounded accusations based on honest action taken by them in good faith and without malice; that if such public officer be wrongfully charged he should be defended in the public interest, because otherwise a public official, improperly charged, could be hounded out of office by unfounded charges brought against him requiring him to expend enormous funds for counsel fees and court costs in defending himself, and that for this reason section 2001, supra, was amended to so provide; that any decrease in the potential liability of an official will increase the willingness of competent people to assume the risk of office and an expenditure to that end is for a public purpose, and that similar statutes so providing have been held constitutional, citing People v. Standard Accident Insurance Co., 42 Cal.App.2d 409, 413, 108 P.2d 923; 67 C.J.S., Officers, § 91, page 330; Board of Com'rs of Natrona County v. Casper National Bank, 56 Wyo. 132, 105 P.2d 578, 130 A.L.R. 736.

The legislative history of that section shows that it was based on the Statutes of 1919, chapter 360, as amended by Stats. 1931, chapter 1168, and Stats. 1933, chapter 807. It then applied only to *suits for damages* on account of injury to persons or property resulting from the dangerous or defective condition of any public property on account of any action or work done by him in his official capacity. Under these circumstances it was the duty of the attorney for the county to act as counsel in defense of such suit "unless *lawful* provision has been made for the employment of other counsel in connection therewith". Under such circumstances the "fees and expenses involved * * * are a lawful charge" against the county. In all of these statutes, that portion relating to the duties of counsel now found in subdivision b(2) of the section was not segregated from and was obviously applicable to the entire section. Upon codification of the act in 1943, it was divided into sections and subdivisions, substantially as it is now found. In 1951, Stats. 1951, chapter 1087, § 1, section 2001 was amended to read as above quoted, to eliminate the words "suit for damages" and substitute the words "any action or proceeding, including a taxpayer's suit".

[1, 2] It does not appear to us that this change clearly indicated a legislative intent to so radically enlarge and change the purpose and scope of the act as to include the costs of defense of a criminal action or of a Grand Jury accusation, which is criminal in nature, instituted by a body politic in the name of the People of the State of California which, in effect would call upon the district attorney to prosecute the action and the county counsel to defend the action at the county's expense. It does not appear to us that the legislature intended by the amendment of that section in 1951 that a mere claimed refusal on the part of the district attorney or county counsel and advice to the county official to obtain private counsel to represent him, is sufficient to authorize the county official to employ such private counsel, at any price agreed upon by such county official, without any previous authorization obtained from the Board of Supervisors on behalf of the county and against whom the claim must be made, or without any authorization by some officer authorized by it so to act, particularly

where the question of the good faith and lack of malice on the part of the county official must be first ascertained by someone before the district attorney or county counsel is authorized to act in any event.

This conclusion is supported by a more careful examination and comparison of the act as it previously existed with its provisions as presently amended. It affirmatively appears that, under the original section, before the county official would be entitled to be represented by the attorney for the county the "suit" must be (1) for damages; (2) on account of "any action taken or work done" by him when done under provisions of the law respecting his office.

In the instant case the first six counts referred to in the accusation do not allege that the action arose out of "any action taken or work done" by the county official but upon inaction in failing to do anything pertaining to the violations charged. However, the seventh cause of action may be construed to be "action taken or work done" by him in appointing as his undersheriff one who was known by him to be incompetent, corrupt, etc. Under the original section nothing was said about the question of good faith and lack of malice. In the present section it is clearly shown that before the county official would be entitled to be represented by the attorney for the county to defend a suit against such official for "any action taken or work done" by him, it would become immediately necessary for such official to show to someone or to some body (the manner in which and the degree to which it must be shown is not indicated, and the section does not indicate the person or body) that he was free from bad faith and malice. Upon such showing it then becomes the duty of the attorney for the county to act in defense of such suit unless provision has been made (by someone—the section does not indicate) for the employment of other counsel.

[3, 4] The crucial question then arises as to who is to determine the question of good faith and lack of malice, and upon what standard is it to be determined. Is it the Board of Supervisors, the County Attorney, or is it to be ultimately determined in a subsequent court action and must the county official's good faith and lack of malice be established by a preponderance of the evidence or beyond a reasonable doubt? It does not appear from the instant pleadings that the question of the sheriff's good faith and lack of malice was ever considered by any of the parties above mentioned. It is apparent that the question was not presented to the Board of Supervisors. If it was considered by the County Counsel it appears that the determination was against the sheriff on this issue because the County Counsel allegedly refused to act and the reason may have been that he was not satisfied that the sheriff acted in good faith and without malice. Plaintiff's contention that the jury's finding that the allegations of the accusation were in favor of the sheriff and were accordingly res judicata on this issue is not supported by the pleadings or the law. The accusation did not plead either that the sheriff acted in good faith or bad faith and/or with or without malice. Malice is not a necessary element in an accusation for willful misconduct in office. Coffey v. Superior Court, 147 Cal. 525, 529, 82 P. 75. See, also, Mechem on Public Officers, sec. 457, where it is said:

> "* * * misconduct in office does not necessarily imply corruption or criminal intention. The official doing of a wrongful act, or official neglect to do an act which ought to have been done, will constitute the offense, although there was no corrupt or malicious motive."

[5] The form of verdict returned by the jury was that the accusations were "untrue". In other cases a verdict of "not guilty" has been returned. People v. Elliott, 115 Cal.App.2d 410, 252 P.2d 661; Matter of Accusation of Shepard, 161 Cal. 171, 118 P. 513. In either event the result is the same. The jury, in the trial of the accusation, was, no doubt, instructed as in an ordinary criminal proceeding, that it was necessary for the people to prove the allegations of the accusation beyond a reasonable doubt, and if these allegations were

not so proved, defendant was entitled to a verdict in his favor. Section 3070 Government Code. Accordingly, under this measure of proof it could not be held, as a matter of law, that the verdict of the jury established that defendant was free from malice and bad faith in reference to the acts charged. Under section 2001, supra, before the public official would be entitled to be represented by the County Counsel or the district attorney, as the case may be, or to make provision for other counsel at the expense of the county, it would be necessary for the county official to first show, to someone or some authority, that the actions taken by him were in "good faith *and* without malice". Just what measure of proof is required is not indicated by the section, but it does seem reasonable that it would take no more than the greater weight of the evidence, and this would be a discretionary matter to be determined by the authority authorized to determine that issue. Accordingly, the finding of the jury in respect to the Grand Jury accusation was not res judicata of this issue.

[6] The section contemplates that the determination must be made by someone or some authority, other than the county official involved. The implication is that the refusal of the County Counsel to act may have been predicated upon his belief that the sheriff had not established that he acted in good faith and without malice. Plaintiff's complaint in the instant action, although it alleges that the sheriff acted in good faith and without malice and that the county counsel "refused" to defend him and "advised plaintiff to employ other counsel", it did not allege that the Board of Supervisors or County Counsel ever made a determination as to whether plaintiff did or did not act in good faith and without malice. As the pleadings now stand, it does not affirmatively appear that the sheriff brought himself within the provisions of section 2001, supra, in this respect. A similar observation is made in reference to the subdivision of that section making it the duty of the attorney for the county to act as counsel in defense of such suit "unless provision has been made for the employment of other counsel". The special demurrer pertaining to this allegation was sustained with the right or leave to amend, and plaintiff being unable and unwilling to further plead in this respect, elected to stand on the pleadings. That subdivision contemplates that before attorney's fees and costs may become a charge against the county, someone must make provision for the employment of such counsel. Just who is authorized under that section to contract for and authorize the employment of other counsel is not clear. In fact, the section is totally lacking in designating that individual or body. We do not believe that it was intended that the county official involved would be the one to determine whether he acted in good faith and without malice or that he was the one authorized by that section to make provision "for the employment of other counsel" in any unlimited amount and for his own personal defense of such action, without the sanction or direction of some other authority.

The companion section, 2002, of the Government Code, provides that in case of a suit for damages against such officer he may *"with the consent of the board of supervisors,* have the action referred to the district attorney" or County Counsel, and "Upon the determination of such attorney that the officer or employee performed his official duty *in good faith and without malice*", it is the duty of the attorney to appear and defend the officer, in which case the "costs and expenses involved in such an action * * * are a lawful charge against the funds of the department" of the county.

This section clearly contemplates first, an authorization by the Board of Supervisors, and second, a determination by the attorney that the county officer acted in good faith and without malice, before he would be entitled to be represented by the County Counsel and at public expense. It appears more reasonable that this was the intention of the legislature in casting the section here involved and that unless the Board of Supervisors, which body was authorized to audit and pay the claim in the final analysis, had previously, by contract or otherwise, made provision for the employment of other counsel, the fees, costs, and expenses involved would not be a lawful charge against the county. Ward v. San Diego School District, 203 Cal. 712, 265 P. 821; Sloane v. Hammond, 81 Cal. App. 590, 254 P. 648; and Niceley v. County of Madera, 111 Cal.App. 731, 296 P. 306, relied upon by plaintiff, are factually dissimilar.

When the history and purpose of this section are considered, prior to the 1951 amendment there was no authority, at least from this section, for the attorney for the county to represent a county officer in a suit such as a taxpayer's suit, mandamus, injunction, etc., where the county itself might well be the real party in interest, and the very essence and purpose of the defense be to protect the public interest. Apparently, there was a very real need, in public interest, for an amendment extending the provisions of this section to cover such cases. Such actions or proceedings are to be expected frequently and inherently to arise out of the normal and diligent discharge of a public office. Not only the public agency involved, but the officers who are usually the nominal defendants in such actions should have the right to the services of the attorney for the public agency whose own interests are inextricably involved. However, this does not appear to be true in criminal actions and actions based on Grand Jury accusations for the removal of such public officials from office. These types of actions are not normal incidents of public office. They are actions instituted and prosecuted by other arms of the public body itself. Whether the cost of a successful defense of a criminal case or Grand Jury accusation should be a public charge may be debatable, but in any event, the principles involved are wholly different from those involved in the historic scope of the section and such a radical change from the past policy of the State in this regard should not be grafted into the law casually and unintentionally. By the section no machinery is provided for the employment of such other counsel by the official involved, and nothing is said about who is to determine the right of such official to the employment of other counsel, or under what conditions or for what remuneration such other counsel is to be paid. It does not appear that the legislative intent was to permit public officials, on their own initiative, to hire private attorneys and make the cost thereof, without any limitation, a public charge. Such a construction is repugnant to sound principles of public policy.

[7, 8] If plaintiff's construction of this section be correct, it would mean that the legislature has, at least in a measure, delegated to the official in question, in this case the sheriff, a power over the public purse in his own interest; a power exercised on the county level by the Board of Supervisors, presumably in the interest of the public as a whole. Whenever a statute relates to the payment of public money, or is an impairment of the prerogatives of Government, any doubt should be resolved in favor of the Government. This expression is more succinctly stated by the late Mr. Justice Cardozo in People ex rel. Rand v. Craig, 231 N.Y. 216, 131 N.E. 894, 895, where he said:

> "We have felt it our duty, however, when obscurity has engendered doubt, to fall back upon the fundamental principle that only clear warrant of law will justify the assumption of a power to control the public purse."

At least as to these matters discussed, the section is not clear, certain and unambiguous, in which case the courts are authorized to determine, if possible, the legislative intent. Section 1859, Code Civ.Proc.; People v. Higgins, 87 Cal.App.2d Supp. 938, 197 P.2d 417; In re Estate of Jacobs, 61 Cal.App.2d 152, 142 P.2d 454.

It has been held that a statutory enactment specifically providing for the reimbursement to a public officer of the reasonable expenses actually incurred by him in defending himself against a criminal prosecution based on the charge of official misconduct is within the constitutional power of the legislature, where it is not forbidden by any express or implied prohibition contained in the fundamental law of the state. Kane v. McClellan, 110 App. Div. 44, 96 N.Y.S. 806, 130 A.L.R. 746. However, for the reasons expressed, we conclude that the legislature never intended to extend the provisions of section 2001 of the Government Code to include cases of this nature, under the facts pleaded.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

125 Cal.App.2d 193

GRANT

v.

UNITED STATES ELECTRONICS CORP. et al.

Civ. 19973.

District Court of Appeal, Second District, Division 3, California.

May 14, 1954.

Rehearing Denied June 2, 1954.

Hearing Denied July 7, 1954.

Action against individual defendant and corporate defendant for damages resulting from fraud practiced upon plaintiff. The Superior Court of Los Angeles County, H. S. Farrell, J., entered judgment for plaintiff, and the individual defendant appealed. The District Court of Appeal, Vallée, J., held that statute declaring in substance that no evidence is admissible to charge person upon representation as to credit of third person, unless such representation, or memorandum thereof, is in writing, and subscribed by or in handwriting of party to be charged, did not preclude evidence as to representation of a defendant as to financial status of corporation in reliance on which plaintiff made payments to the corporation, when that corporation was but the alter ego of the individual defendant and it was intention of defendant that moneys received from plaintiff should be used, and were in fact used, for defendant's personal benefit.

Judgment affirmed.

1. Frauds, Statute of 🔑39

Under statute declaring that no evidence is admissible to charge person upon representation as to credit of a third person, unless such representation, or memorandum thereof, be in writing, and either subscribed by or in handwriting of party to be charged, intent and purpose which prompted making of particular representation is material, and where primary purpose was to procure credit for another, representation comes within purview of statute even though in making it person also makes false representations concerning himself or derives an incidental benefit therefrom. Code Civ.Proc. § 1974.

2. Frauds, Statute of 🔑39

Statute declaring that no evidence is admissible to charge person upon representation as to credit of third person, unless representation, or memorandum thereof, is in writing, and subscribed by or in handwriting of party to be charged, is applicable only when the primary object of the representation is to induce the procurement of credit to a third person. Code Civ.Proc. § 1974.

3. Corporations 🔑1

If a corporation is but the instrumentality through which an individual, who is sole owner of corporation, for convenience transacts his business, and, as result of such double relationship, fraud or injustice will inure to third person, corporate entity will be disregarded and corporation will be considered in law as alter ego of person owning the corporation.

4. Frauds, Statute of 🔑39

Statute declaring in substance that no evidence is admissible to charge person upon representation as to credit of third person, unless such representation, or memorandum thereof, is in writing, and subscribed by or in handwriting of party to be charged, did not preclude evidence as to representation of a defendant as to financial status of corporation in reliance on which plaintiff made payments to the corporation, when that corporation was but the alter ego of the individual defendant and it was intention of defendant that moneys received from plaintiff should be used, and were in fact used, for defendant's personal benefit. Code Civ.Proc. § 1974.

5. Fraud ⚿58(3)

In action for damages for fraud of individual defendant and corporate defendant whereby plaintiff was induced to make payments to corporate defendant, wherein it was contended that individual defendant falsely represented that corporate defendant was solvent and capable of carrying out the agreement, evidence warranted finding that it was intention of individual defendant that moneys received from plaintiff should be used, and were in fact used, for individual defendant's personal benefit. Code Civ.Proc. § 1974.

6. Fraud ⚿12, 64(2)

Under provision of Civil Code defining actual fraud to include promise made without intention of performing it, the fraudulent intent must exist at time of making of the promise, and whether such intent existed at the time is a question of fact, on which subsequent conduct may be considered as sufficient to show that there was no intention of performing at the time of the promise. Civ.Code, § 1572.

7. Fraud ⚿58(3)

In action against individual defendant and corporate defendant for damages for fraud practiced upon plaintiff who was induced to part with money on allegedly false representation that any money paid by plaintiff would be used solely for benefit of the corporate defendant, evidence warranted finding that the fraudulent intent of individual defendant not to use funds received for benefit of corporation, which was his alter ego, existed at time promise was made. Civ.Code, § 1572.

◆

Eugene L. Wolver, Los Angeles, for appellant.

Cannon & Callister and Reed E. Callister, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant Marquis from an adverse judgment in an action for damages for fraud. Defendant United States Electronics Corporation defaulted. It will be referred to as "the corporation." Marquis will be referred to as "defendant."

In 1950 the corporation was engaged in the promotion and sale of a playback electronic audible advertising machine, which during its operation reproduced a broadcast of advertising matter. The machines were sold by a franchise method as to area under written contracts. Contracts were made with various distributors, one of whom was located in San Francisco. On and prior to September 8, 1950, defendant Marquis was president of the corporation. He was dissatisfied with the San Francisco distributor and he was interested in obtaining a new one. Plaintiff was a Chrysler dealer in Hollister.

The complaint alleged that for the purpose of inducing plaintiff to become the San Francisco distributor and to enter into a contract with the corporation, defendants represented to and promised plaintiff: "(a) That the corporate defendant was financially and otherwise capable of carrying out and fulfilling, and would carry out and fulfill, any agreement it made with the plaintiff or with any other person. (b) That the corporate defendant was solvent and was able to pay upon demand each and all of its obligations without discount. (c) That whatever, if any, consideration in money or otherwise plaintiff should pay or give under any agreement made between plaintiff and the corporate defendant would be used for the benefit of the defendant, United States Electronics Corporation." The complaint also alleged that the representations were false, the promise made without any intention of performing it, and all other facts necessary to state a cause of action for fraud.

The court found that the allegations of the complaint were true and that plaintiff had been damaged in the sum of $4,800. Judgment was entered accordingly, from which Marquis appeals.

Defendant's specifications of error are: 1. Plaintiff did not prove the alleged acts of fraud by competent admissible evidence. 2. The findings are not supported by competent evidence. 3. The acts alleged and found do not constitute actionable fraud.

The first and second specifications of error are based on the claim that the first two representations alleged and found constitute representations as to the credit of the corporate defendant; and since they were not in writing, they are not actionable under section 1974 of the Code of Civil Procedure.

Testifying about the corporation, defendant Marquis said: "It was a corporation which I had put in all the money, and nobody else put in any money, and I controlled that corporation."

Sometime prior to September 1950, the corporation offered a Mr. Oldham a fee of $200 if he could secure someone to take over the San Francisco area distributorship. Oldham talked to Richard Mealey about it. Mealey talked to plaintiff, his friend. Plaintiff sent Mealey to Los Angeles to talk to defendant. Mealey met defendant and told him plaintiff was his principal, that plaintiff had sent him to obtain what information he could so plaintiff could evaluate his findings. Defendant told Mealey they had a practice all across the United States that distributors would have to place a deposit of $10 a machine as a goodwill or performance piece to be sure the machines were shipped according to invoice; they would be required to take 600 machines a month. Mealey asked defendant "if that wasn't a pretty heavy dose of equipment to take away, and he said no, we probably would be asking for many more machines than that, and they could make them if necessary, but he wanted a minimum of $6000 deposit." Defendant said "they didn't need our money; it was just a deposit and there was nothing wrong with that; that they were well financed and a well-established company, and all they wanted was that money to be placed in a deposit so they could give it back to us each time we were invoiced machines." Defendant said the factory was in production, but as it was Labor Day it would be useless to go through the plant. Mealey asked defendant: "As a war baby what happens to this if we go ahead and Mr. Grant deposits $6000 with you and you can't make the machines? And he said, 'Oh, don't worry about that. We have subassemblies that can make thousands of these machines. As a matter of fact, my associate, Mr. Wolvin, is now traveling throughout the United States and working with our distributors and we are shipping machines day after day, and we will have good production to meet the terms of this contract.'" Defendant said they had 1,000 machines in the factory ready for shipment. Defendant gave Mealey copies of a contract which he stated was used by the corporation, and said $1,000 should be sent to him with the contract and that he (defendant) would go to Hollister or San Francisco to terminate the contract with the San Francisco distributor and negotiate the new contract. Mealey then returned to Hollister, reported his conversation with defendant to plaintiff, and delivered the copies of the contract to him. On September 8, 1950, plaintiff signed the contract and mailed it with a certified check for $1,000 to defendant.

Defendant went to Hollister and on September 14, 1950, met plaintiff and Mealey. Plaintiff asked defendant why it was necessary to give him an additional $5,000 as deposit money since he had already sent him $1,000 "to bind the original phase of the contract." Defendant said that was their way of doing business; he had set up a quota of 600 machines for plaintiff; on every machine plaintiff bought he would get on the invoice a $10 credit until the $6,000 was used up, and that "this money would be held in deposit in their company." Plaintiff asked defendant if with the $1,000 he had already sent him he would give him an additional $1,000, would he accept two promissory notes, "one in thirty days and one in sixty days." Defendant agreed. Plaintiff asked defendant if he could be sure when his $6,000 was on deposit that the corporation could furnish that many machines. Defendant replied that the corporation had 1,000 machines on hand; their factory was building machines all the time; they had distributors in New York, St. Louis, Philadelphia, and all over the United States; he could fulfill every term that was in the contract. Plaintiff asked him what happened in the event he did not get the machines. Defendant replied, "My company is solvent and you will get your money back." Various changes were then made in the contract and it was executed. Plaintiff paid defendant the additional $1,000 and executed the two notes.

The corporation did not at any time own a factory. It purchased machines from another company. It never had 1,000 machines on hand. The corporation was insolvent. As of August 30, 1950, fourteen days before plaintiff closed the deal, it had a net operating loss of $56,147.69 with assets of $29,113.58 and liabilities of $78,011.27. In September 1950, it owed the company which had sold it machines between $20,000 and $21,000. On September 26, 1950, defendant sold out to one Valianos. Defendant took plaintiff's notes totaling $4,000 and the cash on hand, which were all of the assets of the corporation. Plaintiff paid the notes when due. Defendant received and retained the money. Later when plaintiff sought to obtain machines, he discovered the facts.

The court specifically found that it was never the intention of defendant that the considerations, including the money plaintiff paid under the agreement, should be used; nor were such considerations used for the benefit of the corporation, but were used for the personal benefit of defendant Marquis.

[1] Section 1974 of the Code of Civil Procedure provides: "No evidence is admissible to charge a person upon a representation as to the credit of a third person, unless such representation, or some memorandum thereof, be in writing, and either subscribed by or in the handwriting of the party to be charged." In determining whether a representation is within the operation of a statute such as section 1974, the intent and purpose which prompted the making of a particular representation is material. 49 Am.Jur. 371, § 9; 37 C.J.S., Frauds, Statute of, § 36, p. 551. Where the primary purpose in making the representation is to procure credit for another, the representation comes within the purview of the statute even though in making it the person also makes false representations concerning himself or derives an incidental benefit therefrom. Baron v. Lange, 92 Cal.App.2d 718, 721, 207 P.2d 611.

[2] Section 1974 is applicable only when the primary object of the representations is to induce the procurement of credit to a third person. See Andrews v. Osius, 203 Mich. 195, 168 N.W. 1032, 1037; Massey v. Luce, 158 Mich. 128, 122 N.W. 514; Ruddy v. Gunby, Mo.App., 180 S.W. 1043, 1045; Newman v. Lyman, Tex.Civ.App., 165 S.W. 136, 138.

[3] If a corporation is but the instrumentality through which an individual, who is the sole owner of the corporation, for convenience transacts his business, together with a showing that as a result of the double relationship fraud or injustice will inure to a third person, the corporate entity will be disregarded and the corporation will be considered in law as the alter ego of the person owning the corporation. Shea v. Leonis, 14 Cal.2d 666, 669, 96 P.2d 332; Stark v. Coker, 20 Cal.2d 839, 846–849, 129 P.2d 390. The doctrine is particularly within the province of the trial court. Stark v. Coker, supra, 20 Cal.2d at page 846, 129 P.2d 390.

Andrews v. Osius, supra, 203 Mich. 195, 168 N.W. 1032, is analogous. The court held that a statute similar to section 1974 was not applicable since the corporation concerning which the representations were made by the defendant was practically owned by the defendant and his wife, was controlled by the defendant, and the money the plaintiff was induced to invest was used for the purpose of reimbursing the defendant for moneys he had paid out and to pay debts for which he was personally liable.

[4, 5] Defendant, in his own words, was the corporation. It was his alter ego, the instrumentality through which he did business. The representations were not as to the credit of a third person. They were representations as to the credit of defendant Marquis himself. The corporation was Marquis, and he was the corporation. Nor is it a case merely of an officer of a corporation making representations with reference to its financial standing or means.

The representations were not made for the purpose of obtaining credit for another, but for the sole purpose of advancing defendant's own interest. The evidence supports the finding that it was the intention of defendant that the moneys received from plaintiff should be used, and that they were in fact used, for defendant's personal benefit.

Authorities relied on by defendant are not analogous on their facts. Carr v. Tatum, 133 Cal.App. 274, 24 P.2d 195, was an action against real estate brokers for alleged fraud in making representations concerning the financial responsibility of a third person. In Cutler v. Bowen, 10 Cal.App.2d 31, 51 P.2d 164, the facts were identical with those in Carr v. Tatum, supra. Beckjord v. Slusher, 22 Cal.App.2d 559, 71 P.2d 820, was an action based in part on alleged false representations concerning the financial responsibility of a person who without question was a third person. Baron v. Lange, 92 Cal.App.2d 718, 207 P.2d 611, and Bank of America v. Western United Constructors, 110 Cal.App.2d 166, 242 P.2d 365, 32 A.L.R.2d 738, are in the same category.

[6] There was evidence of fraud other than the mere making of false affirmations as to the credit of the corporation. It was alleged and found that defendant promised that whatever moneys plaintiff should pay would be used for the benefit of the corporation. The third specification of error, as we understand it, is that there is no evidence of an intent not to perform at the time the promise was made. Section 1572 of the Civil Code provides: "Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract: * * * 4. A promise made without any intention of performing it; * * *." Where, in bad faith and without intent to perform, one makes a promise touching a substantive part of the consideration moving to the party with whom he is dealing, it constitutes fraud. 12 Cal.Jur. 738, § 22. The fraudulent intent must exist at the time of the making of the promise. Benson v. Hamilton, 126 Cal.App. 331, 334, 14 P.2d 876. Whether such intent existed at that time is a question of fact. Bechtold v. Coney, 42 CalApp. 563, 564–565, 183 P. 841. Subsequent conduct may be sufficient to show that there was no intention of performing at the time of the promise. Snyder v. City Bond & Finance Co., 106 Cal.App. 745, 748, 289 P. 859. An intention not to perform a promise may be inferred from the facts proven. 12 Cal.Jur. 829, § 78. Where the circumstances were such at the time of the making of the promise that it would be impossible to perform, the promise has been held fraudulent.

In Langley v. Rodriguez, 122 Cal. 580, 55 P. 406, the answer alleged, as a defense to an action by the vendee against the vendor for breach of a written contract for the sale of a growing crop of grapes, that one Bates, the agent of the vendee, induced "defendant to sign the paper, Bates orally promised and agreed, on behalf of the packing company, that, when the grapes should be ready to gather, said company would advance to defendant, on the said agreed price thereof, the sum of $350, to enable him to pick and cure the same; that, without the prior promise of such advance, defendant would not have signed said writing; that Bates, when he made the said oral promise, did not know and was without reasonable ground to believe that the packing company would advance anything on the contract price, as promised by him; that said company refused such advance when, at the proper time, defendant requested the same; and that, because of such refusal, defendant on his part refused to deliver the raisins as stipulated in said instrument of writing." The trial court refused to receive evidence in support of the defense. On appeal, it was held, 122 Cal. at page 582, 55 P. at page 407: "Now, if, as defendant alleged, and as the evidence he offered had some tendency to show, when Bates agreed that the company would make an advance payment he had no reasonable ground to believe that it would do so, it is impossible to see how his promise could have been made in good faith; that is to say, with intent that it should be kept. Therefore it was equivalent to a promise made without such intention, and was fraudulent."

[7] The evidence justifies the inference that the promise was made and that at the time it was made defendant had no intention of performing it.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

125 Cal.App.2d 359

BRIDGES v. BRIDGES.

Civ. 8308.

Sac. 6338.

District Court of Appeal, Third District, California.

May 19, 1954.

Action for division of property, real and personal, accumulated by man and woman while living together as husband and wife, and for custody of their minor son and for money for his support. The Superior Court, Butte County, McGregor, J., awarded the custody to the mother, and awarded support money, and made division of joint accumulations, and the man appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that the evidence supported finding that the parties had agreed to combine their assets and earnings and to acquire property for their mutual benefit.

Affirmed.

1. Marriage ⚷54

If a man and woman live together as husband and wife under agreement to pool their earnings and to share equally in their joint accumulations, equity will protect the interests of each in such property.

2. Partition ⚷63(3)

In action for division of property, real and personal, accumulated by man and woman while living together as husband and wife, evidence supported finding that there was an agreement between the parties to combine their assets and earnings and to acquire property for their mutual benefit.

3. Partition ⚷63(3)

In action for division of property, real and personal, accumulated by man and woman while living together as husband and wife, evidence was insufficient to show that agreement to share equally in their joint accumulations was made in contemplation of and because of promise of meretricious relationship.

4. Partition ⚷83

Where man and woman, who lived together as husband and wife, agreed to pool their assets and to share equally their joint accumulations of property, real and personal, fact that man at time of agreement had equity in house of approximately $1,300 did not render inequitable the awarding of the house to the woman, upon division of the property, without regard to the previously acquired equity of the man.

Bruce A. Werlhof, Red Bluff, for appellant.

J. Oscar Goldstein, P. M. Barceloux, & Burton J. Goldstein, Goldstein, Barceloux & Goldstein, Chico, for respondent.

VAN DYKE, Presiding Justice.

Responsive to the pleadings the trial court made the following findings of fact: In February of 1946, plaintiff-respondent and defendant-appellant began living together as husband and wife and continued in that state until August of 1950. Respondent obtained a final decree of divorce from her former husband on February 16, 1948. Appellant had often promised her that he would marry her immediately after her divorce became final. She relied upon these promises and continued her relationship with appellant during all of the said period from the 16th of February, 1946, to August, 1950. A son was born to them December 13, 1948. During the entire period the parties worked together with the common purpose and design of accumulating property, money and other assets and they agreed verbally that they would do so and would pool their joint assets, work, labor and services. By virtue of their common efforts they acquired real property in Chico and in Redding and certain personal property. The value of the Chico real property was about $8,000 and the value of the Redding real property was about $7,500. When they began living together appellant had little financial means and the parties agreed that he would continue to work as a salesman, and that she would contribute her earnings and services for their mutual benefit. Appellant had never shared and had refused to share the earnings and accumulations which the two had acquired, although respondent had repeatedly asked for such division. Appellant had refused to support the child born to the couple, and had threatened, if she should attempt to secure any part of their property, to dispose of the same and leave the State to escape the jurisdiction of the State's courts. Respondent was a fitting and proper person to have the sole care and custody of the minor son of the parties. Defendant was able-bodied and gainfully employed and able to pay for the support of said child the sum of $50 per month. From February 16, 1946 to August, 1950, respondent had performed services for defendant, including all the duties of a housewife and that the reasonable value of such services exceeded or equaled the value of the Chico real property.

Judgment was entered whereby the court divided the property between the parties, assigning to respondent the Chico real property, with the furniture and equipment located in the residence, and to appellant the Redding real property and certain personal property. Respondent was given the custody of the minor son of the parties and appellant was ordered to pay to her for his support $50 per month. From that judgment this appeal is taken.

[1, 2] Appellant first contends that the evidence was not sufficient to support the finding of the court that there was an agreement between the parties to combine their assets and earnings and acquire property for their mutual benefit. This contention cannot be sustained. The evidence throughout on almost every issue was conflicting. It consisted mostly of the testimony of the parties themselves. We must, of course, disregard conflicts and, doing so, the following appears in the record upon the matter of the agreement: Appellant was discharged from the armed services in January, 1946. Respondent and her husband were then living with his parents at Auburn, the husband having been injured and being unable to work. The couple had three children. Appellant visited them in Auburn. He had purchased a three-room house in Chico in 1943, upon which he had paid $300, plus $30 per month. He also was married and had three small children. He proposed that respondent come to Chico with her three children and take care of his house and the six children. It appears that the domestic relations of each were unhappy with their respective spouses and in the words of respondent: "I was going to get my divorce and he was getting his divorce and then as soon as the divorces were final he was to marry me, and I was to take care of his children and he said, the very words he said, 'I will be a father to your children and you will be a mother to mine'." She was then asked: "Did you have any arrangement with him with respect to property or anything that was acquired during this relationship." She answered: "Everything was supposed to be 50-50." It appears that for four and a half years respondent kept this bargain and it is a fair inference that her work and services thereunder were a material factor in the success the parties had in the accumulation of property. The record contains testimony as to many things the two did in the acquisition and improvement of property which afford fair inference that an agreement, such as that to which she testified, existed. It further appears that in August, 1950, he left her and married another woman; that he went with his wife to reside in the Redding property, leaving respondent with her own children, including the minor son of the two, in the Chico residence and that she continued to occupy that property without any demand made upon her by him respecting her use of it. More could be gleaned, but more is unnecessary, to show that the finding of the court as to the making of the agreement between the parties is justified by the record. "If a man and woman live together as husband and wife under an agreement to pool their earnings and share equally in their joint accumulations, equity will protect the interests of each in such property." Vallera v. Vallera, 21 Cal.2d 681, 685, 134 P.2d 761, 763, and cases cited. The foregoing rule of law was properly applied by the trial court to the situation it found to have existed.

[3] Appellant contends that as a matter of law the agreement found to have existed between the parties was unenforceable for having been made in contemplation of and because of the promise of meretricious relationship. There is nothing in the record which furnishes a basis for this contention. Neither party testified that there was any agreement that the parties would pool their assets and share their accumulations in contemplation of meretricious relations nor do the findings of the court contain such matter by implication. Appellant's own testimony concerning what happened when respondent and her children came to appellant's Chico house was the following: "The reason they came down there was the fact they had been earning nothing, were living [at Auburn] off their parents up there, I had the house, needed someone to take care of my children, so we struck a bargain, it was 50–50 on everything, I furnished the house and half the groceries and half the utilities and they were to furnish the rest, that was the whole deal." It was appellant's contention that the agreement was not between himself and respondent but between himself and respondent's husband, but on this matter his testimony is in conflict with that of respondent. Nowhere is it expressly testified to by anyone that there was anything in the agreement for the pooling of assets and the sharing of accumulations that contemplated meretricious relations as any part of the consideration or as any object of the agreement. As the court said in Hill v. Estate of Westbrook, 95 Cal.App.2d 599, 602, 213 P.2d 727, 729:

> "Although the parties live together in illicit relationship during the time the services are performed, an express contract to compensate for services performed as a housekeeper has been held valid and enforceable unless made in contemplation of such illicit relationship."

It was also said in Garcia v. Venegas, 106 Cal.App.2d 364, 368, 235 P.2d 89, 92:

> "* * * But when, as here, they entered into a contract to pool their work and earnings and share equally in the property accumulated therewith, and the illicit relationship was not so involved in the contract as to render it illegal, the law recognizes the contract and enforces the rights arising out of it. Such a joint business enterprise, somewhat akin to a partnership, is one which any two persons (two women or two men, for example) might undertake."

The situation which the court found here to exist squares with the foregoing statements of the rule that permits the enforcement of contracts such as this record shows, notwithstanding the performance of that contract may be contemporaneous with meretricious relations.

Appellant complains that the property division made by the court finds no support in the record and he notes particularly that there was no specific finding as to the value of the property awarded to each party to the agreement and no specific finding as to the reasonable value of plaintiff's services which, as we have seen, the court did find equal in value to the property which respondent took under the judgment. There was evidence that the Redding residence awarded to appellant represented an equity of $4,500; that the furniture in it was valued at $1,000; that there was given to appellant a Norge refrigerator valued at $750, a new Ford car valued at $1,368.50, an airplane worth $700 and a bank account of $50. In addition he took a life insurance policy and a motorcycle which were unvalued. The valuation totaled $8,368.50. There was testimony that the Chico residence and contents awarded to respondent were worth approximately $8,500. When we consider that testimony as to values are never more than approximations, it does not appear from the record that there was anything inequitable in the division worked out by the trial court.

[4] Appellant complains that the court awarded to respondent property which appellant had contracted to buy before the agreement was made between himself and respondent. It was in evidence that three years before the agreement was made appellant had entered into a contract to purchase the Chico residence, had paid $300 down and agreed to pay $30 per month so that he had an equity in the house at the time the agreement was made of approximately $1,300; but it was also in evidence that when the parties went to this house to live they added two bedrooms and purchased furnishings, all of which respondent testified was paid for from their earnings, expending on the house in this way several times the amount of appellant's equity. Also the agreement was that the parties would pool their assets and that they would thereafter own everything, equally. Under these circumstances, there was no error by the trial court when it ignored the state of the legal title and made equitable distribution as it did.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

125 Cal.App.2d 304

HAINES et al.
v.
DEPARTMENT OF EMPLOYMENT et al.

Civ. 8409.

District Court of Appeal, Third District, California.

May 18, 1954.

Rehearing Denied June 9, 1954.

Hearing Denied July 14, 1954.

Petition for writ of mandate to cancel assessments for unemployment insurance contributions allegedly due from petitioners as employers. The Superior Court, Sacramento County, Henry, J., rendered judgment sustaining demurrer to petition without leave to amend, and petitioners appealed. The District Court of Appeal, Van Dyke, P. J., held that repeal of Gen. Laws, Act 8780d, § 45.5, authorizing Department of Employment to make arbitrary assessments for unemployment insurance contributions against employers who did not make returns as to their liability for contributions did not divest Department of jurisdiction to make such assessments on account of contributions falling due before cited statute was repealed, where repealing act substantially re-enacted repealed provisions.

Judgment affirmed.

1. Taxation 🔑362

Repeal of provisions of Unemployment Insurance Act authorizing Department of Employment to make arbitrary assessments for unemployment insurance contributions against employers who failed to make returns as to their liability for contributions did not divest Department of jurisdiction to make such assessments on account of contributions falling due before provisions were repealed, where repealing act, though it contained no saving clause, substantially re-enacted such repealed provisions. Gen. Laws, Act 8780d, § 45.5.

2. Statutes 🔑170

Where a statute is repealed without a saving clause, and as a part of the same act the law is simultaneously re-enacted in substantially the same form and substance, all rights and liabilities which had accrued under former act will be preserved and enforced.

R. H. Schwab, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Vincent P. Lafferty and Charles J. Miller, Deputy Attys. Gen., for respondents.

VAN DYKE, Presiding Justice.

[1] Appellants petitioned the Superior Court for a writ of mandate directed against the Department, compelling it to show cause why certain so-called arbitrary assessments it had made for unemployment insurance contributions claimed by it to be due and payable from appellants as employers pursuant to the Unemployment In-

surance Act should not be canceled. Petitioners allege that, pursuant to the Act, the Department had on May 30, 1950 levied an arbitrary assessment against them for the reason "that no returns for contributions were filed by them"; that the assessment was on account of contributions alleged to have become due and owing for the period commencing June 1, 1942 through September 30, 1945; that during that period the section of the act, to wit, Section 45.5, which authorized the arbitrary assessment, was as that section had been enacted in 1939 and amended in 1943; that the Department had no jurisdiction in May of 1950 to make said arbitrary assessment on account of contribution liability arising during the period January 1, 1942 to September 30, 1945 for the reason that "the law in force at the time the alleged contributions became due was repealed in 1945 prior to the date of said assessment", and the repealing act contained no saving clause. Section 45.5 of the act, which provides for assessments where an employer fails to file a return, was first added to the act by Statutes of 1939, Chapter 630. The section was amended by Statutes of 1943, Chapter 1114, and was repealed by Section 1 of Statutes of 1945, Chapter 561. Its provisions, however, were substantially reenacted by section 2 of said Chapter 561. Petitioners' claim is that, notwithstanding a substantial concurrent reenactment of the provisions authorizing assessments where an employer has made no return, the effect of the repealing clause is to divest the board of jurisdiction to make such assessments on account of contributions falling due before the repealing clause was enacted. This contention cannot be sustained.

The Unemployment Insurance Act is one devoted to the relief of unemployment. Speaking broadly, the subject legislation establishes a fund for such relief; places a liability on both employers and employees to pay contributions into that fund and directs the use of the fund in relieving against the incidence of unemployment. The act contains various provisions, including the power of arbitrary assessment where no return is made, for compelling the payment of contributions into the fund. With respect to the primary liability of the petitioners, their petition is silent and contains no allegations that during the assessment period they were not employers obligated to withhold employee contributions, to add their own contributions, and pay the whole into the fund. Essentially, therefore, their contention is that by repealing one statutory method of compelling them to discharge their obligations to the fund the State has forgiven the debt. Such a result could hardly flow from a statute which repealed the provisions as to one only of the various methods which the statute contains whereby the obligation to pay into the fund could be enforced.

But even if the repealing clause be taken as effecting a release of existing liability, still the simultaneous reenactment of provisions substantially the same would preserve that liability.

> [2] "* * * When a statute is repealed without a saving clause, and as a part of the same act the law is simultaneously reenacted in substantially the same form and substance, all rights and liabilities which had accrued under the former act will be preserved and enforced. 25 R.C.L., p. 934, sec. 186; Perkins Mfg. Co. v. Clinton Const. Co., 211 Cal. 228, 237, 295 P. 1, 75 A.L.R. 439. In Ruling Case Law above cited, it is said: 'Where a statute is repealed and all, or some, of its provisions are at the same time reenacted, the reenactment neutralizes the repeal, and the provisions of the repealed act which are thus reenacted continue in force without interruption, so that all rights and liabilities that have accrued thereunder are preserved and may be enforced.'" In re Estate of Naegely, 31 Cal.App.2d 470, 473–474, 88 P.2d 715, 716.

The problem presented is one of statutory construction and makes apt the following quotation from Los Angeles, etc., Transp. Co. v. Superior Court, 211 Cal. 411, 418, 295 P. 837, 840:

> "We think it is not strictly true to say that the legislative intention must be ascertained solely from the lan-

> guage of the Repealing Act. Rather it should be said that, if from contemporaneous enactments it is disclosed that the Legislature did not intend to abandon the revenue from this particular source, but did intend to continue it in the same or a similar form of revenue exactions, then the general rule would not apply, and those subject to payment under the act repealed would be holden for payment under the continued revenue plan."

Turning now to a comparison of Section 45.5 as it existed before its repeal with the new Section 45.5 as simultaneously enacted, we find that both contain a provision that if any employment unit fails to make a return as to its liability for contributions, an assessment may be made upon whatever information is available in the absence of such return to those authorized to make such assessment for the period not reported upon. It, therefore, becomes apparent that there has been no interruption in the power given by the act to make so-called arbitrary assessments whenever an employing unit has failed to make the report which the statute requires or to make the contributions called for by the report. It follows that the order of the Superior Court sustaining respondent's demurrer to the petition without leave to amend must be affirmed. It should be added that there is no suggestion on the part of appellants that if the effect of the repealing clause was not as they contended it to have been they have any other ground for the issuance of the writ prayed for which could have been brought forward by amendment to their petition.

We have in effect decided this matter upon the merits, although respondents have urged that, in any event, the writ prayed for was not available for the following reasons: 1. That the petition is an effort to have the court cancel certain assessments levied against petitioners by the Department of Employment, which assessments have not been paid and that, therefore, Section 45.11(d) of the Unemployment Insurance Act, forbidding the issuance of injunctions or writs of mandate or other equitable or legal process to prevent or enjoin the collection of contributions sought to be collected stands as a complete bar to the issuance of the writ sought; 2. That, although the petition is silent upon the matter, the briefs of petitioners disclose that petitioners have not exhausted their administrative remedies. Our foregoing decision is not to be taken as an implied holding that these contentions of respondents are not sound.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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125 Cal.App.2d 365

STOCKTON UNIFIED SCHOOL DIST. OF SAN JOAQUIN COUNTY

v.

TRUCCO et al.

Civ. 8355.

District Court of Appeal, Third District, California.

May 19, 1954.

Condemnation proceeding wherein the Superior Court, San Joaquin County, Dunne, J., rendered judgment, and an appeal was taken. The District Court of Appeal, Van Dyke, J., held that condemnation complaint amendment merely alleging that portion of tract involved had been subject of conveyance made after filing of original complaint and consenting to grantee's retention of portion of land so conveyed was not so substantial as to open default to original complaint.

Affirmed.

1. Appeal and Error 🔑901

Error must be made to appear and will not be assumed.

2. Eminent Domain 🔑136

Right to severance damages does not arise merely from fact that parcel condemned was part of larger parcel since benefit to parcel not taken as well as detriment thereto may occur.

3. Judgment ⚿102, 150

Condemnation complaint amendment, merely alleging that portion of tract involved had been subject of conveyance made after filing of original complaint and consenting to grantee's retention of portion of land so conveyed, was not so substantial as to open default to original complaint. Const. art. 6, § 4½.

4. Judgment ⚿102

A plaintiff cannot by amendment unserved enlarge his remedy, and a defendant admitting by default allegations of a complaint submits to a judgment consonant therewith but no more.

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Jones, Lane, Weaver & Daley, Stockton, for appellant.

Frederick L. Felton, County Counsel, and Richard W. Dickenson, Asst. County Counsel, Stockton, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment rendered in a condemnation proceeding. The respondent is a school district and for its purposes as such it sought to condemn property belonging to the appellants. It filed its complaint in condemnation on February 1, 1952 and on the same day recorded notice of action pending. Summons was issued February 6th and promptly served on the named defendants. The complaint, the summons and the lis pendens were in the usual and proper form. The complaint alleged that by the action it was sought to condemn for school purposes a described tract of land which we shall hereafter call "Parcel 'A'"; that appellants, naming them, constituted the persons who claimed an interest in said parcel; that defendants Doe One to Doe One Hundred each claimed to have an interest in the parcel, their true names being unknown to the condemnor; that the condemnor sought to condemn a fee simple title in the property. After the service of summons upon them appellants conveyed a portion of Parcel A to Faith Evangelical Lutheran Church, sued in the action as Doe Nine. The deed was recorded April 23, 1952. We shall refer to the parcel transferred by appellants to the church as Parcel B. On June 11th following, the church filed its answer, setting up its title to Parcel B. Appellants did not answer and on May 2, 1952, condemnor demanded that their defaults be entered, which action was taken by the clerk on May 6th. Previous to the demand, however, and on April 25th there was served upon appellants the respondent's notice of intention to enter default unless they appeared in the action. Appellants made no response. The cause came on for trial on August 14, 1952 between the respondent and the church, no other parties having appeared. On that day the complaint was amended, the amendment alleging that after the filing of the original complaint, and on April 23, 1952 there had been recorded in the county recorder's office a deed dated February 11, 1952, wherein appellants conveyed to the church Parcel B, being a portion of the property sought to be condemned according to the description contained in the original complaint. It was further alleged that respondent had determined that it would consent to the retention by the church of a portion of said Parcel B and that the property which was sought to be condemned would then consist of Parcel A, less that portion of Parcel B so relinquished. The amended complaint was not served on appellants. On August 15th the court filed its findings of fact and conclusions of law which recited that the cause had come on for trial on the day previous between the church and respondent, there being no other defendants who had appeared; that the appellants had been regularly served with summons and complaint and had failed to answer the same and that their defaults had been regularly entered. It was further recited that evidence had been taken by the court and the court found as follows: That the property being condemned was taken for a public use; that by the aforesaid amendment respondent had abandoned its condemnation of a portion of Parcel B originally proposed to be condemned and described in the original complaint; that the taking in condemnation of the remaining property was necessary for said use; that the church had acquired the portion of Parcel B sought to be condemned by a deed recorded April 23, 1952; that the appellants were the owners in fee of all the property sought to be condemned save and except that portion which they had conveyed by deed to the church; that the value of the property rights of appellants sought to be condemned was $15,800; that the value of the church property sought to be condemned was $1,200. On September 4th following, a final order of condemnation was entered. This appeal followed. The church did not appeal.

Appellants contend that respondent had amended its original complaint in matter of substance affecting the interests of the appellants; that the making of the amendment opened their defaults and that it was error for the court to proceed in the action as it did without requiring that the amended pleading be first so served. They further contend that reversible error was committed in that the court failed to ascertain and separately assess severance damages, the property of appellants condemned having constituted part of a larger parcel.

[1, 2] Treating the second contention first, it may be briefly disposed of. Error must be made to appear and will not be assumed. Nothing in the record appears which affords any inference that severance damages were suffered. The mere fact that the parcel condemned was part of a larger parcel does not come to the aid of appellants, for benefit to the parcel not taken is just as consistent with the situation presented on the appeal as is detriment thereto. The fact that the court did not separately find that detriment had been caused and fix the amount thereof is consistent with a consideration by the court of the issue of severance damages and the conclusion by the court that no such damages had been suffered. This contention of error, therefore, cannot be sustained.

[3, 4] We think it unnecessary that we follow appellants in their contentions concerning the substantiality of the amendment, or that we should rule thereon. For it is quite apparent from all that appellants say and from all that the record discloses that if error there was it was error in procedure which would not invalidate the judgment appealed from as being one rendered without or in excess of jurisdiction. Zierath v. Superior Court, 35 Cal.App. 788, 171 P. 112; Bley v. Dessin, 31 Cal.App.2d 338, 87 P.2d 889. And, further, in the absence of even a suggestion that appellants have been injured by the error, this Court could not reverse for such procedural error in view of the constitutional mandate contained in Section 4½ of Article VI, commanding that no judgment be set aside for any error as to any matter of procedure unless the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. Vallejo & N. R. R. Co. v. Reed Orchard Co., 169 Cal. 545, 558, 147 P. 238. Considering the situation as presented by the record when the original complaint was filed, the appellants owned the parcel sought to be condemned—Parcel A. Served with summons and complaint and copy of lis pendens they, nevertheless, proceeded to convey Parcel B to the church. They would have had, therefore, no moral or legal right to receive compensation for more than the part of Parcel A which remained in their ownership and this compensation was awarded to them by the judgment. At no time did they elect to appear and present evidence to the trial court as to the value of their property or as to any severance damage which they might have contended would result from the taking of the part condemned from that which remained in their ownership. Their defaults were not hastily entered. Indeed, an unusually long period was accorded to them had they desired to litigate the issues as to the amount of compensation which should be paid them and those defaults were finally entered only after written notice served upon them that they would be so entered unless an appearance was promptly made. Nowhere do they contend on this appeal that the findings of the trial court as to their having conveyed Parcel B after this action was begun was not a finding of the truth; and the briefs they filed

do not purport to contend that they had not so conveyed Parcel B. On the contrary those briefs assume the fact of such transfer. The relinquishment of a part of Tract B to the church was not, therefore, a matter which was injurious to them and they do not argue that it was. It results, therefore, that their only complaint of injuries must be based upon this proposition: That the making of the amendments would have offered them a second opportunity to appear and present evidence as to the value of the property remaining in their ownership had the amendments been served upon them, an opportunity which had been fully extended to them and which they had stubbornly refused to use. The reason for the rule requiring service of amendments is that a defendant having by default admitted the allegations of the complaint has submitted to a judgment consonant therewith but no more. The plaintiff cannot by amendment unserved enlarge his remedy. The vital question, therefore, is, does the amendment permit such enlargement—and has detriment followed. The law is not concerned with a second chance for the defaulting defendant to contest issues he failed to contest and which were tendered by the first pleading.

In their briefs the appellants specifically urge as a reason why they should have been permitted after amendment to appear in the action that they lost the opportunity to contest what they say was a new issue injected by the amendment, namely, the fact, validity and circumstances of the "alleged conveyance" to the church. Acting in what perhaps was an excess of caution, this Court, on its own motion, ordered a reference to be made to the Judge who heard this case in the trial court to afford appellants an opportunity to make a showing that there was some materiality to this complaint. The report of the referee has been filed with this Court and it appears therefrom that the opportunity was thus afforded and that appellants appeared before the referee. At that hearing it was stipulated that the conveyance had been made, was valid and, therefore, that they no longer had any interest in the parcel they had thus deeded away. At the hearing, however, they did introduce evidence that the conveyance was made at the suggestion of a deputy district attorney of San Joaquin County before the condemnation suit was filed, the suggestion being that the appellants establish the value of their property by making a sale of a portion of the property which at that time the school district was intending to condemn. Their evidence further showed that such a sale was made to the church at a price considerably more than the acreage value set by the trial court at the trial of the action. This makes it apparent that it was not concerning issues introduced by the amendment with which appellants were concerned, but with the issue of value of the property which was an issue tendered by the original pleading. Appellants were represented by counsel for a substantial period of time before their defaults were entered and surely must have known that if they did not appear and present evidence to the trial court as to the value of their holdings that court would be compelled to rely upon such evidence as their adversaries chose to present. Summing up, the record shows that the amendment of the complaint was a purely fortuitous circumstance which the appellants here wish to seize on in order that they may obtain a retrial of the issue of value. Upon such a record the judgment ought not to be set aside.

The judgment, therefore, is affirmed.

SCHOTTKY and PEEK, JJ., concur.

125 Cal.App.2d 76

CULVER et al.
v.
SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY.

Civ. 20199.

District Court of Appeal, Second District,
Division 2, California.

May 6, 1954.

Proceeding to obtain writ of prohibition. The District Court of Appeal, Moore, P. J., held that, where motorist, who was defendants' minor son, was in armed forces over seas at time set for trial of cause of action arising from motorist's operation of defendants' automobile, but defendants did not, for six months after case had been set for trial, attempt to procure motorist's deposition after trial court had denied their motion for continuance except for a brief period to enable them to obtain a deposition, defendants would not, under the Soldiers' and Sailors' Civil Relief Act of 1940 be entitled to writ of prohibition preventing any further action in cause until motorist returned to county in which trial was to be held.

Alternative writ discharged, and peremptory writ denied.

1. Army and Navy 🔑34

Soldiers' and Sailors' Relief Act of 1940 is to be always liberally construed so that it protects active soldiers and sailors. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521.

2. Army and Navy 🔑34

The Soldiers' and Sailors' Civil Relief Act of 1940 does not require abatement of trial of soldier's codefendants who are not in military service. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 201, 204, 50 U.S.C.A.Appendix, §§ 521, 524.

3. Appeal and Error 🔑966(1)

Continuance 🔑7

In regard to obtaining testimony of soldier in service, motion for continuance is addressed to court's sound discretion, and such discretion will not be disturbed in absence of proof of abuse thereof. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 201, 204, 50 U.S.C.A.Appendix, §§ 521, 524.

4. Appeal and Error 🔑1043(7)

Where soldier's testimony could have been obtained with reasonable diligence, refusal of continuance to soldier will not afford ground for reversal. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 201, 204, 50 U.S.C.A.Appendix, §§ 521, 524.

5. Prohibition 🔑5(3)

Where motorist, who was defendants' minor son, was in armed forces overseas at time set for trial of cause of action arising from motorist's operation of defendants' automobile, but defendants did not, for six months after case had been set for trial, attempt to procure motorist's deposition after trial court had denied their motion for continuance except for a brief period to enable them to obtain a deposition, defendants would not, under the Soldiers' and Sailors' Civil Relief Act of 1940, be entitled to writ of prohibition preventing any further action in cause until motorist returned to county in which trial was to be held. Soldiers' and Sailors' Civil Relief Act of 1940, §§ 201, 204, 50 U.S.C.A.Appendix, §§ 521, 524.

B. W. Minsky, Los Angeles, in opposition to petition.

Helen Lee Mackellar, Los Angeles, for petitioners.

MOORE, Presiding Justice.

The question here for decision is whether the parents of a minor son who with them is defendant in an action for damages for his alleged negligence in the operation of an automobile are entitled to a "stay" of the trial until the son returns to Los Angeles County from the armed forces overseas.

In February 1953, one John Kulash and others filed an action in respondent court against petitioners Edgar Culver and wife and their son Ronald Wesley for damages resulting from an automobile accident in which the son was a participant. Ronald was a minor and his parents had consented to his driving the offending car. Petitioners answered the complaint, and on April 3, 1953, plaintiffs served and filed a setting card. The cause was set for trial in respondent court on December 11. Within a week prior to the trial date, counsel for the defendants asked plaintiffs' attorney for a continuance because of Ronald's being in the army overseas and could not be present. When the matter was called for trial, defendants moved for a continuance to a time when Ronald would be discharged. The court denied the motion as to Mr. and Mrs. Culver but consented only to a brief continuance to enable them to obtain the deposition of Ronald. Thereupon, the Culvers applied for a writ of prohibition against any action "for the time required and provided in said Soldiers' and Sailors' Civil Relief Act of 1940."

Section 521 of the Soldiers' and Sailors' Civil Relief Act of 1940[1] provides that an active soldier who is a defendant in an action before any court shall be entitled to a stay of proceedings unless in the opinion of the court the ability of the defendant to conduct his defense is not materially affected by reason of his military service.

[1, 2] In the action at bar, the parents are defendants by virtue of having consented to their son's driving the motor car on a public highway. They are in effect demanding that the trial of the action be stayed until the son is released from service. While the Act is to be always so liberally construed as to protect the active soldier and sailor, Vasey v. Hoffman, 60 Pa.Dist. & C. 606, the law in no sense requires the abatement of a trial of the codefendants of a soldier who are not in any military service. In his affidavit opposing the issuance of a writ of prohibition herein, counsel for the plaintiffs in the action pending in respondent court expressly concedes that "no judgment can be obtained" against son Ronald if he is in the armed forces. Now, by virtue of the pleaded concession, there is not the remotest possibility that the trial will proceed against Ronald. As to the parents, the only risk they could incur by an immediate trial lies in the likelihood of their not having the benefit of Ronald's testimony. In the first place, respondent court granted a continuance for the purpose of enabling petitioners to take Ronald's deposition. It is not to be presumed that he would not tell the facts just as fully before a commissioner in Korea as he would in the presence of the court. With that avenue open to the receipt of Ronald's testimony, there is no good reason for a "stay" of the trial for the parents' benefit. In fact, the Act of 1940 makes no provision for staying the trial for a civilian because his witness is in the armed forces. Section 524 of the Act specifically provides that the court may in such a situation proceed against those who are neither soldiers nor sailors. 50 U.S.C.A.Appendix, § 524.

[3, 4] As to the matter of obtaining the testimony of a soldier in service, the motion for a continuance is addressed to the sound discretion of the court and its decision will not be disturbed in the absence of proof of the abuse of such discretion. Slaughter v. Zimman, 105 Cal. App.2d 623, 624, 234 P.2d 94; Kalmus v. Kalmus, 103 Cal.App.2d 405, 414, 230 P.2d 57; Taylor v. Gordon, 102 Cal.App.2d 233, 239, 227 P.2d 64. It has even been held that the refusal of a continuance to a soldier will not afford ground for reversal where his testimony could have been obtained with reasonable diligence. Johndrow v. Thomas, 31 Cal.2d 202, 209, 187 P.2d 681.

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[1] 50 U.S.C.A.Appendix, § 521: "At any stage thereof any action or proceeding in any court in which a person, in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act (sections 501–548 and 560–590 of this Appendix), unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

[5] By reason of the foregoing and because petitioners did not, for six months after the case had been set for trial, make an attempt to procure the deposition of Ronald,

It is ordered that the alternative writ be discharged and the peremptory writ is denied.

McCOMB, J., concurs.

125 Cal.App.2d 239

HENDRICKS v. HENDRICKS.

Civ. 20036.

District Court of Appeal, Second District,
Division 1, California.
May 17, 1954.

Divorce proceeding by husband. The Superior Court of Los Angeles County, Joseph W. Vickers, J., denied divorce to each party under doctrine of recrimination, and wife appealed. The District Court of Appeal, Doran, J., held that, where there was long-continued strife, involving husband and wife, who had been married almost 23 years, and also their two children, public policy could not well be served by denying divorce to both parties on ground of recrimination, and, in view of fact that both parties were entitled, under the evidence to divorce on ground of cruelty, they would be granted such relief.

Judgment reversed with directions to grant decree of divorce to both parties.

1. Marriage ⚷ 1

Marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to marital relationship.

2. Divorce ⚷55

Where there was long-continued strife, involving both husband and wife, who had been married almost 23 years, and their two children, public policy could not well be served by denying divorce to both parties on ground of recrimination, and, in view of fact that both parties were entitled, under evidence to divorce on ground of cruelty, they would be granted such relief. Civ. Code, § 122.

Lauren M. Handley, Los Angeles, for appellant.

Gladys Towles Root, Joseph M. Rosen, Los Angeles, for respondent.

DORAN, Justice.

The judgment from which plaintiff appeals, dated November 7, 1952, and entered November 10, 1952, recites that "The above matter came on regularly for trial on the 14th to 17th and 22nd to 31st days of October, 1952", that both parties were represented by attorneys, and "the Court having found that by the evidence produced both parties were entitled to a decree of divorce on the grounds of extreme cruelty, and the Court in applying the doctrine of recrimination under the law is required to deny relief to both parties; and findings having been expressly waived in open court; it is ordered, adjudged and decreed that a divorce be denied to each party and that each party bear his own costs".

Appellant's brief states the grounds of this appeal as follows:

"From an examination of the language contained in the Judgment * * * it would appear that the Trial Court apparently believed it was required to apply blindly the Doctrine of Recrimination under a set of fact such as this and was *required* to deny relief to both parties. * * *

"It was, however, decided in DeBurgh v. DeBurgh, 39 Cal.2d 858, at page 871, [250 P.2d 598], that no such mechanical application of the Doctrine of Recrimination is proper and the Court therein expressly disapproved cases which appeared to have supported such a mechanical application * * *".

The DeBurgh opinion, just cited, was decided on November 25, 1952, approximately two weeks after the entry of the trial court's decision in the instant litigation.

Holding that a trial court is not "required" to deny a divorce because of recrimination, the reviewing court in 39 Cal.2d at page 871, 250 P.2d at page 605, "concluded that section 122 of the Civil Code [the recrimination statute] imposes upon the trial judge the duty to determine whether or not the fault of the plaintiff in a divorce action is to be regarded 'in bar' of the plaintiff's cause of divorce based upon the fault of the defendant."

Further elucidating the rule to be applied in this matter, the DeBurgh case says, "There can be no precise formula for determining when a cause of divorce shown against a plaintiff is to be considered a bar to his suit for divorce, for the divorce court, as a court of equity * * * is clothed with a broad discretion to advance the requirements of justice in each particular case. In general, however, certain major considerations will govern the court's decision", namely (1) the prospect of reconciliation; (2) the effect of the marital conflict upon the parties; (3) the effect of the marital conflict upon third parties; and (4) comparative guilt. "We have concluded", said the reviewing court, "that in light of the foregoing discussion the findings and conclusions in the present case are not sufficient to support the determination that recrimination was established".

The appellant's brief avers that, from the pleadings and affidavits on file, it appears in the present case (1), "That prospects of reconciliation appear totally absent (Clerk's Transcript, p. 40); (2) That continued litigation and marital conflict appear likely to ruin the health and finances of both the parties (Clk.Tr., p. 41); (3) That the effect of this discord on the children of the marriage, both of whom have now almost obtained their majority, appears degrading and bestial (Clk.Tr., pp. 9–11, 20, 21); (4) It would appear from the Court's findings that they are both guilty of cruelty". Appellant also calls attention to the fact "that recrimination was not, apparently, pleaded by either of the parties".

Answering the foregoing contentions, respondent's brief states that since this is an appeal on the judgment roll alone, and there is no transcript of the evidence, and findings were waived, "The evidence is presumed to support the judgment in the absence of findings". Respondent further claims that there is no evidence "that the trial judge blindly adopted the doctrine of recrimination", and that "There are no facts before this court to show that the conduct of the parties was not such as to bar a decree of divorce to each of them". The DeBurgh case supra, "did not hold", respondent says, "that recrimination could not bar a divorce but that the question of whether or not it existed in bar of divorce is one of fact for the trial court to determine".

The recent case of Phillips v. Phillips, 41 Cal.2d 869, 264 P.2d 926, 930, reaffirms the rule stated in the DeBurgh case, and holds that "The doctrine of recrimination may not be mechanically applied by a trial judge, but it is an equitable principle to be followed according to the circumstances of each case and with a proper respect for the paramount interests of the community at large. * * * The trial court necessarily has a broad discretion. It must, however, give consideration to the prospects of reconciliation, the effect of the marital conflict upon the husband, wife, and third parties, and the comparative fault of the parties".

The decisions hereinbefore mentioned are, of course, controlling in the instant controversy. Applying the rule there announced to the present situation, it appears that appellant's contentions are sound. Following the trial court's explicit finding that "both parties are entitled to a decree of divorce on the grounds of extreme cruelty", the judgment goes on to state that the court, "in applying the doctrine of recrimination *under the law is required to deny relief* to both parties". (Italics added.) As has been seen from the cited cases, this is not the law, and although both parties have been found to be at fault, the trial court was not "required" to deny relief.

As was said in the Phillips case, supra, it appears from the pleadings, affidavit, finding and judgment, as well as from the briefs of the respective parties, that in the present case "the legitimate objects of the marriage have been destroyed. No public policy would be served by denying a divorce because each party was guilty of extreme cruelty toward the other. It is a degradation of marriage and a frustration of its purposes to use it as a means of punishing the parties to the divorce action. In our opinion, the trial judge should not have denied the parties a divorce on the ground that recrimination had been shown".

Assuming the trial court's statement that both parties were entitled to a divorce on the ground of cruelty to be a general finding, which respondent does not admit, then it is conceded that when an appeal is taken on the judgment roll alone the evidence is conclusively presumed to support the findings. However, respondent's further statement that in such case "it is also conclusively presumed that the said evidence will operate as a bar and prevent both parties from acquiring a decree of divorce, is not persuasive." In view of the holdings in the cases hereinbefore cited, such a conclusion does not necessarily follow.

[1, 2] It is fundamental that a marriage contract differs from other contractual relations in that there exists a definite and vital public interest in reference to the marriage relation. The "paramount interests of the community at large", quoting from the Phillips case, supra, is a matter of primary concern. The instant case presents a picture of long continued strife not merely between husband and wife but as well involving the two children in the marital quarrels. The parties have been married almost 23 years, and as appellant says, it appears that "their constant litigation has produced nothing so far but additional trouble for the entire family (Clk.Tr. pp. 40, 41)." Public policy cannot well be served by denying a divorce to both parties. Since both parties are, under the evidence, entitled to a divorce on the ground of cruelty, they should be granted that relief without further litigation.

For the reasons hereinbefore stated, the judgment is reversed with directions to grant a decree of divorce to both parties, each party to bear his own costs on appeal.

WHITE, P. J., and DRAPEAU, J., concur.

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125 Cal.App.2d 100

BOARD OF EDUCATION OF CITY OF LOS ANGELES

v.

WILKINSON.

Civ. 20109.

District Court of Appeal, Second District, Division 1, California.

May 10, 1954.

Rehearing Denied May 24, 1954.

Hearing Denied July 7, 1954.

Proceedings on complaint by Board of Education against teacher, charging that there existed cause for dismissing teacher from school system. The Superior Court of Los Angeles County, Anthony Brazil, J., entered judgment from which the teacher appealed. The District Court of Appeal, Drapeau, J., held that in view of rule of Board of Education requiring a teacher or other employee of any school district governed by such Board to answer questions of any legislative committee relating to present or past membership in any organization advocating forceful overthrow of government, and provision of Education Code prohibiting the advocacy of teaching of communism, refusal of a teacher to answer questions of State Senate Committee concerning her activities in communism constituted unprofessional conduct, authorizing her discharge.

Judgment affirmed.

1. Witnesses ⚷52(5)

Questions asked of a school teacher appearing before Fact Finding Committee on Un-American Activities of State Senate as to her occupation and whether she was acquainted with certain person, and his wife, and whether she was aware of association of such persons with communist party, and as to whether teacher herself was a member of the communist party, were not in any way related to husband of teacher, and teacher was not entitled to refuse to answer on ground of privilege of wife not to testify against her husband. Education Code, § 8275; Code Civ.Proc. § 1881.

2. Schools and School Districts ⚷141(4)

In view of rule of Board of Education requiring a teacher or other employee of any school district governed by such board to answer questions of any legislative committee relating to present or past membership in any organization advocating forceful overthrow of government, and provision of Education Code prohibiting the advocacy and teaching of communism, refusal of a teacher to answer questions of State Senate Committee concerning her activities in communism constituted unprofessional conduct, authorizing her discharge. Education Code, §§ 8275, 13521 (a); Code Civ.Proc. § 1881.

3. Schools and School Districts ⟹127, 133

A teacher's employment in a public school is a privilege and not a right, and a condition implicit in that privilege is loyalty to government under which the school system functions, making it duty of teacher to answer proper questions put to him by lawfully constituted body authorized to propound such questions, concerning the teacher's fitness to occupy his position.

4. Schools and School Districts ⟹127

The Levering Act making public employees civil defense workers and requiring an oath or affirmation of allegiance does not prohibit governing bodies in the school systems from requiring their employees to be loyal to the State and the United States, and does not relieve such bodies from their duty of inquiring into fitness of teachers, and from prescribing rules reasonably necessary to protect schools against communists or other traitors. Education Code, § 13230; Government Code, §§ 3100–3109.

5. Schools and School Districts ⟹127, 133

Governing bodies in the school system have the right to direct that teachers and other employees shall not belong to organizations which advocate overthrow of the government by force or other unlawful means, and to require an oath of such tenor as a condition to obtaining or continuing in employment. Education Code, § 13230; Government Code, §§ 3100–3109.

Kenny & Morris and Daniel G. Marshall, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, and Wm. E. Lamoreaux and Clarence H. Langstaff, Deputies County Counsel, Los Angeles, for respondent.

DRAPEAU, Justice.

The Superintendent of Schools reported to the Board of Education of the City of Los Angeles that within the area included within the boundaries of the Los Angeles School District there were "active, disciplined communist organizations presently functioning." He also reported that there was a clear and present danger that the members of such organizations would "engage in concerted effort to hamper, restrict, interfere with, impede, and nullify" the efforts of the Los Angeles City Board of Education to comply with and enforce the provisions of Section 8275 of the Education Code of the State of California. That section prohibits the advocacy or teaching of communism "for the purpose of undermining the patriotism for, and the belief in, the Government of the United States and of this State in the minds of the pupils".

The Board of Eduction adopted a rule that no person "who is knowingly a member of the Communist Party shall hereafter be employed by, or, except as provided in Section 3 hereof, retained in the employment of, any school district governed by the Los Angeles City Board of Education."

Section 3 of the rule provides that any employee of any school district governed by the Los Angeles City Board of Education who now, or within one year prior to the date of the adoption of the rule, was knowingly a member of the Communist Party "shall within thirty days of the date of the adoption of this rule file with the Los Angeles City Board of Education a verified statement that he is no longer a member of the Communist Party and that such membership has been terminated in good faith."

Section 5 of the rule provides, "It shall be the duty of any employee of any school district governed by the Los Angeles City Board of Education who may be subpoenaed by a United States Congressional Un-American Activities Committee or a California Legislative Un-American Activities Committee or any other committee or subcommittee of the United States Congress or the California Legislature, or of either House of either thereof, to appear before said committee or subcommittee and specifically to answer under oath questions propounded by the committee or subcommittee relating to * * * present or * * * past membership in any organization now advocating the forceful overthrow of the government of the United States or of any state or political subdivision thereof."

A copy of the rule was personally served upon Jean Benson Wilkinson, a permanent high school teacher in the city system, and defendant in this case.

Thereafter the Superintendent of Schools formally charged defendant with unprofessional conduct, in that she appeared before the Fact-Finding Committee on Un-American Activities of the California State Senate, and failed and refused to answer questions whether she had joined the communist party in 1941 and was presently a member thereof.

Defendant demanded a hearing on the charge. The Board of Education elected to file a complaint in the Superior Court, charging that there existed causes for dismissing defendant from the Los Angeles school system.

The trial court found defendant guilty of unprofessional conduct within the meaning of Section 13521(a) of the Education Code, and adjudged that the School Board "may dismiss the defendant as a certificated employee of the Los Angeles City School District." Defendant appeals from the judgment.

Defendant contends:

1. That she was excused from answering questions before the Committee under the provisions of Section 1881 of the Code of Civil Procedure. This is the code section that excuses a wife from testifying against her husband.

2. That there was no final refusal to answer the questions directed to her.

3. That the trial court should have exercised its discretion to find that in the circumstances in this case there was no unprofessional conduct on her part.

4. That the Levering Act (Sections 3100–3109 of the Government Code) precludes any action against defendant in the circumstances in this case.

To understand these contentions it is necessary to set out considerable portions of the record.

Defendant's husband was a witness before the Committee, just preceding defendant's appearance. Mr. Combs, counsel for the Committee, asked Mrs. Wilkinson what her name was and where she lived. She answered these questions.

Then Mr. Combs asked, "You are the wife of Frank Wilkinson?" To this question the witness made the following reply:

"I refuse to testify in this particular hearing because it is obviously an investigation into my own husband's political activities. So therefore I must refuse on the grounds of Section 1881 of the Code of Civil Procedure. You gentlemen no doubt, some of you anyway, are married. You know it is a very difficult position to be in."

To this statement Mr. Combs replied: "Mrs. Wilkinson, my questions are not concerning your husband's activities but your own activities. I will ask you no questions concerning your husband's activities."

After some further discussion, the following occurred:

"Q. By Mr. Combs. What is your occupation, Mrs. Wilkinson? A. I will have to refuse on the grounds I previously stated.

"Mr. Burns. There has been no stipulation as to the refusal of this witness.

"Mr. Combs. No, Mr. Chairman. Will the Chairman direct the witness to answer the question?

"Senator Burns. The Chair on behalf of the Committee will instruct the witness to answer the question that has been asked by the Committee counsel.

"The Witness. Well, I must refuse on the same grounds.

"Q. By Mr. Combs. Would you mind stating the grounds? A. On the grounds that as I understand it in Section 1881 of the Code of Civil Procedure it says that certain confidential conversations as between husband and wife or a lawyer and client are confidential, and those would be excepted.

"Q. Is that the only ground for your refusal to answer the question? A. Yes, it is."

Finally the following proceedings took place:

"Q. And that you are now employed as a teacher in the East Los Angeles Girls Vocational High School? A. I refuse to answer the question on the grounds previously stated.

"Senator Dilworth. Well now, Mr. Chairman, it seems to me that her conversations with her husband have nothing to do with her employment in the high school.

"Senator Burns. That is the ruling of the Chair, and the witness in each instance is requested to reply to the question.

"Q. By Mr. Combs. Are you acquainted with Alvin Averbuck? A. I refuse to answer the question on the grounds heretofore stated.

"Q. Are you acquainted with Evelyn Averbuck, his wife? A. I refuse to answer the question on the grounds previously stated.

"Q. And is it not a fact within the scope of your own personal knowledge, Mrs. Wilkinson, that Alvin Averbuck is the Organizational Secretary of the Communist Party of Los Angeles County? A. I refuse to answer the question on the grounds previously stated.

"Q. Did you ever have anything personally to do with an organization known as the League for Industrial Democracy? A. I refuse to answer the question on the grounds previously stated.

"Q. And is it not a fact that you are at the present time a member of the same Communist Party Club as your husband, to-wit, the Altgeld Club No. 1 of the Communist Party of the County of Los Angeles? A. I refuse to answer the question on the grounds previously stated.

"Q. Are you presently a member of the Communist Party, Mrs. Wilkinson? A. I refuse to answer the question on the grounds previously stated.

"Q. Mr. Combs. That is all."

The record supplies a complete answer to all of defendant's contentions.

[1] Excepting one question, there is nothing in the record that had anything to do with defendant's husband. With that exception, no question asked comes within the provisions of Section 1881 of the Code of Civil Procedure.

[2, 3] When defendant refused to answer the questions asked her she was guilty of unprofessional conduct as an employee of the school system. The trial court had no discretion other than to so find.

A teacher's employment in the public schools is a privilege, not a right. A condition implicit in that privilege is loyalty to the government under which the school system functions. It is the duty of every teacher to answer proper questions in relation to his fitness to teach our youth when put to him by a lawfully constituted body authorized to propound such questions.

The trial judge in a well-considered memorandum of opinion succinctly states the principles here involved:

"I hold, in view of the declared policy of Education Code 8275, and plain common sense, that the rule requiring a teacher to answer questions concerning her activities in Communism before a proper investigating committee is a reasonable rule; the violation of which constitutes unprofessional conduct within the meaning of Education Code Section 13521(a). This is so because such conduct is inherently unprofessional in one who is hired by a governmental agency in one of the most important of governmental functions * * * the teaching and instruction of the youth of the country. The power of a teacher to mold the thoughts and conduct of children is so great that surely the State must have power to inquire into the beliefs of the teacher in whose care the youth of the country is placed for instruction. Such conduct, furthermore, is unprofessional under the rule adopted by the Board of Education.

"'Past conduct and loyalty have a reasonable relationship to present fitness and trustworthiness, and public servants may properly be required to furnish information regarding past membership in organizations that to their knowledge advocated overthrow of government by force or other unlawful means.' (Pockman v. Leonard, 39 Cal.2d 676 [249 P.2d 267].)

"The defendant contends she was protected by C.C.P. art. 1881, relating to privilege of confidential communications between husband and wife; being an exception recognized by section 5d of the rules adopted September 22, 1952; which rules were soon thereafter personally served on her. The transcript of the Committee hearing no where discloses any justification for claiming the husband and wife privilege. All questions were asked directly of her, and none concerned itself with her husband or any communication between them. This Court cannot now be concerned with her personal reasons for not answering. It matters only that she refused to answer, and whether or not she was ill informed, misguided, or may have later changed her mind on the subject if ordered by this or some other Court is of no concern."

Nothing in In re McLain, 99 Cal.App.2d 274, 221 P.2d 323 is pertinent here. This is not a contempt proceeding. In this case the duty of the court began and ended with a determination that defendant's conduct did or did not constitute grounds for dismissal.

Referring to defendant's contention relative to the Levering Act: Our Supreme Court held in Fraser v. Regents of University of California, 39 Cal.2d 717, 249 P.2d 283, that that Act fully occupies the field of loyalty oaths for public employees.

[4, 5] But this does not mean that the Levering Act prohibits governing bodies in our state school system from requiring their employees to be loyal to the State of California and to the United States of America. The Levering Act does not relieve such bodies from the duty of inquiring into the fitness of teachers, and from prescribing rules reasonably necessary to protect our schools against traitors * * * infamous traitors who would scatter dragons' teeth amongst boys and girls of their own American fellow citizens.

Section 13230 of the Education Code requires that "Each teacher shall endeavor to impress upon the minds of the pupils the principles of * * * patriotism, * * * and to train them up to a true comprehension of the rights, duties, and dignity of American citizenship." Section 8275 of that Code provides that no teacher giving instruction in any school shall advocate or teach communism with the intent to indoctrinate any pupil with or inculcate a preference in the mind of any pupil for communism. "For the purposes of this section, communism is a political theory that the presently existing form of government of the United States or of this State should be changed, by force, violence or other unconstitutional means, to a totalitarian dictatorship which is based on the principles of communism as expounded by Marx, Lenin and Stalin."

In the life-and-death struggle into which our people have been plunged by the monstrous conspiracy called communism, it is becoming more and more apparent that it is essential for the continuance of our national life that we know who is for us and who is against us. This is no time to allow any person who would destroy us, our liberties, our religious convictions, and our government to be employed in any branch of that government, * * * "to bite the hand that feeds it." The men and women of America who pay their salaries have a right to know whether or not any of their employees are communists.

In Christal v. Police Commission, 33 Cal.App.2d 564, 92 P.2d 416, police officers refused to answer questions before a Grand Jury involving malfeasance in the performance of their duties. In upholding the right of the Police Commission to discharge these officers for their refusal to answer questions, our Supreme Court says, 33 Cal.App.

2d at page 568, 92 P.2d at page 419: "As we view the situation, when pertinent questions were propounded to appellants before the grand jury, the answers to which questions would tend to incriminate them, they were put to a choice which they voluntarily made. Duty required them to answer. Privilege permitted them to refuse to answer. They chose to exercise the privilege, but the exercise of such privilege was wholly inconsistent with their duty as police officers. They claim that they had a constitutional right to refuse to answer under the circumstances, but it is certain that they had no constitutional right to remain police officers in the face of their clear violation of the duty imposed upon them. McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517. We are of the opinion that such a violation of duty would constitute cause for dismissal even in the absence of any specific rule requiring such officers to give testimony before the grand jury, * * *."

In the McAuliffe case Mr. Justice Holmes, speaking for the Massachusetts court, succinctly stated the rule: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."

In the recent case of Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 556, 261 P.2d 261, 268, our Supreme Court says:

"One employed in public service does not have a constitutional right to such employment and is subject to reasonable supervision and restriction by the authorized governmental body".

And in the same case the Court quotes from Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783:

"'The teacher is intrusted with the custody of children and their high preparation for useful life. His habits, his speech, his good name, his cleanliness, the wisdom and propriety of his unofficial utterances, his associations, all are involved. His ability to inspire children and to govern them, his power as a teacher, and the character for which he stands are matters of major concern in a teacher's selection and retention. * * * No one has a natural or inherent right to teach a public school' and the Legislatures 'for reasons of public policy' may 'make the right to teach in any particular school subject to a broad discretion in the school authorities to dismiss for causes which come within very general designations'."

In Pockman v. Leonard, supra, 39 Cal.2d 676, 686, 249 P.2d 267, 273, our Supreme Court points out the effect of recent decisions of the United States Supreme Court upon the reciprocal rights of the public and its employees:

"It has been held that a governmental body has the right to direct that its employees shall not belong to organizations which they know advocate overthrow of the government by force or other unlawful means, and that they may be required to make sworn statements similar to the oath prescribed by section 3103 as a condition to obtaining or continuing in public employment. Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380 [96 L.Ed. 517]; Garner v. Board of Public Works of Los Angeles, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Gerende v. Board of Supervisors of Elections, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; cf. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925. A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty, and the state, under its police power, may properly limit a person's freedom of choice between membership in such organizations and employment in the school system. Adler v. Board of Education of City of New York, 342 U.S. 485, 72 S.Ct. 380, 385 [96 L.Ed. 517]."

For the reasons stated, the judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

SIGNORELLI et ux.
v.
POTTER et al.*

Civ. 19918.

District Court of Appeal, Second District,
Division 3, California.
May 7, 1954.

Rehearing Denied May 25, 1954.

Hearing Granted June 30, 1954.

Action for property damage caused by fire which occurred while gas supplier was filling butane gas tank near house, and which destroyed house. The Superior Court, Santa Barbara County, Ernest D. Wagner, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained findings that gas supplier was negligent in allowing the large amount of butane gas to escape and reach water heater within house, that such negligence was the sole proximate cause of fire which occurred when gas reached water heater, and that homeowners' negligence in maintaining tank near house and near water heater, even though but for these circumstances fire would not have occurred, was superseded by suppliers' negligence.

Judgment affirmed.

1. Gas 🔑18

That property owners, in violation of safety order, maintained butane gas tank within ten feet of their home and near water heater within home, and that, but for these circumstances, no fire would have occurred when gas, which escaped while gas supplier was filling tank, reached water heater, did not establish that property owners' negligence in this respect was a concurring cause of fire, where gas supplier's actions in allowing gas to escape, being unusual, exceptional, and not reasonably to be anticipated, constituted a superseding cause. 8 Cal.Adm.Code 4935.

2. Gas 🔑20(6)

Trial court's finding, in property owners' action for damages arising out of fire which occurred while gas supplier was filling butane gas tank near property owners' house, that negligent positioning of tank was not a proximate cause of the fire, constituted a finding that the explosion was caused by some unusual and exceptional occurrence not reasonably to be anticipated by property owners.

3. Negligence 🔑56(1.9), 136(25)

There are no definite rules by which it can be determined that a particular result of an actor's negligent conduct is so highly extraordinary as to prevent such conduct from being a substantial factor in bringing about damage, and this matter is for the judgment of the court and jury formulated after the event and, therefore, with knowledge of effect that was produced.

4. Gas 🔑20(2)

Where butane gas tank situated next to house and near water heater within house had been serviced for a period of years without event prior to occasion when explosion and fire occurred while tank was being filled, it could reasonably be deduced that on this occasion the person filling the tank had allowed a large quantity of gas to escape.

5. Gas 🔑20(2)

In property owners' action for property damage caused by fire which occurred while gas supplier was filling butane gas tank near property owners' house, evidence sustained findings that gas supplier's negligence in allowing a large quantity of gas to escape was sole proximate cause of fire which occurred when such gas reached water heater within property owners' house, and that property owners' negligence in maintaining tank near house and near water heater within house, even though but for these circumstances fire would not have occurred, was superseded by supplier's negligence. 8 Cal.Adm.Code 4935.

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Conron, Heard & James, Bakersfield, for appellants.

Edward J. Trevey, Santa Barbara, for respondents.

SHINN, Presiding Justice.

Alfred Signorelli and wife recovered judgment in the sum of $5,240.80 against

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* Subsequent opinion 275 P.2d 449.

James L. Potter and Don Munoz as damages for the partial destruction of their residence and contents by fire November 14, 1949, which the court found was due to the negligence of the defendants, appellants herein. The fire occurred while defendant Munoz, an employee of Potter, was filling a storage tank with Butane gas. Defendants denied negligence and pleaded that the fire was caused by the contributory negligence of the plaintiffs in that they maintained the Butane gas tank upon their premises in dangerously close proximity to a hot water heater containing an automatic pilot.

The tank was of 50 gallons capacity. It was located just outside the house and had been there since it was installed in 1942. Just inside the house were a water heater and a stove which used Butane. The wall between was of 1 inch by 12 inch board and batten construction. A pipe connected the tank through a hole in the wall with the water heater and the stove. It is not questioned that the tank was maintained in violation of Safety Order 4935 of the Division of Industrial Safety, Title 8, Administrative Code, in that the order forbids the maintenance of a tank of that capacity within 10 feet of such a building. Defendant Potter acquired the servicing business in January 1946 and was familiar with the location of the tank and stove, knew that the tank was unlawfully maintained, but he testified that he did not know of the location of the heater. Several of Potter's employees, including Munoz, testified that they had warned the Signorellis of the dangerous location of the tank and requested that it be moved. They nevertheless continued to service the tank. Munoz had serviced it for more than a year. Before that another employee, Stickler, had serviced the tank; upon one occasion he had lighted the water heater at Mrs. Signorelli's request, and he advised her then to have the tank moved. Potter at no time refused to service the tank. The tank required refilling about every 5 weeks and was filled through a hose from a tank truck by means of a pressure pump. The hose would be connected to the tank, a valve opened, the pump would be started and then a gauge would be turned on and a valve on the tank would be opened to admit gas into the tank. There is always some Butane between the valve on the hose and the valve on the tank that escapes when the hose is uncoupled. On the day of the accident Munoz filled the tank, closed the valves and was unscrewing the filler hose from the house tank when he saw flames leap out from around the hose. Almost immediately the entire corner of the house was on fire. There was too much flame and too much heat to enable Munoz to completely uncouple his hose from the tank. He got a fire extinguisher from his truck but it was defective and he could not operate it. The house and contents were almost completely destroyed.

The court found that plaintiffs as well as defendants were negligent. The negligence of plaintiffs consisted of their maintaining the tank in violation of said safety order. Defendants were likewise guilty of negligence since it was a violation of the order to fill a tank so located; but the court also found "* * * the defendant Don Munoz negligently permitted a quantity of Butane gas to escape, and that such escaping Butane gas ignited and exploded, and that as a direct and proximate result of such fire the contents of said house were damaged and destroyed." The court found that the negligence of the plaintiffs was not a proximate cause of the ignition and explosion.

The sole question in the case is whether, upon the evidence, it was established as a matter of law that the maintenance of the tank by plaintiffs was a proximate contributing cause of the accident.

We are of the opinion that there was evidence to sustain the finding that the negligence of the defendants was the sole, proximate cause of the fire. Munoz testified that he observed the flash of flame come out from the hose and coupling; also that he saw flame coming from between the boards of the house. He smelled Butane when he had the 10 per cent gauge and the valve open but continued filling the tank. The gas, being highly inflammable, would have ignited if it had reached the pilot of the water heater in any considerable quantity. For over 7 years the tank had been serviced in the same manner without accident.

[1-3] We may assume, as defendants contend, that the accident would not have occurred if the tank had been 10 or more feet from the house. But the fact that it was not so located does not mean that violation of the safety order was necessarily a concurring cause of the accident, in a legal sense. It would have been a concurring cause if there had been no superseding cause, that is to say, a causal event so unusual and exceptional as not to have been reasonably foreseeable. The finding that the position of the tank was not a proximate cause of the accident means that aside from violation of the safety order, plaintiffs were not negligent. Had the court found them to have been negligent for the reason that they should have anticipated an explosion, the judgment would doubtless have been in favor of defendants. Therefore, the finding means that the explosion was caused by some unusual and exceptional occurrence not reasonably to be anticipated. See, discussion in Gibson v. Garcia, 96 Cal.App.2d 681, 216 P.2d 119. Mr. Prosser, in his work on Torts says, Sec. 50, p. 374: "In any case where there might be reasonable difference of opinion as to the foreseeability of a particular risk, the reasonableness of the defendant's conduct with respect to it, or the normal character of an intervening force, the question is for the jury, subject of course to suitable instructions from the court as to the legal conclusion to be drawn as the issue is determined either way. By far the greater number of the cases which have arisen have been of this description; and to this extent it may properly be said that 'proximate cause is ordinarily a question of fact for the jury, to be solved by the exercise of good common sense in the consideration of the evidence of each particular case.'" Section 433, comment f, Restatement, Torts, phrases the rule as follows: "It is impossible to state any definite rules by which it can be determined that a particular result of the actor's negligent conduct is so highly extraordinary as to prevent the conduct from being a substantial factor in bringing it about. This is a matter for the judgment of the court and jury formulated after the event and, therefore, with the knowledge of the effect that was produced."

[4] The question is whether reasonable minds could differ as to whether an explosion was likely to occur while plaintiffs' tank was being serviced. Upon the one hand the very fact that the safety order specifies a distance of 10 feet between tank and building was a warning which plaintiffs should have heeded. And certainly the explosive nature of Butane is generally known. Upon the other hand the tank had been serviced regularly over a period of years without accident. The small amount of gas that normally escaped had not caused any explosion and apparently had created no serious risk. It was reasonable to assume that defendants would not permit the escape of gas in excessive and dangerous quantities. After weighing the probabilities the court found that defendants did allow a large quantity of gas to escape. That was a reasonable deduction from the fact that there was an explosion and a burning of gas so extensive that the southeast corner of the building was immediately ablaze. In fact, the most reasonable inference was that if there had been no excessive escape of gas there would have been no fire. Defendants say a broken pipe or some other condition may have been responsible for the explosion, but these possibilities were for the trial court to weigh against the known facts. Although Munoz testified that no excessive amount of gas escaped during the operation the physical facts strongly indicated the contrary.

[5] It must be apparent from the foregoing that we cannot say that the trial court reached a conclusion that was unwarranted by the evidence. To the contrary, an excessive amount of gas escaped, defendants were in control of it, and could not deny that in a normal, careful operation there would have been no ignition of gas. While continued violation of the applicable safety order by plaintiffs was, as defendants say, an acquiescence in a dangerous condition,

and invites no sympathy for them, it is not correct to say that they were, or should have been, well aware that defendants might allow a large quantity of gas to escape, and yet were willing to run the risk.

The factual issues were given careful consideration during the trial and on motion for new trial, and have support in the evidence.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

125 Cal.App.2d 343

STAGLIANO v. STAGLIANO.

Civ. 19947.

District Court of Appeal, Second District, Division 3, California.

May 19, 1954.

Application by ex-husband for modification of judgment regarding the custody and support of a minor child. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered order modifying custody order and reducing support payments and ex-wife appealed. The District Court of Appeal, Fred B. Wood, J., held that in absence of evidence as to location or kind of living quarters maintained by ex-husband, or as to the living conditions that would surround child at such quarters or as to moral qualities of ex-husband or others with whom child would be associated, evidence was insufficient to support an implied finding that the modification would be for best interest of child or would not be detrimental to child's welfare, but that evidence justified reduction of support payment from $200 a month to $150 a month.

Reversed in part and affirmed in part.

1. Infants 🔑19

The paramount consideration in determining the question of custody of a minor child is the welfare and best interest of the child.

2. Infants 🔑19

Generally, to justify a modification of an order for custody of a minor child there must be a change of circumstances arising after original decree was entered which change makes a modification of former custodial order advisable from a consideration of the welfare of the child.

3. Divorce 🔑303(3)

Burden was upon ex-husband to prove that circumstances or conditions had changed so as to justify ex-husband's requested modification of custody order.

4. Divorce 🔑303(3)

Ex-husband seeking a modification of custody order had the burden of proving that such a modification would be for the best interest of the child, or at least that such a modification would not be detrimental to child's welfare.

5. Infants 🔑19

A trial judge has a broad discretion in determining the question of custody of a minor child, but such discretion is to be exercised only within limits of fixed legal principles.

6. Divorce 🔑303(3)

In ex-husband's proceeding for modification of custody provision of divorce decree, evidence was insufficient to support an implied finding that a modification would be for best interest of child or would not be detrimental to child's welfare, and modification of custody order was an abuse of discretion.

7. Divorce 🔑309

In ex-husband's proceeding for reduction of child support order, although property settlement agreement provided that ex-husband should pay for support of child, support order was subject to modification and evidence justified order reducing child support payments.

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James B. Fredericks, Beverly Hills, for appellant.

Walter W. Heil, Los Angeles, for respondent.

FRED B. WOOD, Justice.

Appeal by plaintiff (wife) from an order modifying a judgment regarding the custody and support of a minor child.

On August 19, 1947, plaintiff obtained an interlocutory judgment of divorce which stated that a property settlement agreement of the parties was approved. In said judgment the custody of the minor daughter, 5½ years of age, was awarded to plaintiff, subject to defendant's right of reasonable visitation; and it was ordered that defendant pay to plaintiff, pursuant to the property settlement agreement, $200 a month for support of the child. On August 26, 1948, a final judgment of divorce, which included those provisions as to custody and support, was entered.

On April 21, 1953, upon application of defendant, the court made an order directing plaintiff to show cause why said provisions relating to custody and support of the child should not be modified by reducing the amount of support, and allowing defendant to have custody of the child during school vacation periods. Defendant had remarried and was living with his wife and six-months-old daughter. (The attorney for plaintiff stated, at the hearing herein, that defendant lives in Massachusetts.)

The matter was contested. On May 18, 1953, the court made an order, that plaintiff have custody of the child subject to defendant's right of reasonable visitation, provided that "defendant shall have physical custody of said child for a period of four consecutive weeks between July 1 and August 31 in each year, without interference by plaintiff, defendant to pay in advance the cost of first class round trip transportation for said child by air from Los Angeles, California, to place of such visitation"; and that commencing June 1, 1953, defendant shall pay to plaintiff for support of the child $150 a month except for the period of four weeks each year when she is in the custody of defendant.

Appellant contends that the court abused its discretion in modifying the order regarding custody and support. She argues that there was no evidence which would warrant such modification.

The child was 11 years of age at the time of the hearing herein. She has always resided with plaintiff in Los Angeles and, at the time of the hearing herein, she and plaintiff were living at the home of plaintiff's father in Los Angeles. Defendant is a horn player in the Boston Symphony Orchestra. In 1951, defendant was delinquent more than $4,000 in his payments for support. On November 15, 1951, plaintiff and defendant entered into a written agreement which provided that beginning January 1, 1952, defendant should pay plaintiff $200 a month for the child's support; and that so long as defendant continued to make said payments, plaintiff would take no action to enforce payment of the amount past due. At the time of the hearing on the order to show cause herein, defendant was delinquent again in the payments. According to defendant's testimony $200 was past due, and according to plaintiff $815.40 was past due.

Defendant testified that under his present circumstances he is able to pay $100 a month for support; since 1947 his living expenses and taxes have increased, and his salary has decreased; he pays $352 a year for life insurance, in which policies the child is beneficiary (pursuant to property settlement agreement); he is the sole provider for his present family consisting of his wife, and a child; his gross income for each of the past four or five years has been over $11,000. According to a document (Exhibit B), prepared by defendant's accountant, defendant's gross income for 1952 was $11,854.53, and his expenses were $15,231.35. The expenses included $2,027.07 for withholding tax, $2,400 for child's support as ordered by court, and $352 for insurance. Said document showed a deficit of $2,657.35, after deducting $719.47 for depreciation. Defendant testified further that when he was in Los Angeles he had "full rights" to see the child (referred to hereinafter as Hope); her grandfather's home (where she lives) is quite an elaborate place; he (defendant) discussed with his wife the matter of Hope visiting them, and his wife is "very much in accord"; he asked plaintiff many times to have Hope visit him in the East, and each time there was some excuse why she could not come; until the day before the hearing he had not seen her for five years; he is unable to come to Los Angeles to see her because it would take him away from his family and his work, and it would be easier financially if she came East; Hope told him (on the day of the hearing) that she would like to come to visit him but she would like for her mother to come too. He testified further that from time to time he is sent to other cities to conduct auditions on behalf of the orchestra; the last tour was from Boston to Chicago and was for 13 days; they did make such tours each year but have not made them lately because they conduct the auditions on their concert tour.

Plaintiff testified that at the time of her divorce from defendant and for approximately three and one-half years thereafter, Hope attended a private school; plaintiff was unable to keep her in the school after defendant became delinquent in his payments. and since that time she has attended public school; she has been accepted again by the private school (Marlborough) upon the condition that she attend summer school —that term being from July 6 to July 31; Hope's expenses have increased since the divorce, and she now needs $300 a month; plaintiff has records and receipts showing that, from July, 1947, through April, 1953, she has paid expenses for Hope in the amount of $14,252.84; she still owns the house, which she received under the property settlement agreement, and it is rented for $380 a month. Plaintiff testified further that every time she wrote to defendant, she urged him to come to see Hope; defendant had asked that Hope come to visit him but he had never made any suggestions as to how she would get there; Hope has never been away from home (overnight), except on two occasions—once when she was at Yosemite for three days, and at another time when she was with her godmother for a few days.

Defendant did not present any evidence which purported to describe the house or place where he lives. The only evidence regarding his dwelling place was testimony implying that he lived in Boston. There was no evidence regarding the living conditions which prevail in his home. He testified that his present wife is a singer but he gave no information regarding her ability to supervise or care for Hope. There was no evidence as to what supervision or care Hope would have when he was performing his duties with the orchestra. According to the written report of his accountant his expenses during the year preceding the hearing were about $2,600 more than his income. In his affidavit in support of his application for the order to show cause herein, he stated that his earnings "with his increased cost of living and income tax do not permit him to maintain a reasonable standard of living for his present family." It thus appears that it was not shown what the home environment would be if Hope were to go to defendant's home. During the hearing the court asked plaintiff the following question: "Do you have any reason to believe her father's home in the east is not a fit and proper home for your daughter?" Plaintiff answered: "I am sorry to have to bring this into it, but I divorced Mr. Stagliano because the environment in our home and his companions and living habits were so intolerable that I did not feel they were fit for me." The court then said: "You know nothing about his present companions or environment?" Plaintiff replied that she did not know, and that she had no way of knowing whether he had changed his habits.

[1] The paramount consideration in determining the question of custody of a minor child is the welfare and best interest of the child. Sorrels v. Sorrels, 105 Cal.App. 2d 465, 469, 234 P.2d 103.

[2-4] The general rule is that in order "To justify a modification of an order for custody of a minor child there must be a change of circumstances arising after the original decree was entered * * * which [change] makes a modification of the former custodial order advisable from the consideration of the welfare of the child * * *." Johnson v. Johnson, 72 Cal.App. 2d 721, 723, 165 P.2d 552, 553. The "change of circumstances" rule is not an "iron-clad" rule, however, to which there can be no possible exception. See Foster v. Foster, 8 Cal. 2d 719, 728, 68 P.2d 719. As stated in that

case, 8 Cal.2d at page 728, 68 P.2d at page 723: "It is perhaps possible to conceive of a case in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed. (Citation.) It is also possible to conceive of some theoretical case in which some fact, secret and hidden at the time of the entry of the former judgment, would in the interest of the welfare of the child justify a court in modifying the former order of custody despite the fact that there had been no actual change of circumstances since the entry of the former order." It was also said therein, 8 Cal.2d at page 729, 68 P.2d at page 723: "However, such a case would be a most unusual one. It is more speculative than real * * *." The present case does not present an exception to the general rule that there must be a change of circumstances. The burden was upon defendant herein to prove that circumstances or conditions had changed so as to justify his requested modification of the order for custody. Johnson v. Johnson, supra, 72 Cal.App.2d at page 724, 165 P.2d at page 554. He had the burden of proving that such a modification would be for the best interest of the child, or at least to prove that such a modification would not be detrimental to her welfare. In Foster v. Foster, supra, it was also said, 8 Cal.2d at page 732, 68 P.2d at page 725: "In deciding a matter so vital to the parents and to the welfare of the child, it is important that the trial court in order to make as wise a decision as possible, should have as complete a picture of the whole background of the child as possible—the financial condition of the parents, their interests, their morals, and their dispositions, as well as any other factor which might aid the court in determining the probabilities of either parent furnishing a happy, harmonious home for the child. In a question involving so intimately human relationships, the trial court has a delicate as well as a difficult problem to solve, and it may be that, if some of the factors are missing, he may not arrive at the best solution." As above stated, in the present case several factors regarding the home surroundings and conditions of defendant were not before the trial judge. The judge was entitled to know the home environment of defendant; and that information should have been presented by the defendant. In summary, the evidence offered by defendant in support of his application for modification was: An implication that he lives in Boston. He has remarried, and his wife is a singer. His expenses exceed his income. His earnings do not permit him to maintain a reasonable standard of living for his present family. The child is 11 years of age.

[5, 6] It might well be that defendant could present evidence that would be sufficient to justify such a modification of the order regarding custody, but under the record here there is practically no evidence which would make such modification advisable from the point of view of the welfare of the child. An affirmance of the order herein would be, in effect, a ruling that a trial judge may modify an order regarding custody, by awarding custody to the parent who has not had the custody, without any evidence as to the location or kind of living quarters maintained by such parent, or as to the living conditions that would surround the child at such quarters, or as to the moral qualities of such parent or others with whom the child would be associated. A trial judge has a broad discretion in determining the question of custody of a minor child, Sorrels v. Sorrels, 105 Cal.App.2d 465, 469, 234 P.2d 103, but such discretion is to be exercised "only within the limits of fixed legal principles" Gossman v. Gossman, 52 Cal.App.2d 184, 194, 126 P.2d 178, 184, and "To exercise that power all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent, and just decision" (Ibid.). The evidence herein was not sufficient to support an implied finding that such modification would be for the best interest of the child or that such modification would not be detrimental to her welfare. In view of the meager amount of evidence in the record bearing upon the subject of the welfare of the child under such change of custody, this

court must conclude that it was an abuse of discretion to modify the custody provision of the judgment.

[7] Appellant contends further, as above stated, that the court abused its discretion in reducing the amount to be paid for the support of the child. She argues that the provision in the property settlement agreement that defendant should pay $200 a month for the support of the child is an "integral part" of the property settlement agreement and is inseparable therefrom; that, in said agreement, she specifically waived her right to alimony in order to obtain a provision in said agreement that defendant would pay $200 a month for the support of the child; and that, by reason of such provision in the agreement, the court did not have the right to modify the provision in the divorce judgment which required the payment of $200 a month for child support, except upon a very clear showing that the welfare of the child made such a demand. The property settlement agreement provided that the property be divided between the parties in a certain manner, that plaintiff have custody of the child, and that the defendant pay to plaintiff for the support of the child $200 a month during the minority of the child. In Streeter v. Streeter, 67 Cal.App.2d 138, at page 142, 153 P.2d 441, at page 443, it was said: "There is a vast difference between a property settlement confined to the interests only of husband and wife, and an agreement wherein the rights or the support of a minor is involved." It was also stated therein, 67 Cal.App.2d at page 145, 153 P.2d at page 445, that if the provision for payment "was intended as an agreement for the support of the child, it was, under all the authorities, subject to modification." In Avila v. Leonardo, 53 Cal.App.2d 602, at page 607, 128 P.2d 43, at page 46, it was said that the authority of the court to make necessary orders for the support of minor children "is conferred by statute, and its exercise cannot be limited or abridged by the parties." In the present case, the order for the payment of $200 a month for the support of the child was subject to modification. The evidence on behalf of defendant, with respect to his ability to pay for the support of the child, was sufficient to justify the order reducing the amount to be paid by him. The court did not abuse its discretion in modifying the support provision of the judgment.

The order is reversed insofar as it modifies the judgment as to custody. In all other respects the order is affirmed.

SHINN, P. J. and VALLÉE, J., concur.

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125 Cal.App.2d 186

WALTER H. LEIMERT CO.
v.
WOODSON et al.
Civ. 19970.

District Court of Appeal, Second District, Division 2, California.

May 14, 1954.

Action against real estate broker and others seeking to require the conveyance of realty to plaintiff or for damages. The Superior Court, Los Angeles County, Clarence M. Hanson, J., entered judgment of dismissal and plaintiff appealed. The District Court of Appeal, Fox, J., held that complaint alleging that plaintiff employed real estate broker to purchase for plaintiff realty adjacent to realty recently purchased for plaintiff by real estate broker, that real estate broker agreed to act as broker but did so without intending to carry out agreement but to induce plaintiff to rely thereon thus preventing plaintiff from negotiating directly with owner and that defendant purchased the realty in his own name, stated a a cause of action on theory of either actual or constructive fraud.

Judgment reversed.

1. Principal and Agent 🔑48

The relationship of principal and agent is of a fiduciary nature and when acting for his principal an agent must give undivided loyalty and exercise utmost good faith and honesty.

2. Principal and Agent 🔑48

The position of an agent is similar to that of a trustee and his acts are judged with substantially the same degree of strictness as are those of a trustee. Civ.Code, § 2322.

3. Brokers 🔑38(3)

Complaint alleging that plaintiff employed defendant to represent plaintiff in negotiating the purchase of realty adjacent to realty recently purchased by plaintiff with defendant's help, that defendant agreed to act as broker but did so without intending to carry out agreement but to induce plaintiff to rely thereon thus preventing plaintiff from negotiating directly with owner and that defendant purchased the realty in his own name, stated a cause of action on theory of either actual or constructive fraud. Civ.Code, §§ 2224, 2322.

4. Trusts 🔑92½, 109

Where plaintiff allegedly employed real estate broker to purchase realty for plaintiff but real estate broker purchased the realty for himself individually, such agreements are not within statute of frauds and evidence of the employment would be admissible for the purpose of showing the relation between the parties and the fiduciary duties that arose therefrom and to establish a constructive trust based upon the violation of that fiduciary duty. Civ. Code, §§ 852, 1624, subd. 5, 2224, 2322.

5. Trusts 🔑102(1)

A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if property was obtained by actual or constructive fraud through the violation of some fiduciary or confidential relationship.

6. Fraud 🔑12

The mere violation of a contract is not a fraud.

Lehman & Van Buskirk, Los Angeles, for appellant.

Riedman & Silverberg, Long Beach, for respondents.

FOX, Justice.

Defendants' objection to the introduction of any evidence on the ground that the complaint does not state a cause of action was sustained. Plaintiff appeals from the ensuing judgment of dismissal.

The complaint alleges that prior to October, 1949, plaintiff had employed defendant Floyd William Woodson, who was a duly licensed real estate broker, to represent it in the acquisition of a parcel of property in the Norwalk area of Los Angeles County; that shortly thereafter, through the efforts of defendant,[1] plaintiff purchased Lots 224 and 225 of Tract 5348; that pursuant to their agreement, plaintiff paid defendant a commission for his services; that soon after the purchase of these lots plaintiff informed Woodson that it desired to acquire the parcel of land immediately to the southwest of the property it had just purchased, viz., Lot 240 of the same tract; that plaintiff informed Woodson that the acquisition of this lot was necessary in order for plaintiff to fully develop and make use of the other lots previously purchased through his services; that plaintiff would pay defendant a commission in the same manner and under the same agreement as in the previous transaction if he would act as broker for plaintiff; that plaintiff was willing to pay approximately $4,000, or such additional sum as might be necessary, to acquire said lot, and on terms acceptable to the owner. The complaint further alleges that the defendant falsely and fraudulently represented to plaintiff that he would act as broker on its behalf in acquiring said parcel; that he knew the owner but did not believe the owner would be willing to sell; that he would contact the owner and attempt to negotiate a sale on behalf of plaintiff for the commission offered by plaintiff and on the same terms and conditions as in the previous transaction. The complaint also alleges that "at the time defendant made said false and fraudulent representations to plaintiff, he made them without any intention of carrying out or performing same, but, in fact, made such representations and statements in order to induce plaintiff to rely thereon and in order to prevent plaintiff, itself a real estate broker, from attempting to negotiate a sale." Thereafter, and during a period of eight to ten months, it is alleged, plaintiff inquired of defendant whether he was succeeding in inducing the owner of Lot 240 to sell upon the terms outlined; that on each occasion defendant falsely and fraudulently represented that he was trying but had not succeeded in inducing the owner to sell the property, but that he would continue to try; that soon thereafter plaintiff ascertained that defendant had purchased said property in his own name; that said purchase had been made by defendant approximately 60 days after he falsely and fraudulently agreed to negotiate for the acquisition of the property for a commission on behalf of plaintiff. It is alleged that defendants paid approximately $4,300 for the lot. Plaintiff states it is willing to pay this amount, or the actual price defendants paid therefor. Plaintiff prays that defendants be required to convey this property to it upon payment of such sum as they actually paid for it; or, in the event conveyance cannot be had, then for damages.

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[1] Blanche Woodson, the spouse of Floyd William Woodson, is also a defendant and respondent. Reference to "defendant" and "Woodson" indicates Mr. Woodson.

It is conceded that the arrangement with defendant was not in writing. Relying, therefore, on the statute of frauds, Civ. Code, sec. 1624, subd. 5, the position of defendants is that plaintiff's complaint fails to show that it is entitled to any relief. Plaintiff, however, insists its allegations disclose both constructive and actual fraud on the part of defendant and lay a sufficient foundation for a judgment, declaring that defendants are involuntary trustees of the property and that the statute of frauds is not applicable. Plaintiff's position must be sustained.

[1, 2] The Legislature has declared that "One who gains a thing by fraud * * * violation of a trust, or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it." Civ. Code, sec. 2224. Our Supreme Court has held that "A constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud, mistake or the like, or by constructive fraud through the violation of some fiduciary or confidential relationship. (Citations.) Such a trust, imposed upon a partner, agent, or other fiduciary, arises by operation of law, and, accordingly, the statute of frauds is no bar. (Citations.)" Mazzera v. Wolf, 30 Cal.2d 531, 535, 183 P.2d 649, 651. The relationship of principal and agent is of a fiduciary nature. In acting for his principal an agent must give undivided loyalty and exercise the utmost good faith and honesty. Adams v. Herman, 106 Cal.App.2d 92, 98, 234 P.2d 695; Bell v. Scudder, 78 Cal.App.2d 448, 454, 177 P.2d 796; Thompson v. Stoakes, 46 Cal.App.2d 285, 289, 115 P.2d 830; 2 Cal. Jur.2d sec. 104, p. 771. The position of an agent is similar to that of a trustee and his acts are judged with substantially the same degree of strictness as are those of a trustee. Kinert v. Wright, 81 Cal.App.2d 919, 925, 185 P.2d 364; Hickson v. Gray, 91 Cal.App. 2d 684, 686, 205 P.2d 420. In fact, our statutes provide that an agent may not do any act a trustee is forbidden to do. Civ.Code, sec. 2322.

[3] Turning now to an analysis of the complaint, we find it is alleged that plaintiff employed defendant to represent it in negotiations with the owner and in acquiring the ownership of this lot. This was a sufficient allegation of defendant's agency. Sands v. Eagle Oil & Ref. Co., 83 Cal.App. 2d 312, 321, 188 P.2d 782. This was not, however, just the ordinary principal-agent relationship flowing from an initial employment of a real estate broker to represent a purchaser in the acquisition of a piece of property. In the first place, the parties had recently had a similar transaction. It had apparently proven satisfactory and thus served to establish confidence in defendant on the part of plaintiff. As a consequence, plaintiff again employed defendant to represent it in negotiating the purchase of an adjacent lot. In the second place, plaintiff advised defendant of its need for this particu-

lar lot in order to fully develop and make use of the other lots it had purchased through his services. If these allegations are established by the evidence an inference that a fiduciary relationship existed between the plaintiff and defendant would clearly be justified. Defendant's purchase of the property in his own name would obviously be a breach of his fiduciary duty to plaintiff. In addition, actual fraud is charged for it is alleged that at the time defendant represented he would act as broker on behalf of plaintiff he did so without any intention of carrying out his agreement and for the purpose of inducing the plaintiff to rely thereon and thus prevent plaintiff from negotiating a purchase directly with the owner. The complaint therefore contains sufficient allegations to state a cause of action upon the theory of either actual or constructive fraud. Civ.Code, sec. 2224; Sands v. Eagle Oil & Ref. Co., supra, 83 Cal.App.2d 312, 188 P.2d 782; Berenson v. Nirenstein, 326 Mass. 285, 93 N.E.2d 610, 20 A.L.R.2d 1136; Mackey v. Baker, 327 Mich. 57, 41 N.W.2d 331; Harris v. Dunn, 55 N.M. 434, 234 P.2d 821, 27 A.L.R.2d 1277; Harrop v. Cole, 85 N.J.Eq. 32, 95 A. 378, affirmed in 86 N.J.Eq. 250, 98 A. 1085; Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173; Lamb v. Sandall, 135 Neb. 300, 281 N.W. 37; Oetken v. Shell, 168 Kan. 244, 212 P.2d 329; Rest. of Restitution, sec. 194(2).

[4] It is the defendant's position that since his employment was not in writing no evidence thereof may be received. If he were seeking to establish such a parol agreement for the purpose of collecting a real estate commission that position would be impregnable for the purpose of the statute was to prevent fraudulent claims in such circumstances. But here the evidence of the employment is to be offered not for the purpose of establishing an enforceable agreement, but for the purpose of showing the relation between the parties and the fiduciary duty that arose therefrom and to establish a constructive trust based upon the violation of that fiduciary duty. Evanoff v. Hall, 310 Mich. 487, 17 N.W.2d 724, 726; Mitchell v. Allison, 51 N.M. 315, 183 P.2d 847, 848; Quinn v. Phipps, supra, 113 So. 423; 3 Scott on Trusts, sec. 499; Pomeroy, Eq.Juris. (5th Ed.) sec. 1056b. In the comment on this point, under subsection 2 of section 194, Restatement of Restitution, it is said that "Where one person orally undertakes to purchase land on behalf of another, it may be urged that the other cannot enforce a constructive trust because the undertaking is oral and there is no compliance with the provisions of the Statute of Frauds. The answer to this objection is that the other is not enforcing an oral contract, but is enforcing a constructive trust based upon the violation of fiduciary duty * * * The rule is applicable * * * where a person is employed professionally to purchase the property for the employer, as in the case of a real estate broker, * * *" Such agreements are not within the statute of frauds. Civ.Code, sec. 2224; Harris v. Dunn, supra; Harrop v. Cole, supra; Williston on Contracts, rev. ed., Vol. 4, sec. 1024; 54 Am.Jur., Trusts, sec. 237. If they were, that would make the statute an instrument of fraud (Heard v. Pilley, 4 Ch.App.L.R. 548, 552), and thus protect fiduciaries in their wrong doing. Such was never the purpose of the statute of frauds. A constructive trust is created by operation of law in such circumstances in order to avoid injustice. Such a trust need not be in writing. Civ.Code, sec. 852; Stromerson v. Averill, 22 Cal.2d 808, 815, 141 P.2d 732.

[5, 6] Defendants rely upon Mazzera v. Wolf, 30 Cal.2d 531, 183 P.2d 649; Bradley v. Duty, 73 Cal.App.2d 522, 166 P.2d 914; Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854; Elliott v. Wood, 95 Cal.App.2d 314, 212 P.2d 906; Sweeley v. Gordon, 47 Cal. App.2d 381, 118 P.2d 14; and Bauman v. Wuest, 32 Cal.App. 217, 162 P. 434. None of these decisions justified the ruling in the instant case. In the Mazzera case there was "no claim of actual fraud". The trial court found on substantial evidence that "there was no partnership or confidential relationship." The court simply held that "the mere failure to perform an oral promise to convey real property is not itself fraud". Hence such an "agreement will be held unenforceable under the statute of frauds in the absence

of actual or constructive fraud." However, the court pointed out, as previously noted, that a "constructive trust may be imposed when a party has acquired property to which he is not justly entitled, if it was obtained by actual fraud * * * or by constructive fraud through the violation of some fiduciary or confidential relationship." It is this latter principle that specifically applies to the instant case in view of the alleged agency relationship and charge of actual fraud. In the Bradley case, supra, plaintiff pleaded a resulting trust, and the findings and judgment were upon that theory. There was "no proof of a fraud" and under the complaint such evidence was not admissible. The court follows the established principle that "the mere violation of a contract is not a fraud." 73 Cal.App.2d at page 525, 166 P.2d at page 916. In the Neet case, supra, relief was denied to the plaintiffs on the theory of laches. No such problem is here presented. In the Elliott case, supra, there was "neither proof of actual nor constructive fraud". 95 Cal. App.2d at page 317, 212 P.2d at page 908. The decision simply follows the rule of the Mazzera and other similar cases that the mere failure to perform an oral promise to convey real property is not a fraud and a constructive trust cannot be founded on such fact alone. In the Sweeley case, supra, plaintiff, a real estate broker, sought to recover a commission for the sale of an apartment house without having secured proper written authorization. He relied upon the oral promise of defendant. Obviously he ran squarely into Civil Code section 1624, subdivision 5, and lost. That case has no pertinency here. The Bauman case, supra, was predicated on a resulting trust theory. Civ.Code, sec. 853. There were no allegations of fraud, either actual or constructive. There is no reference to Civil Code section 2224 defining an involuntary trustee or to other sections of the Civil Code relating to constructive trusts. That question does not appear to have been considered.

The judgment is reversed.

MOORE, P. J., and McCOMB, J., concur.

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125 Cal.App.2d 253

MARSHALL et al. v. LA BOI et al.

Civ. 15420.

District Court of Appeal, First District,
Division 1, California.
May 18, 1954.

Action by contractor for breach of contract and to foreclose mechanic's lien on home, and by architects for breach of contract. Contractees counterclaimed for breach of contract. The Superior Court, San Mateo County, Edmund Scott, J., granted nonsuit in defendants' action and rendered judgments for plaintiffs and defendants appealed. The District Court of Appeal, Peters, P. J., held that where contractees, not of class to be benefited by federal building regulations, conceived idea of inducing government to issue them permit they could not otherwise secure by using a nephew veteran as a subterfuge, and misled contractor and architects to join them, innocently, in applying for such permit, and received $120,000 in value from contractor and architects, contractor and architect were entitled to affirmative relief, even though they were not of the class to be benefited by regulations, and were not limited to relying on their innocence as a defense.

Judgments affirmed.

1. Contracts ⟹141(3)

In action by contractor and by architects to recover for breach of contracts to build home, evidence supported implied findings that neither contractor nor architects had knowingly participated in defendants' efforts to circumvent federal building regulations. Second War Powers Act of 1942, 50 U.S.C.A.Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S.C.A.Appendix, § 1821 et seq.

2. Contracts ⟹138(1)

An architect or a contractor who knowingly participates with a contractee in committing a fraud on the government so as to build a home in violation of federal building regulations would be unable to recover for work done and materials used. Second War Powers Act of 1942, 50 U.S.C.A. Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S.C.A. Appendix, § 1821 et seq.

3. Contracts ⚷139

In a proper case, where a regulatory statute prohibits certain acts in order to protect members of a class, and a third person without knowledge of the law enters into a contract in violation of that statute to the injury of a member of class protected, the member of the class may recover on the contract and a third person may not.

4. Contracts ⚷139

Where defendants, not of a class to be benefited by federal building regulations, conceived idea of inducing government, by using the nephew veteran as a subterfuge, to secure a building permit which they could not otherwise secure, and induced contractor and architects to join them, innocently, in applying for such permit and received $120,000 in value from contractor and architect, contractor and architect were entitled to affirmative relief, even though they were not of class to be benefited by regulations. Second War Powers Act of 1942, 50 U.S.C.A.Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S.C.A.Appendix, § 1821 et seq.

5. Army and Navy ⚷51

Prior to effective date of Housing Expediter Priorities Regulation V, there was no limitation on cost of new housing although regulation limited the resale price of any proposed housing, and fact that contemplated house was to cost more than $10,000 did not render contract to construct house, or the permit to do so, illegal. Second War Powers Act of 1942, 50 U.S. C.A.Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S. C.A.Appendix, § 1821 et seq.

6. Contracts ⚷139

That trial court granted contractor and architects nonsuit on ground of illegality of contract, in contractees' action for breach of contract to build home, but denied same relief to contractees in respect to contractor's and architects' action for breach of same contract was not inconsistent, where contractor and architect were innocent parties whose rights were not affected by illegality of contractees' acts in procuring building permit.

7. Contracts ⚷137(1)

Where contract to build home is made within effective period of and in violation of federal building regulations, and some of work on building is done before relaxation of regulations and some after, the contract would be severable as to the work done before and after relaxation of regulations and contractor and architect would be entitled to recover for the latter work even if contract were illegal in its inception. Second War Powers Act of 1942, 50 U.S.C.A.Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S.C.A.Appendix, § 1821 et seq.

8. Appeal and Error ⚷1068(1)
Contracts ⚷353(5)

In action by contractor and architects for amounts due on contract to build home, wherein defendants alleged that contract was illegal as in violation of federal building regulations, trial court should have instructed jury that contract was not rendered illegal by fact that projected cost would exceed $10,000, there having been then no limit on cost of construction, but error was not prejudicial where jury returned verdict for contractor and architects. Second War Powers Act of 1942, 50 U.S.C.A. Appendix, § 631 et seq.; Veterans' Emergency Housing Act of 1946, 50 U.S.C.A. Appendix, § 1821 et seq.

9. Mechanics' Liens ⚷290(5)

Trial court's findings, in contractor's suit to foreclose mechanics' lien on house, that contract to build house was in violation of federal building regulations but that contractor was only slightly at fault, if at all, with respect to such illegality, was not inconsistent with jury's implied finding, in contractor's action for breach of contract, that contractor was innocent of wrongdoing and could recover.

10. Appeal and Error ⚷1069(1)

That some members of jury in contractor's and architects' action for breach of contract to build house read newspaper articles which referred sarcastically to evidence that had been introduced as to luxury features in the house was not prejudicial.

11. Trial ⚷317

A party who discovers, during trial, that jury members have read allegedly prejudicial matter and who makes no objection, waives objection to such misconduct, and cannot urge the objection for the first time after he suffers unfavorable verdict.

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Theodore Golden, J. Bruce Fratis, Robert N. Stefan, Oakland, Julius M. Keller, San Francisco, for appellants.

Pillsbury, Madison & Sutro, John A. Sutro, Francis N. Marshall, G. H. Eckhardt, Jr., San Francisco, for respondent Frank S. Marshall.

James Martin MacInnis, San Francisco, for respondents Wurster et al.

PETERS, Presiding Justice.

The litigants involved in the various appeals here presented are:

Frank S. Marshall, a general contractor engaged in the building construction business, a respondent.

Wurster, Bernardi & Emmons, a copartnership of architects, and respondents.

Sam F. Termini and Alyce C. Termini, husband and wife, who built a home in Hillsborough, and who, directly or indirectly, employed Marshall as contractor, and the Wurster partnership, as architects, to design and construct the house. The Terminis are appellants herein.

Jesse LaBoi, nephew of the Terminis, and world war veteran, also an appellant.

The house involved cost well over $300,000. When it was nearly completed disputes arose between the parties, and the Terminis refused to pay Marshall and the architects large balances claimed to be due. These disputes resulted in the filing of the various actions here involved. Several pleadings and amended pleadings were filed. Only the final amended pleadings appear in the transcript. These need not be summarized in detail because of the limited nature of the issues presented on these appeals. Suffice it to say that from these pleadings it appears that the first action was brought by Marshall against LaBoi and the Terminis to foreclose Marshall's mechanic's lien, and for breach of contract. In addition to the filing of the lien, this pleading alleged the making of a written contract with LaBoi, who, it is averred, acted as agent for the Terminis, LaBoi being charged with being the record owner of the property and the Terminis the true owners, the breach of that contract, and the claim that $104,435.88[1] was due and owing under it. The Terminis filed an answer and cross-complaint. It was stipulated that the answer should also be deemed to be that of LaBoi. In their answer the Terminis admitted the terms of the contract as pleaded by Marshall, alleged that the work had not been performed as required by the contract, and that Marshall had breached the contract in several respects. As one affirmative defense it was alleged that the contract and the work performed under it were illegal, being in claimed violation of certain pleaded federal statutes and the regulations adopted thereunder. By their cross-complaint the Terminis sought not only to defeat Marshall's recovery of any sum, but also sought damages from him for the claimed breach of his contract to keep the costs as low as possible. By this cross-complaint the Terminis also brought in the Wurster firm as new parties, alleging an oral agreement with the architects to pay them ten per cent of the building costs to plan and supervise the construction of the house, and praying for damages for the claimed breach of that contract. In addition, the Terminis asked damages based for an alleged fraudulent conspiracy between Marshall and the Wurster firm to maintain an artificially high construction cost. This pleading of the Terminis admitted that the construction of the house had started September 19, 1946.

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[1] At the trial by stipulation this sum was reduced to $103,079.10, the amount awarded Marshall by the judgments.

Marshall filed an answer denying the allegations of the cross-complaint, as did the Wurster firm. In addition, the architects cross-complained against the Terminis for breach of their contract for architectural services, it being averred that a balance was due and owing to them of $16,319.42, the precise amount of the judgment later entered in their favor. No further basic pleadings are included in the transcript, although it is assumed by all the litigants that the Terminis properly pleaded the defense of illegality against the Wurster firm. Certainly, the case was tried on that theory, and it will be hereafter assumed that such issue was properly raised by a proper pleading.

Thus, under the pleadings, the cases involving Marshall presented an equitable action for the foreclosure of a mechanic's lien, and legal actions for breach of contract and conspiracy. The cases relating to the Wurster firm involved legal actions involving breach of contract and conspiracy.

The legal actions were tried before a jury. At the close of the presentation of the evidence on behalf of Marshall and the Wurster firm, motions of nonsuit made by the Terminis based on the claimed illegality were denied. But after the Terminis had rested their cases, motions for nonsuit directed against the Terminis' cross-complaints for breach of contract made by Marshall and the Wurster firm were granted on the ground that Termini had admitted that he had consciously engaged in an illegal transaction.

There was then submitted to the jury the questions of breach of contract, conspiracy and common counts for work, labor and material furnished pleaded by Marshall and the Wurster firm, and the affirmative defenses of breach of contract and illegality raised by the Terminis. The jury returned verdicts in favor of Marshall for $103,079.-10, plus interest, against LaBoi and the Terminis, and against the Terminis and in favor of the Wurster firm in the amount of $16,319.42. Judgment was entered on these verdicts. Thereafter, the trial court, on the same evidence, entered its judgment in favor of Marshall in the foreclosure proceeding. Thereafter, the Terminis moved for new trials in all the actions. The trial court denied the motion as to Marshall but purported to grant it as to the Wurster firm on the ground of insufficiency of the evidence on the issue of illegality. This order was made, however, more than sixty days after notice of entry of the judgments, and so was admittedly ineffectual. As a result the motions for a new trial were denied as a matter of law. The Terminis and LaBoi have appealed from the judgments.

A large portion of the lengthy reporter's transcript is devoted to evidence relating to the claimed breaches of contract, to the value of the services rendered, and to the claimed conspiracy. These issues are not involved on these appeals. Appellants now urge only that the contracts and work performed thereunder were illegal, error in the instructions on illegality, and that there was misconduct on the part of the jury. In other words, on these appeals it is admitted that the evidence supports the implied and express findings that appellants breached the contracts, and that the damages recoverable, if not barred by illegality, are in the amounts fixed in the judgments. Appellants likewise concede that the contracts were illegal, being in violation of the federal statutes and regulations. It is their theory that respondents are barred because they participated in such illegality.

On the illegality issue, the statutes involved are the Second War Powers Act of 1942, as amended, 6 U.S. Stats. at Large, p. 176, and the Veterans' Emergency Housing Act of 1946, as amended, 60 U.S. Stats. at Large, p. 207. Under these statutes, particularly the last, in an attempt to meet the problems caused by the housing shortage resulting from the war, and to aid veterans, an office of housing expediter was created with power by regulation to "establish maximum sales prices for such housing accommodations", and to issue regulations so as to insure that scarce building materials would be used in construction of veterans' homes. Pursuant to the powers conferred by these statutes, various regulations here relevant were issued. It is not necessary to summarize these regulations and their various amendments in detail. Suffice it to say that under a regulation designated Veterans' Housing Program Order No. 1, and under Priority Regulation No. 33 a permit to construct a residential structure was required, and permits could only be secured by a veteran for his own occupancy or by a builder who agreed to sell or rent to veterans. No permit would or could be granted, in some situations, where the maximum sale price for a one-family unit exceeded $10,000. Undoubtedly, it was the policy of the F.H.A. not to issue permits where the cost of construction was in excess of $10,000, but at all times here pertinent there was no statutory provision or regulation expressly limiting the cost of construction to $10,000 or to any other sum. Such provision did not become applicable until late in 1946 when Housing Expediter Priorities Regulation 5 became effective. It expressly provided that the estimated cost of the building could not exceed the maximum sale price. It also provided, however, that this regulation was not applicable where priorities and authorization had already been granted pursuant to Veterans' Housing Program Order No. 1, and Priority Regulation No. 33. For this reason appellants now admit that Housing Expediter Priorities Regulation 5 has no application to this case. Violators of the statute or regulations were made subject to criminal and civil penalties. So far as pertinent here, all the relevant statutes and regulations were repealed as of June 30, 1947, 50 U.S.C.A.Appendix, §§ 631 et seq. and 1821 et seq.

The theory of appellants is that the contracts with the contractor and architects violated the applicable statutes and regulations in two respects: First, that the regulations limiting priority permits to cases where the property was to be owned by or rented to or sold to veterans were violated by the use of LaBoi as a dummy, and secondly, that, under the regulations, permits could not be issued where the cost of construction as well as the sales price exceeded $10,000, and that such provisions were here violated.

Before considering these points a brief resumé of the evidence should be made with particular emphasis on those facts relating to illegality.

Early in 1946 the Terminis owned a building lot in Hillsborough. They approached the Wurster firm and orally agreed to hire that firm for the usual ten per cent fee to plan and to supervise the construction of a house for them. Through the efforts of the architects Marshall was brought into the transaction as general contractor. He entered into a written contract with LaBoi, nephew of the Terminis, and a veteran, to construct the building on a cost plus basis. Construction started on September 19, 1946, before final plans and specifications had been drafted. The house was built in sections, two separate permits being secured from the federal authorities. From the start of construction, the Terminis, through the architects, ordered numerous changes, usually involving custom-made luxury items made of very expensive materials. This caused delays and increased the final cost far beyond the original intent of the parties. In the latter part of 1947 serious disputes arose between the parties over the delay and increased costs.

Marshall has been a licensed building contractor for many years. Prior to the transaction here involved he had worked under the supervision of the Wurster firm on about fifteen jobs. Construction of this job continued until just before Christmas of 1947, when it was stopped by the Terminis, who had moved into the partially completed house, and who did not want construction work continued during the Christmas period. When Marshall attempted to renew construction in January of 1948, the Terminis ordered him off the job. The house was then eighty-two per cent complete. When Marshall left the job he had been paid $165,478.10 in periodic progress payments as provided in his contract, the last such payment having been made on December 23, 1947, in the amount of $5,000. These are the general facts. Some of them should be set forth more fully.

There is no dispute over the existence and terms of the architects' oral contract and the contractor's written contract, these matters being admitted by the pleadings. The architects' oral contract was with the Terminis. By it the architects agreed to render architectural services in return for a fee based on ten per cent of the cost of labor and material used on the job. Computed on this basis, and deducting a percentage for unperformed supervision, the architects' fee amounted to $30,994.25, of which $16,319.42 was claimed and adjudged to be due.

Marshall's written contract was dated July 11, 1946, and was with LaBoi, it being conceded that all concerned expected the Terminis to pay the bills. It called for costs of labor and materials, plus ten per cent overhead, plus ten per cent additional for supervision of the subcontractors. It provided for monthly progress payments in architects' certificates, but only to the extent of seventy-five per cent of "labor and materials actually incorporated in the work during the preceding calendar month" with the remaining twenty-five per cent payable thirty-five days after completion and acceptance of the building and its delivery free of liens. Under this provision all progress payments were paid by the Terminis until March of 1947. In that month Termini offered to eliminate the withholding provision, but Marshall only accepted this offer of modification by reducing the withholding from twenty-five per cent to ten per cent. Progress payments were thereafter made until December of 1947 subject to the ten per cent withholding. Marshall's contract required him to secure all necessary permits and to operate in conformity with "all applicable laws and regulations."

The contractor and the architects stand in different legal relationships to the transaction. Marshall is, of course, an independen contractor, while the architects are the agents of the owners at least in arranging for the construction contract, issuing progress certificates, supervising the work, and in approving subcontractors.

The architects first came into the transaction in March of 1946. Most of the negotiations on the part of the architects were handled by Theodore Bernardi, one of the partners in the Wurster, Bernardi & Emmons firm. Bernardi testified that the Terminis called upon him on March 8, 1946. He then knew that houses could only be built for veterans under F.H.A. permit and that such houses were limited by a resale regulation. He told the Terminis that, since neither was a veteran, the house could not be built for them because of these restrictions. The Terminis stated that they had a nephew, LaBoi, by name, who was a veteran, and who would be living with them when the house was completed. Bernardi and Emmons, another partner, testified that they accepted this statement as the bona fide intention of the Terminis, and believed it. Several conferences were held, resulting in the oral contract between the architects and Termini which was entered into in May of 1946. About this time the parties agreed that to comply with regulations it was necessary to build the house in sections except as to excavations and the foundation, which were not subject to federal regulations. Bernardi testified: "But Mr. Termini wanted to build a portion of the house that would come within the regulation of size as laid out by the F.H.A. In other words, that he had to get a permit, and he pointed out that his nephew, Jesse LaBoi, living somewhere in the Middle West, was a GI, and that he expected him to come out here and live with him, and he wanted to build this house, that it would be for Mr. and Mrs. Termini and this nephew; so that he would make application in his [LaBoi's] name, and all the papers and drawings were carried out and made accordingly."

Bernardi admitted that at all times his firm looked to the Terminis for payment, and, indeed, the contract pleaded by the architects was one directly with Termini. But Bernardi also testified that it was not unusual for an architect to build a house for one man while another paid the costs. He stated that at all times the architects believed in good faith that the Terminis and LaBoi were going to occupy the house as owners.

On May 22, 1946, the Terminis deeded the property in Hillsborough to LaBoi. Termini testified that the architects had suggested the plan and had also suggested he take a deed back from LaBoi and not record it, which he did. The architects denied advising or participating in this transaction. The jury obviously did not believe Termini in this respect.

Marshall testified that he came into the transaction in June of 1946 when, as a result of a telephone call from the architects, he met with the Terminis, Bernardi, and Rossi, an employee of the architects. He was then told that the house was to be built for LaBoi and the Terminis, who intended to live together. He was shown a preliminary drawing of the completed house but was told that only the "first portion" of the house was to be constructed at that time. No discussion was then had of veterans' priorities, or of who was going to pay for the house, or as to who LaBoi was, or where he then lived. Bernardi testified that this meeting occurred on June 25, 1946, that he then showed Marshall the preliminary sketches of the entire house, that he explained that Termini was to pay for the house, but that it was to be built for Termini's nephew, who was a veteran and who was to live with the Terminis. Marshall stated the terms upon which he would accept the job, and the meeting adjourned.

The architects made no investigation of Termini's credit rating, stating that they accepted Termini's statements to them of his ability to pay, and Marshall made no investigation of LaBoi, or of the Terminis, stating that because of his past relationships with the architects he relied upon them to protect him.

Marshall, after this June meeting, without further conversations with the architects, signed a blank form contract about July 11, 1946, naming LaBoi as the owner contracting party, and himself as contractor, and mailed it to the architects. He received back a copy with LaBoi's name typed in the place for the owner to sign. The date on this contract remained blank. Neither a starting nor a completion date was provided in the contract. Bernardi testified that he mailed the original contract to Termini for transmission to LaBoi, and was later informed by Termini that LaBoi had properly executed it. Termini testified that he signed LaBoi's name to the contract in Marshall's presence. This was denied by Marshall. A handwriting expert testified that the LaBoi signature on the Marshall contract was the same as the signature of LaBoi on another document that had admittedly been signed by LaBoi. This conflict has been resolved by the jury against Termini.

There is much conflict in the record as to when the plans and specifications were actually drawn. Marshall testified that he did not receive such plans and specifications until September of 1946, having seen preliminary sketches without working dimensions prior to that time. When he signed the contract in July he knew nothing of such luxury items as a marble bathtub, jeweled faucet handles, an underground den, an electronically controlled disappearing safe, extra fireplaces, aluminium encased windows, and many other items later ordered by Termini. Bernardi testified that preliminary sketches were first made of the entire house and then the small portion intended to be first built superimposed on the preliminary sketches. After the first preliminary sketches were made in May, Termini kept adding luxury features, so that the plans kept being changed. The first portion of the house to be built included a rumpus room with cooking facilities, the master bedroom, bathroom, and a glassed-in corridor. The other rooms to be built later were merely sketched in to locate them on the drawings.

Bernardi testified that the Terminis at first wanted to copy a house in Burlingame, which he inspected, and then told them that it would cost between $125,000 and $150,000 to duplicate. As the plans developed, rooms were deleted from the original rough plans. On July 18, 1946, Bernardi, in writing, estimated the cost of the first portion of the house as then planned at $55,000. Marshall did not know of this estimate. Bernardi stated that much of this estimate included luxury decorative items as to which there were no priority controls. Termini kept stating that cost was no object and kept developing new and expensive ideas.

The first application for a federal permit was made by the architects in the name of LaBoi sometime in July of 1946. Marshall knew none of the details. All he knew was that on October 11, 1946, he received from the architects a project serial number issued by the federal government to be used to secure the few priority materials required on the job. Bernardi testified that he took the preliminary drawing of the entire house on which the small portion to be first built had been superimposed, filled out the necessary forms required by the F.H.A., and sent these documents to Termini for him to send to LaBoi for signature. Termini furnished Bernardi with the essential information about LaBoi, including his veteran status. Termini returned the documents, apparently properly signed, and Bernardi mailed them to the F.H.A. on July 18, 1946. This application was rejected "for the reason that the sales price does not bear reasonable relationship to the proposed accommodations, and exceeds $10,000 for one family dwelling unit." Thereupon, Bernardi omitted a bathroom and the garage from the plans and the request, and reapplied on the reverse of the original application. This time the application was granted. On the original application where value of the improvement was to be listed Bernardi inserted "To be built by self." This was crossed out by someone, apparently in the F.H.A. office, and "10,000" inserted in pencil.

Construction started in September, 1946. According to Marshall the house was built in three sections, with three separate pours of the foundation, the house expanding as federal regulations lightened. When completed, the house, in addition to the first section, contained two more bedrooms, a large living room, a dining room, kitchen, garage, an underground den and a bathroom for LaBoi's child. Marshall testified that when he started construction he was retained to build only the first portion of the house, and that he then had no intent of building a completed house. He admitted that he knew the first portion could not be built for $10,000. Bernardi testified that in November of 1946 Marshall gave him an estimate of $37,515 as the construction cost for the first unit, while Marshall's foreman estimated such cost at $43,175. Bernardi further testified that the house grew as Termini kept changing his mind and ordering expansions, and as building regulations were removed. He testified that he tried to follow the restrictions in the permits, and made changes only as regulations were lifted. By June of 1947 all regulations were lifted.

Quite early in the meetings between the Terminis and the architects discussions arose as to where LaBoi was to live in the first unit to be constructed. Bernardi stated that it was agreed that LaBoi could sleep on a couch in the playroom, and his son could sleep in a temporary room to be constructed in a hallway. This tends to support the contention of the architects that they believed in good faith that LaBoi and his son were to be bona fide residents in the house.

By February, 1947, it was necessary to file a second application with the F.H.A. to secure approval for the second portion of the house. By this time regulations as to cost of construction had been repealed, the only restriction being as to area. Bernardi sent to Termini a suggested letter to be signed by LaBoi to constitute the application to build a basement and a garage, the proposed letter stating that the garage was necessary to store LaBoi's automobile and for storage of his goods pending construction. Bernardi testified that he then honestly believed LaBoi was going to live there as the true owner. The second application was necessary to secure priorities on steel beams to be used in the construction. This letter estimated the cost of the extensions at $3,500. Termini admitted that he signed LaBoi's name to this application, which was confirmed by a handwriting expert. It was sent to the F.H.A. and the permit granted. Marshall testified that he had no knowledge of the circumstances surrounding the making of this application, but was furnished the information necessary to secure materials by the architects.

Until December of 1947, when construction was terminated, there were monthly progress billings by Marshall and payments by the Terminis. These payments to Marshall were based on architects' certificates. Every bill was paid by the Terminis, including the October, 1947, billing, up to the November, 1947, billing. Bernardi testified that all payments sued for by the architects and contractor accrued in the fall of 1947 and after all building restrictions had been removed by the government. In the billings made by Marshall from November of 1946 through March of 1947 LaBoi was listed as the debtor, although Termini made the payments, usually in cash. Starting April 7, 1947, the name of Termini was substituted in such billings, because Termini was actually making the payments. Marshall, Bernardi, and Emmons all testified that all during construction they honestly believed they were building the house for LaBoi with the Terminis paying the bills, such practice being not uncommon. They knew that Termini was exercising complete control over construction details and even as to modifications of the contract itself. Neither the architects nor the contractor ever saw or directly communicated with LaBoi, but they testified that they did not become suspicious until December of 1947, when the Terminis moved into the house, then still uncompleted, without LaBoi.

On these facts the jury brought in verdicts of $103,079.10 in favor of Marshall against the Terminis and LaBoi, and of $16,319.42 in favor of the architects against the Terminis. By these verdicts the jury determined that the contracts and work done thereunder were not illegal so far as the architects and contractor were concerned, or that Marshall and the architects were not *in pari delicto* with the Terminis. These verdicts were rendered May 22, 1951, and judgment on the verdicts entered the same day.

It will be remembered that the equitable action to foreclose Marshall's mechanic's lien was tried at the same time as the legal actions above discussed. On November 1, 1951, the trial court entered its judgment for the foreclosure of Marshall's mechanic's lien. This judgment was supported by findings and conclusions signed the same day. In its findings the trial court first found the major allegations of Marshall's complaint to be true and the allegations of the Terminis' and LaBoi's answer to be untrue, that the work was performed in the amount fixed by the jury, and that the contract had been breached by LaBoi and the Terminis. In reference to the defense of illegality, the court found that LaBoi in the Marshall-LaBoi contract was acting on behalf of the Terminis, that the work performed and materials furnished under it "were in violation of the Second War Powers Act of 1942, * * *, Veterans' Emergency Housing Act of 1946, * * *, Priorities Regulation 33, Veterans' Housing Program Order 1 and Housing Emergency Permit Regulation No. 5" but that on entering into the contract and performing the work Marshall "was not *in pari delicto* with defendants Jesse LaBoi, Sam F. Termini, also known as Sam Murray, and Alyce C. Termini or any of them; that said defendants and each of them were grievously at fault and that plaintiff, Frank S. Marshall, was only slightly at fault, if at all. In addition, this court finds that plaintiff, Frank S. Marshall, was not guilty of moral turpitude, whereas each of said defendants was.

"Also, if plaintiff, Frank S. Marshall, is denied relief the loss he will suffer is wholly out of proportion to the requirements of public policy.

"This court further finds that plaintiff, Frank S. Marshall, was ignorant that the above-mentioned contract and the work performed and materials supplied thereunder were in violation of the above-mentioned federal laws and regulations, and that such ignorance was fostered and encouraged by defendants Jesse LaBoi, Sam F. Termini, also known as Sam Murray, and Alyce C. Termini."

[1, 2] The facts above set forth demonstrate that the implied findings of the jury in the legal actions that neither Marshall nor the architects knowingly participated in any illegal transaction are amply supported by the record. These facts disclose that the Terminis wanted and got a most ornate, luxurious and expensive home. On this appeal they now admit that they have received value of almost $120,000 for which they have not paid. The contractor has furnished material, time and money (by paying subcontractors) of $103,000 plus,

for which he has not been paid. The architects have furnished time and effort valued at $16,000 plus, for which they have not been paid. The Terminis now admit that they have received these valuable services, that the services were worth that much, but urge that they knowingly committed a fraud on the government, knowingly engaged in an illegal transaction, but should be successful in avoiding payment because Marshall and the architects participated with them in violating the law. Of course, if this were true, neither Marshall nor the architects could recover. If they knowingly participated in a violation of the law such participation would bar them, regardless of how disproportionately this might benefit the Terminis. But whether they acted knowingly was a factual question. It has been resolved by the jury against the appellants. It must be remembered that appellant Termini was impeached by evidence of prior falsehoods and by his admitted forgery.

The parties discuss at length, and ably, the various phases of the law applicable to the doctrine of illegality. Many cases are cited on the subject. But extended reference to them is not required. Here the illegality asserted is that Marshall and the architects violated the federal law in participating in the building of a house for a non-veteran, and exceeded the assumed cost limitations of the regulations.

So far as the veteran provision is concerned, there can be no doubt that the Terminis at all times intended to construct a house for themselves, and that they used LaBoi as subterfuge to avoid the applicable federal restrictions. Termini testified that he never intended that the house should be built for his nephew. There is also evidence that would have supported an implied finding of the jury, had it been made, that Marshall, and certainly the architects, knew or should have known that the use of LaBoi's name was a subterfuge. Had the jury so found, this probably would have barred respondents from affirmative relief. Young v. Hampton, 36 Cal.2d 799, 228 P.2d 1, 19 A.L.R.2d 830. But the jury found to the contrary, and there is substantial evidence to support that finding. Marshall testified that he contracted with LaBoi in the good faith belief that he was to reside in the house with the Terminis as one of the owners. The architects testified that they contracted with the Terminis in the good faith belief, based on the representations of the Terminis, that LaBoi and his son were to become bona fide residents in the house. The jury believed Marshall and the architects. Thus, so far as this claim of illegality is concerned, the case is one where the Terminis misrepresented LaBoi's status to the respondents, were successful in convincing them of the truth of their misrepresentations, and now contend, in a suit between the respondents and themselves, that they can avoid paying for what they have received because they were successful in deceiving the government and the respondents. Certainly, the doctrine of illegality was never intended to operate in that fashion. The respondents, according to the supported findings of the jury, were innocent participants in the fraud.

[3] The appellants contend that, since the permits were secured by permitting a fraud upon the government by misrepresenting the status of LaBoi, the contracts of respondents (entered into before the fraud was committed) and the work done under them and under the fraudulently secured permits, were illegal, and that even if respondents had no knowledge of the illegality, they are barred from recovery because of such illegality. In this connection it is pointed out that the statutes and regulations were passed to protect veterans against contractors and architects, and that in such a case ignorance of the illegality by one not of the class intended to be benefited is immaterial. It is undoubtedly true that, under a proper state of facts, where a regulatory statute prohibits certain acts in order to protect members of a class, and a third person without knowledge of the law enters into a contract in violation of that statute to the injury of a member of the class protected, the member of the class may recover on the contract, and the third person may not. Thus in Elmers v. Shapiro, 91 Cal.App.2d 741, 205 P.2d 1052, where an exchange of real

properties was effected with a veteran in violation of the maximum price fixed under the Veterans' Emergency Housing Act of 1946, and the veteran sued to recover the overcharge, it was held that the good faith of the third person or his lack of knowledge of the illegality were immaterial factors. The case held that from the defendant seller's standpoint, good faith, even in the form of reliance on the representations of government officials, was no defense under the act. That case involved an action for an overcharge by a veteran, a member of the class protected by the statute, against a seller of property, a member of the class the statute was intended to protect the veterans against, and involved the direct provisions of the statute granting a civil remedy to the veteran without mentioning that the violation must be willful, although the criminal provision of the statute expressly required the violation to be "willful." The case is not in point.

[4] Appellants also urge that, although respondents were innocent of wrong, since illegality is involved, and since respondents are not of the class benefited by the statute, they cannot secure affirmative relief, although they might have urged innocence as a defense. This may be the law under some circumstances. But where one party, Termini, not of the class intended to be benefited, conceives the idea and executes it of using a veteran nephew as a subterfuge so as to induce the government to issue him a permit that he otherwise could not secure, and where such party then defrauds and misleads other parties, the respondents, also not members of the class intended to be benefited, and induces them to join with him, innocently, in applying for such permit, and then the first party receives value of about $120,000 from respondents, it would be a strange doctrine that would hold, in an action between the guilty party and the innocent parties, that the innocent parties are barred from affirmative relief because of such innocent participation. That is not and should not be the law.

[5] The other claimed violation is of the federal regulations. Appellants claim and assume that there was a $10,000 limitation as to cost as well as to resale price. That is not so. The provisions of the regulations applicable when the two permits here involved were granted contained no limitation at all as to the *cost* of construction. The basic regulation is Priority Regulation No. 33. The pertinent subdivisions of that order in force when the contracts here involved were entered into, and when the permits were granted, provided:

"(1) Applications for authorization under Veterans' Housing Program Order 1 or for priorities assistance under this regulation or both may be made by the following:

> "(i) A veteran of World War II or a member of the Armed Forces who wishes to build, alter or repair a house for his own occupancy. *A proposed sales price* (except in cases of farmhouses) must be stated, if the application covers the construction of a house, to be applicable in case of sale of the house.
>
> "(ii) A person who wishes to build, complete or convert moderate or low-cost dwelling accommodations * * * to which veterans of World War II and members of the Armed Forces will be given preference in selling or renting. *The maximum sales price* for applications of this sort may not exceed $10,000 for a one-family dwelling or $17,000 for a two-family dwelling. * * *

"(c) If the application satisfies the requirements indicated in paragraph (b) and any applicable regulations of the National Housing Agency, if the proposed accommodations meet the standards as to space, accommodations and the like which are customary in the community for year-round occupancy, *if the proposed sales prices* or rents (where required) are reasonably related to proposed accommodations, and if the available supply of building materials reserved for the program or for the appropriate part of the program has not been fully committed, the application may be approved." (Italics added.) The complete lack of any cost limits as to homes built by the owner for his own occupancy is apparent. There is a requirement that in such cases a resale price be fixed, and, in the case of construction for resale to veterans, such resale price was limited to $10,000, except in special and hardship cases, but there was no limitation at all as to the cost of houses to be constructed for owner occupancy. Thus, under the regulations, there was no limitation at all on cost of construction, at most, there being a $10,000 limit on resale price in some cases. The first time the federal regulations fixed a cost of construction limitation was upon the adoption of Housing Expediter Priorities Regulation 5. Appellants now concede that this regulation has no application to the permits here involved, or to this case. Thus, the situation is one where the F.H.A. had the power to grant a permit regardless of the cost of construction, the only legal limitation being that, in some cases, the permittee had to agree to a resale price of $10,000. Thus, so far as this claim of illegality is concerned, as a matter of law, there was no illegality at all.

It is true that undoubtedly the evidence shows that the F.H.A. had a policy not to approve building permits, except in hardship cases, where the construction cost exceeded the agreed upon resale price. But it is also true that until Housing Expediter Priority Regulation 5 became effective the F.H.A. had the power to issue a permit, in the case of a veteran who was building for his own use, regardless of the cost of construction. Even though the F.H.A. may have been imposed upon so as to induce it to violate its policy, and even though such imposition would have been sufficient to justify it in cancelling the permit, the F.H.A. has not sought such relief, and the issued permit violated no provision of the federal law or regulations, and was a legal permit in so far as the cost of construction was concerned.

[6] Appellants also contend that a grave inconsistency exists between the treatment afforded them and the treatment afforded respondents. This contention is predicated on the fact that the trial court granted the motion for a nonsuit made by respondents on appellants' cause of action for breach of contract, but denied appellants' similar motion, and, as to respondents, submitted the issue of illegality to the jury. There is no inconsistency in such rulings. Appellants' counsel, on the argument of respondents' motion for a nonsuit, admitted that the contract sued upon was illegal, and admitted that the Terminis, for this reason, could not secure affirmative relief for its breach. Inasmuch as Termini had testified that he never had intended that his nephew should live upon the property, those admissions amounted to a consent to the granting of the nonsuit against the Terminis. But, as already held, such illegality on the part of the Terminis, if respondents were innocent, would not affect the right of respondents to secure affirmative relief against appellants. Since the evidence was conflicting on the issue of respondents' innocence, that issue was properly submitted to the jury.

[7] On this general issue of illegality, there is one other comment that should be made. Independently of any of the points discussed above, it is an admitted fact that the statutes and regulations claimed to have been violated were repealed, effective as of June 30, 1947. The record shows that all of the amounts claimed by the contractor (except amounts lawfully withheld on prior payments under the terms of the original and amended contract) were for work performed after the effective repeal date above mentioned. Except as to the withheld sums, the amounts sued for by the contractor were based upon architects' certificates from October 1, 1947, to February 26, 1948. Thus, they were for work performed between September, 1946, and January, 1948. This is conceded to be so. So far as the architects' claim is concerned, Bernardi testified that all payments sued for by them accrued in the fall of 1947. Thus, the entire amount sued for was for work performed after June 30, 1947. As to the sums withheld from Marshall for work performed prior to June 30, 1947, they were not payable under the written contract until after completion of the house, which would have been long after June 30, 1947. Those sums did not accrue or fall due until Termini made perform-

ance of the condition of completion impossible by breaking the contract in December of 1947 and January of 1948. Under these circumstances, where all sums sued for by the architects and all sums sued for by the contractor, except perhaps the sums withheld for prior work, was for work performed after repeal of the statutes and regulations, and at a time such work was perfectly legal, it is clear that, even if the original contracts and work done under them were illegal, and even if respondents participated in such illegality, such illegality and participation would not infect the claims here involved, all of which fell due after the statutes and regulations were repealed. While appellants claim that the transactions were inseverable and that the prior illegality made the entire transaction illegal, the case of United States v. Fortier, D.C., 89 F.Supp. 708; Id., 1 Cir., 185 F.2d 608; Id., 342 U.S. 160, 72 S.Ct. 189, 96 L.Ed. 179, indicates quite the contrary. Common sense tells us that it could never have been the intent of Congress in passing, and later repealing, these regulatory statutes, that half finished houses, started illegally, could not be completed when restrictions were removed. The transactions were clearly severable.

[8] The appellants next complain of several of the instructions on the issue of illegality. It is urged that the instructions erroneously left to the jury the determination of whether the contracts were illegal. It is contended that the true rule is that the jury passes on the conflicting facts and that the judge then passes on the issue of legality. This contention overlooks the nature of the sole question involved on the issue of legality—did Marshall or the architects participate in securing a permit knowing that LaBoi was being used as a subterfuge? The evidence on that issue was conflicting. The trial court properly left its determination to the jury. So far as the claimed illegality as to cost price is concerned, as already pointed out, there was no illegality as a matter of law. The court should have instructed that in this respect there was no illegality. Submitting the issue to the jury was undoubtedly error, but an error favorable to appellants of which they have no legal right to complain. This holding also disposes of the contention that the court in its instructions did not tell the jury how to apply the federal regulations. Normally, such instructions should have been given, but here the regulations did not fix a cost price for one building for his own occupancy. As already pointed out, the court should have instructed that there was no illegality as to cost price. Its failure to do so or to explain the application of the federal regulations was not prejudicial error.

Objection is made to an instruction to the effect that if the Marshall-LaBoi contract was found to be illegal, Marshall could still recover for labor and materials "if you find that plaintiff Marshall did not know the contract was illegal and such ignorance, if any, was fostered by defendants." That instruction states the law in accordance with the views already expressed.

Objection is also made to the instructions embodying the doctrine of *in pari delicto*. Again the argument is made that, at most, such doctrine might constitute a defense but cannot justify the granting of affirmative relief to one not a member of the class benefited by the statute. That argument has already been disposed of adversely to appellants. The doctrine was applicable here. McAllister v. Drapeau, 14 Cal.2d 102, 92 P.2d 911, 125 A.L.R. 800; Becker v. Stineman, 115 Cal.App. 740, 2 P.2d 444; Norwood v. Judd, 93 Cal. App.2d 276, 209 P.2d 24; Severance v. Knight-Counihan Co., 29 Cal.2d 561, 177 P.2d 4, 172 A.L.R. 1107; Morrison v. Landers, 56 Cal.App.2d 607, 133 P.2d 34.

While the instructions are somewhat confusing, and presented some legal issues to the jury that should have been decided as a matter of law, and certainly did not define the issues with the clarity desired in such a case, the errors, if any, were in favor of appellants. They are in no legal position to complain.

[9] In the action to foreclose Marshall's mechanic's lien it is urged that the findings of the court are inconsistent with the implied findings of the jury in the legal ac-

tions. It is urged that the jury must have found the contracts legal while the court, in the equity case, found them to be illegal. This claimed inconsistency, according to appellants, is emphasized by the action of the trial court in nonsuiting the Terminis on their cross-complaints, and in refusing such nonsuit as to respondents. As already pointed out, there was no inconsistency in granting the nonsuit as to the Terminis. Nor is there any inconsistency between the findings in Marshall's mechanic's lien case and the action of the jury in Marshall's law case. While the court found in the mechanic's lien case that the work performed under the LaBoi-Marshall contract was in violation of the statutes and regulations, in view of the facts and the law, that finding must refer to the subterfuge used by the Terminis in using their nephew's name in order to qualify as a veteran. As already pointed out, at all times here pertinent there was no cost limitation applicable, so no illegality could or did exist as to costs. Thus, the trial court's finding is simply that a fraud was practiced on the government by the Terminis in representing LaBoi to be a bona fide owner of the property—a fraud in which the jury found in the contract action that Marshall did not participate. That must also be what the court found in the equity case, because after finding that the contract was illegal, it found that Marshall was not *in pari delicto* with appellants, that the Terminis were "grievously" at fault while Marshall was "only slightly at fault, *if at all*." (Italics added.) The court then found that Marshall was not guilty of moral turpitude while appellants were, and that Marshall was ignorant of the illegality, which ignorance was fostered and encouraged by appellants. These findings are consistent with the implied findings of the jury above discussed.

[10, 11] The last contention of appellants is that the jury was guilty of prejudicial misconduct in reading inflammatory newspaper articles during the course of the trial. These newspaper articles claimed to have been read by some members of the jury referred sarcastically to the evidence that had been introduced as to the many luxury features of the house that had been ordered by the Terminis. If the evidence on these issues was admissible, and it obviously was, it is difficult to see how a newspaper summary of such evidence could be prejudicially inflammatory. This point was considered by the trial court on the motion for a new trial. Its failure to grant a new trial on this ground is determinative of this issue. Its abortive order granting a new trial as against the architects was not based on this ground. Moreover, it should be pointed out that, according to the affidavits filed on the motion for a new trial, these articles appeared and were read by some of the jurors during the course of the trial, and appellants' counsel admittedly then discovered this fact. No objection was then made by him. Under such circumstances the misconduct, if any, was waived, under the rule that a party cannot sit back knowing of a claimed error and speculate upon the possibility of a favorable verdict, and then for the first time urge error after he loses. Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; Olmos v. Southern Pacific Co., 84 Cal.App.2d 765, 191 P.2d 766.

The judgments appealed from are affirmed.

BRAY and FRED B. WOOD, JJ., concur.

125 Cal.App.2d 298

BEAGLE v. HANKS et al.

Civ. 8271.

Sac. 6318.

District Court of Appeal, Third District, California.

May 18, 1954.

Action by possessor to quiet title to land. The Superior Court, Tehama County, Curtiss Wetter, J., held that possessor's rights were limited to those under contract under which he took possession. Possessor appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding that possession was never adverse to holder of legal title.

Judgment affirmed.

See also 270 P.2d 115.

1. Adverse Possession ⚿85(3)

In action to quiet title to land by possessor who entered under agreement to purchase from father, who believed that father continued to own property until his death, and who made no claim of ownership to beneficiaries under father's will until ten months before commencement of action, evidence sustained finding that possession was by virtue of contract and that adverse claim of title was never initiated.

2. Adverse Possession ⚿60(4)

Where entry into possession was pursuant to agreement with holder of legal title, possession could not become adverse until possessor had in some manner repudiated legal title and asserted exclusive right in himself outside contractual stipulations.

3. Appeal and Error ⚿1011(1)

Where conflicting inferences from the evidence could be drawn by the trial court, finding of trial court is binding upon reviewing court on appeal.

Alfred E. Frazier, Red Bluff, for appellant.

Stanley Pugh, Red Bluff, for respondents.

VAN DYKE, Presiding Justice.

Plaintiff (appellant here) filed an action to quiet title to certain real property, naming as parties defendant his four brothers and sisters. The complaint alleged that plaintiff was the owner in fee of certain described property and that he had been in the actual, exclusive and adverse possession thereof for over five years before the filing of the complaint, claiming to own the same in fee; that he had paid all taxes during the alleged period of adverse possession. Defendants answered, asserting that subject to administration in the estate of their father, they were the sole owners of the property in controversy and that plaintiff had no right, title or interest therein. The court adopted findings of fact as follows: That plaintiff and defendants were all children of C. M. Beagle; that by his will his property was given to the four defendants in equal shares; that in 1929 said decedent owned the real property in question and in that year entered into an oral agreement with the plaintiff, wherein the parties mutually agreed to sell and to buy the subject property for the sum of $5,000, which plaintiff agreed to pay "as he could"; that plaintiff was given an initial credit of $1,000 upon the purchase price as an advancement of his probable inheritance as one of the five children of his father; that plaintiff took possession of the property and held such possession continuously from that time; that in 1932 plaintiff paid his father $600 in cash; that by the agreement plaintiff was required to pay all taxes and had done so; that immediately after possession of the property was taken by plaintiff the father moved away and during the remainder of his lifetime resided with his other children; that he died in 1943 and by his will left plaintiff the sum of $5 only, all the rest of his property going to the other four children; that plaintiff had never at any time claimed to hold or possess the real property adversely to his father or to the defendants, nor had he ever indicated by word or deed that he claimed the property adversely; that his possession of the property had never at any time been adverse to his father or to his brothers and sisters and was in fact in subordination to the legal title; that plaintiff was not the owner of the property, saving and excepting his rights as vendee. Conformable conclusions of law were drawn and judgment was entered that plaintiff's only right in the property was such as he took and held under the contract. From that judgment the plaintiff has appealed.

[1] The record contains ample evidence to sustain the findings of fact made by the court. For example, appellant himself testified that he had agreed to buy the ranch from his father and had taken possession thereof under that agreement; that under the agreement he was obligated to pay the purchase price when he could; that he knew his father to be the owner of the property and that he believed his father continued to own the property up to the time he died. Concerning his claim to have been holding adversely during the eight years that elapsed between his father's death and his filing of the complaint appellant testified as follows: Asked if he had ever told Wayne Beagle that he claimed to own the ranch, he said that he had so told him about ten months or so before filing his complaint, but had not told him before that date; that he could not recall telling Edna Marston that he claimed to own the ranch and had never talked to her about the property; that he had never told his brother Vernon he claimed to own the property nor his sister Eunice Hanks. Wayne Beagle testified that appellant had never told him that he claimed to own the ranch. This evidence sufficiently sustains the findings of the trial court that appellant's entry into possession of the property was under and by virtue of the contract with his father and that he never at any time initiated an adverse claim of title thereto.

[2] Since appellant's entry into possession of the disputed property was admittedly not adverse but was in subordination to the legal title and pursuant to the terms of the agreement between himself and his father it follows that his possession could not become adverse until in some manner he had repudiated his vendor's title and asserted an exclusive right in himself outside the contractual stipulations. (1 Am.Jur. "Adverse Possession" p. 814.) Says the text referred to: "In such case [entry under contract of purchase] it is necessary that notice, either actual or constructive, of the repudiation be given to the vendor." The testimony of all the witnesses, including the testimony of appellant, was to the effect that he had never repudiated his contract nor had he ever given any notice, either actual or constructive, to either his father during the father's lifetime or to his brothers and sisters after his father's death that he had changed his position and was asserting an exclusive right in himself. Under such circumstances the statute upon which he relies did not commence to run until at best a short time prior to the commencement of his action. "The statute will commence to run only from the time when the purchaser openly disavows the title of the vendor and claims in hostility to it; and, even in that case, notice of the repudiation of his title must be brought home to the vendor, or the hostile claim of the vendee must be evidenced by acts of such notoriety that notice to the vendor will be presumed." Farish v. Coon. 40 Cal. 33, 56; see, also, Unger v. Mooney, 63 Cal. 586, and Kerns v. Dean, 77 Cal. 555, 559, 19 P. 817.

[3] Appellant argues that he proved continuous possession; that he paid all taxes and made improvements upon the property; that he never paid anything to his brothers and sisters, nor did they demand any payment of him which he asserts they could have done when by the will of their father they became vested with title to the property; that his conduct regarding it was sufficient in manner to give reasonable notice that he claimed the property. If we assume for the purpose of argument that by reason of all these things the trial court could have found that his claim of title by prescription had been made out, yet it would not benefit the appellant, in view of the fact that the court found to the contrary, and, as we have pointed out, had ample support in the testimony for that finding. Conflicting inferences from the evidence could be drawn by the trial court to the effect that his possession had never been adverse and under such circumstances the finding of the trial court is binding upon this Court on the appeal.

Appellant further argues that the contract between himself and his father whereunder he took original possession of the property was abandoned during the lifetime of his father, or, if not then, was certainly abandoned a reasonable time after his father's death, and that his evidence sufficiently proved adverse holding thereafter. If we assume that the trial court could have found that the contract had been abandoned, yet there was nothing in the testimony to compel the court to that conclusion. Here again the testimony of the appellant and his brothers and sisters concerning the original peaceful entry and long possession of the property without any claim that the possession was hostile to the legal title affords ample support for the court's factual finding that such abandonment had not taken place.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

125 Cal.App.2d 873

HANKS et al. v. BEAGLE.

Civ. 8457.

Sac. 6405.

District Court of Appeal, Third District, California.

May 18, 1954.

Action for termination of contract for purchase of land. The Superior Court, Tehama County, Curtiss Wetter, J., held that contract, providing for payment when purchaser was able to do so, was repudiated when purchaser filed and prosecuted action to quiet title based upon adverse possession, and was subject to termination. Purchaser appealed. The District Court of Appeal, Van Dyke, P. J., held that where purchaser stated his desire if adverse judgment in previous action to quiet title were affirmed, to comply with interlocutory judgment enabling him to complete purchase of land upon payment of balance of principal, and previous judgment was affirmed, interlocutory judgment would be affirmed without examination into merits of appeal.

Judgment affirmed.

Appeal and Error 🔑1075

Where appellant, in his briefs, stated his desire, if adverse judgment in previous action to quiet title were affirmed, to take advantage of interlocutory judgment appealed from, enabling him to complete purchase of property under contract declared repudiated and subject to termination, and previous judgment was affirmed, interlocutory judgment was affirmed without examination into merits of appeal.

Alfred E. Frazier, Red Bluff, Cal., for appellant.

Stanley Pugh, Red Bluff, Cal., for respondents, Donald B. Webster, Red Bluff, Cal., of counsel, for respondents.

VAN DYKE, Presiding Justice.

This case is closely related to the prior case of Beagle v. Hanks, Cal.App., 270 P. 2d 113. The action of Beagle v. Hanks, was filed on March 12, 1951. It was tried in September of that year and judgment was rendered March 5, 1952. By that judgment it was decreed that the plaintiff therein was not the owner of the real property involved in these actions, except in so far as he could claim under the contract of sale whereunder he went into possession. On April 4, 1952, after the rendition of said judgment, this action was begun by the brothers and sisters of Basil Burton Beagle, plaintiff in the prior suit. By their complaint they alleged the making of the contract between defendant herein and his father, which contract was involved in the prior action. They further alleged that the defendant had repudiated that contract by filing and prosecuting said prior action, wherein he sought to establish title by prescription. The trial court found that said contract had been so repudiated and was subject to termination for that reason. An interlocutory judgment was entered which, while declaring the contract was subject to termination, nevertheless extended to defendant Basil Burton Beagle an opportunity to complete his purchase of the real property on payment of the balance of the principal within the time fixed by the interlocutory judgment. Defendant and appellant herein appealed from only so much of that interlocutory judgment as decreed that the purchase contract was subject to termination. In his briefs in support of his appeal he stated to this Court that if we should determine that his appeal in the other action was not well taken and should affirm the judgment therein he then desired to take advantage of that portion of the interlocutory judgment herein, enabling him to complete the purchase of the property. We have affirmed said judgment in the prior action, and as we understand appellant's position in this action he desires that, since we have done so, we also affirm the judgment herein appealed from. For these reasons we do not examine into the merits of the appeal. The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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125 Cal.App.2d 278

JAMES
v.
KEY SYSTEM TRANSIT LINES.

No. 15895.

District Court of Appeal, First District,
Division 1, California.
May 18, 1954.

Hearing Denied July 14,1954.

Action against street railroad charged with duty of maintaining area in street adjacent to its tracks, for injuries to plaintiff when he rode his motorcycle into a hole in area negligently maintained. The Superior Court, County of Alameda, Chris B. Fox, J., entered judgment on verdict for plaintiff, and defendant appealed. The District Court of Appeal held that failure of trial judge, upon request of jury that they be permitted to examine plaintiff's deposition, to inform jury that they could be returned and had at least a part of the deposition read to them, did not constitute reversible error, in view of fact that deposition contained nothing affecting credibility of plaintiff's testimony.

Judgment affirmed.

1. Street Railroads 🔑117(24)

In action against street railroad company for injuries to police officer who ran his motorcycle into depression permitted by company to remain along its tracks which it was required to maintain, wherein it appeared that officer was required to cross the tracks in performance of his duties and the entire area had been permitted to become rough, evidence made question for jury as to whether plaintiff officer was guilty of contributory negligence in driving motorcycle across rough track area of which he had knowledge.

2. Negligence 🔑136(9)

Contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists, and where there are different inferences that may be drawn by sensible or reasonable men, one for and one against contributory negligence, the one against will be followed.

3. Trial 🔑308

Failure of judge, when jury requested to see deposition of plaintiff, a part of which had been read during trial, to inform jury that it could be brought into courtroom and have the unobjectionable portion of the deposition read, constituted error precluding a fair trial, unless the matters in the deposition were inconsequential.

4. Trial 🔑308

The refusal of a court to comply with jury's request for reading of some portion of the transcript, upon its return during deliberations, constitutes error.

5. Appeal and Error 🔑1069(1)

In action against street railroad company for injuries to plaintiff when he rode his motorcycle into hole in rough stretch of company's track area which it was required to maintain, wherein jury had requested that they be permitted to examine during their deliberations the deposition of plaintiff, failure of trial judge to inform jury that they could be returned and have at least a portion of the deposition read to them, though error, did not constitute reversible error, in view of the nature of the deposition, disclosing no contradictions affecting credibility of plaintiff. Const. art. 6, § 4½.

Donahue, Richards, Rowell & Gallagher, George E. Thomas, Oakland, for appellant.

Ryan & Ryan, Daniel V. Ryan, San Francisco, for respondent.

BRAY, Justice.

From a plaintiff's judgment for $25,000, on a jury verdict, defendant appeals.

Questions Presented.

1. Defendant does not question the sufficiency of the evidence to support the jury's implied finding of defendant's negligence, but contends plaintiff was guilty of contributory negligence *as a matter of law.*

2. Did the court err in refusing to inform the jury after its retirement that plaintiff's deposition, or a portion of it, could be read? If so, was such error prejudicial?

Facts.

For over two and a half years plaintiff had been a policeman of the city of Berkeley, engaged in parking meter maintenance. He drove a 3-wheeled motorcycle and at the time of the accident was engaged in checking parking meters. Defendant maintained two sets of interurban tracks along West Shattuck Avenue. Under agreement with the city, defendant was required to pave and keep in repair the portion of the street occupied by the tracks and for two feet on each side thereof. In the intersection of West Shattuck Avenue and Addison Street there is a "crossover" and a switchbox which is partly covered by wooden planking and partly by metal plate. Plaintiff's cause of action was based upon the alleged careless and negligent maintenance of the street by defendant in the area immediately adjacent to defendant's tracks "in that they permitted a large hole or depression to remain, and exist for a long period of time, in said street adjacent to said tracks." The evidence showed that the pavement was in a defective condition, that pieces were broken out and some of the pavement raised above and some below the level of the tracks. Plaintiff testified that there were several holes there. Plaintiff was familiar with the crossing, having gone over it at least twice a day during his employment by the city, and knew of its defective condition for that length of time. On this day, having checked the meters on one side of Shattuck, he was required to go to the other side to check the meters there. This required him to cross defendant's tracks at the intersection. He was proceeding at 5 to 7 miles per hour, in low gear, was in the act of shifting to second gear, had turned his head slightly to look for traffic when "there was a terrific snap in my neck * * *," the motorcycle "took a sharp jolt," he heard the switchbox cover clanking and had no further recollection until he was at the west curb of Shattuck 10 to 15 feet from the intersection. Plaintiff's neck injury was serious. Defendant contended at the trial, in addition to contending plaintiff was guilty of contributory negligence, that the pavement was not defective as claimed, and that the accident happened at a gap in the switchbox cover concerning which there was no complaint of negligent maintenance. As the sufficiency of the evidence to support the jury's implied adverse findings on the two latter subjects is not challenged, it is unnecessary to detail defendant's evidence in regard thereto.

1. Contributory Negligence.

[1, 2] The contention that plaintiff, as a matter of law, was contributorily negligent, is based upon plaintiff's testimony that he knew for more than two and a half years the condition of the pavement where the accident occurred, and that he steered his motorcycle into the place where the condition existed. This contention overlooks the fact that plaintiff's duties required him to cross at this intersection, that the testimony shows that the pavement adjacent to the tracks against the entire width of Addison Street was in the same condition, and he had no choice except to cross the rough pavement; that in spite of this condition plaintiff had never theretofore experienced any bumps or difficulty in

crossing; that he was in the process of making a left hand turn and looking for traffic, thereby momentarily and necessarily taking his eyes from the pavement, and that he did not deliberately ride into any particular hole or depression. While the evidence might have supported a finding of contributory negligence, it did not compel it. Whether plaintiff, under all the circumstances of the case, was guilty of contributory negligence because of his knowledge of the conditions at the intersection, was a question of fact and not of law. We cannot say that the evidence of contributory negligence meets the test required to prove it as a matter of law. This test is stated in Severin v. Cox, 104 Cal.App.2d 331, 333–334, 231 P.2d 134, 136, quoting from Anthony v. Hobbie, 25 Cal.2d 814, 818, 155 P.2d 826: "'The rule has been stated in various ways in a legion of cases, that contributory negligence is not established as a matter of law unless the only reasonable hypothesis is that such negligence exists; that reasonable or sensible men could have drawn that conclusion and none other; that where there are different inferences that may be drawn, one for and one against, the one against will be followed; and that before it can be held as a matter of law that contributory negligence exists, the evidence must point unerringly to that conclusion. (Citing many cases.)'"

2. Plaintiff's Deposition.

In impeachment of plaintiff, defendant used a portion of the deposition taken of plaintiff by defendant, reading that portion into evidence. Thereafter defendant offered the whole deposition, and suggested a stipulation that any part of it might later be read to the jury. Plaintiff refused to stipulate that any portion could be read other than that which had already been read. Defendant then stated he would later ask permission to read it into evidence. The deposition was admitted. In argument defendant read to the jury portions of the deposition, apparently additional to those theretofore read. The entire deposition was not read. The jury retired to deliberate at 2:16 p. m. At 3:04 in chambers, the judge informed counsel that the jury had requested a certain exhibit and "to see the deposition" and that he intended to send in all the exhibits but not the deposition. All parties agreed and now agree that it would be improper to give the jury the deposition. Code Civ.Proc. § 612 prohibits it. Defendant immediately requested that the jury be told that it could have re-read the portions already read, if it so desired. Plaintiff objected on the ground that the jury had not asked to have them read. The court refused to instruct the jury as requested. At 3:50 p. m. the judge informed counsel that the jury had asked the bailiff to convey a message to the judge "that they considered the deposition the important thing." Defendant again requested that the jury be informed of its right to return to the courtroom and have read to it such portion of the deposition as had been read into evidence, at least. Plaintiff then objected to such an instruction and stated that if any of the deposition was to be read the whole should be read but objected to any reading whatever as the jury had not asked for a reading. Considerable discussion by court and counsel ensued, defendant insisting that the jury be informed of its right to have, if not the whole deposition, the portion already read, again read. Plaintiff insisted that no instruction be given the jury but that if any of the deposition were read the whole should be read. The court then denied defendant's request. Thereupon defendant further requested that the jury be returned to the courtroom and asked by the court just what it wanted from the deposition. "It is just like having only one section of the testimony read." Plaintiff stated: "That would follow my point, that if the jury should hear the deposition, they should hear the entire deposition with the exception of the objections." Defendant then stated that the jury was entitled to be told of its right to have the whole of the deposition read, less any objectionable matter. Plaintiff again objected to any instruction being given. Thereupon the court instructed the bailiff to inform the jury that the law prohibits the taking of a deposition to the jury room. In its original instructions to the jury the court did not inform the jury of its right to return to court for testimony and instructions, which right is provided in section 614, Code of Civil Procedure. At 4:40 p. m. the jury returned to the courtroom with a 10 to 2 verdict in favor of plaintiff.

[3, 4] It is clear from the action of the jury that it wanted to know something that was in the deposition, and that it did not know how to get the information. It first asked for the deposition itself. On being informed that it could not be taken to the jury room the jury informed the judge that in its mind it considered the deposition "the important thing." This message obviously would not have been sent if the jury did not feel it needed at least some portion of the deposition to clear up confusion over some part of its contents. It was the duty of the judge to have the jury brought into the courtroom, to ascertain what the jury wanted from the deposition, or, at the very least, to inform it that it had a right to have at least a portion of the deposition read. If on returning to the courtroom the jury asked for more than it was entitled to have read, the judge could, of course, limit it to that to which it was entitled. But to refuse to inform it of its rights in this respect, when the judge was, in effect, informed that the jury was in difficulty in some way about the deposition, clearly prevented a fair trial, unless the matters in the deposition were inconsequential. While the jury's action did not constitute in so many words a request for a reading of some portion of the transcript, such action can reasonably be interpreted only as such a request, and as held in Kerner v. Surface Transportation Corp., 266 App.Div. 356, 42 N.Y.S.2d 296, a court's refusal to comply with the jury's request in this respect constitutes error. McAvoy v. Helms Bakeries, 43 Cal.App.2d 587, 111 P.2d 431, upon which plaintiff relies, is not in point. There the reviewing court found that the trial judge had instructed the jury that if it wanted any portions of the instructions reread at any time, to so inform the bailiff, and that no request therefor in any form had been made.

In his brief plaintiff stated that shortly prior to the trial, the members of this jury together with all other members of the panel were given general instructions including an instruction embodying the contents of section 612, Code of Civil Procedure, and on oral argument offered to augment the record to show that fact. We denied the request primarily because such fact would make the court's refusal here no less error. This brings us to the question of the effect of the error.

Concerning the condition of the street at the scene of the accident plaintiff testified that there were "Pieces broken out, some of it raised above the level of the track, some below, very rough." "* * * it had just been chewed up, broken out, and it was a drop of, oh, I'd say three to four inches * * * from below the level of the rail." "Some of the pavement was missing that chunks had broken out." "* * * there was no pavement there. That is, it had been broken out * * * pieces of pavement ground up, chewed up." His motorcycle "bounced—I mean, dropped down in that depression in the pavement between the two tracks." He "received a jolt as * * * [he] came to the rail * * * The east rail of the crossover." The difference between the level of the rail and the pavement was "I'd say three inches." He testified when asked if the hole there (meaning where he felt the jolt) was any deeper than any place else, that there were several along the track that were just as bad; that they were not holes one could number, nor was it just one hole, "just uneven, down and up." Nothing there was flush with the track. He may have told the referee of the Industrial Accident Commission at a hearing that he was crossing "the switch at the location of the switchbox." In his deposition he stated that the pavement was broken out and soft above the level of the rail at least two inches and soft below and where the pavement was gone "it is a pretty deep hole."

He testified that the front wheel of the motorcycle was "wrenched," "Jerked. A violent twist." In his deposition when asked if that wheel turned at all he said "no." There he also stated that the motorcycle got "plenty of bounce" and stated that he evidently then lost control of it.

[5] The above matters are the only ones in the deposition which were read to the

jury. It is conceded that some other portion or portions were read by defendant in argument. For this reason and because defendant claims that the jury was entitled to have the whole deposition, less objectionable matter, read to it if it so desired (a matter which we deem it unnecessary to determine) we have studied the entire deposition. Neither in the foregoing extracts from the deposition nor in any other part of it do we find any substantial contradiction with plaintiff's testimony at the trial nor anything affecting his credibility. Nor do we find anything which in any reasonable probability would have caused any of the jurors to vote differently than they did. We are forced to the conclusion that the error has not resulted in a miscarriage of justice. See article VI, § 4½, Const.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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125 Cal.App.2d 326

VIDLER v. DE BELL et ux.

Civ. 15846.

District Court of Appeal, First District, Division 2, California.

May 19, 1954.

Action by broker to recover commission upon sale of real property. The Superior Court, County of San Mateo, A. K. Wylie, J., rendered judgment for plaintiff and defendants appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained findings that broker's agent had been the procuring cause of the sale and that there had been no break in chain of events from broker's contact with purchaser and the consummation of the sale.

Judgment affirmed.

1. Brokers 🔑86(4)

In broker's action for commission upon sale of real property, evidence supported findings that broker's agent had been a procuring cause of the sale and that there had been no break in chain of events from broker's contact with purchaser and the consummation of the sale.

2. Brokers 🔑49(1)

Where a broker's employment agreement does not contemplate that he shall procure a customer on certain terms, he is not obliged to bring the minds of the principal and the customer to an agreement, but he earns his commission when he procures the customer on terms to be arranged with the principal.

3. Brokers 🔑56(3)

Where vendors, in their agreement with broker, offered to build a house on any of vendor's lots, and broker procured purchaser who purchased a particular lot, broker was entitled to commission even though he had not personally effected the sale of that specific lot.

4. Appeal and Error 🔑1071(6)

Where findings are made upon issues which determine a cause, other issues become immaterial, and failure to make findings on such other issues is not prejudicial error.

5. Trial 🔑388(1)

Where matters alleged in the answer do no more than contradict some allegation of the complaint, and findings on allegation of complaint are complete, it is unnecessary to make specific findings on matters alleged in answer.

6. Brokers 🔑88(14)

Where broker alleged that he had procured a purchaser who eventually purchased a lot from vendor, and vendor answered alleging that broker had abandoned the attempt to effect the sale before its consummation, a finding that broker had procured a purchaser was sufficient, and no separate finding on issue of abandonment was required.

7. Brokers 🔑88(14)

Where, in broker's action for commission on sale of real estate, it was established that vendor had given authority to sell to purchaser any of vendor's lots, that no finding was made on issue of broker's authority was not error.

8. Brokers ⚬88(3)

What is a reasonable time within which a broker, having been given authority, must consummate a sale, is ordinarily a question of fact.

9. Brokers ⚬86(3)

In broker's action for commission on sale of real estate, evidence supported finding that sale had been consummated within a reasonable time after broker had been given authority to sell.

◆

Hardy, Carley & Thompson, Palo Alto, for appellants.

Millington, Dell'Ergo, Weeks & Morrissey, Wayne R. Millington, Redwood City, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment in favor of plaintiff and respondent in an action brought to recover a broker's commission upon the sale of real property belonging to appellants.

This is the second trial of this suit. The first trial resulted in judgment for defendants, but a motion for new trial was granted on the ground of the insufficiency of the evidence to sustain the judgment. Following the second trial, a memorandum decision was rendered in favor of plaintiff, and the court directed plaintiff to prepare findings of fact and conclusions of law in accordance therewith. Judgment was rendered for the commission plus interest since the date earned and costs.

Appellants, Jack De Bell and Doris May De Bell, his wife, were owners and developers of a tract of land in San Mateo County known as Oakdell Manor. It had been divided into lots upon which appellants were erecting homes and offering them for sale. Appellant testified that he placed a price of $3,500 on each and every lot in the tract, although the evidence showed that lots were never sold as such, but only improved with homes thereon.

Respondent Walter R. Vidler was a duly licensed real estate broker, who had in his employ Martin Sweeney, a sales agent, from July 1, 1950 to September 8, 1950.

On Sunday July 9, 1950, Martin Sweeney, was on appellant's property with appellant's knowledge and consent, for the purpose of showing and selling said property to prospective purchasers. A. R. Cramer, who ultimately purchased a home in this tract, drove into Oakdell Manor. Sweeney discussed with him the type of house he wanted, showed him a house then under construction which was already sold, that he liked, and arranged for an appointment between Cramer and Mr. De Bell. The following Monday, Sweeney talked to De Bell about it, an appointment was made for Thursday of that week between De Bell and Cramer. Sweeney then discussed with De Bell the fact of protecting himself, since the house was not built as yet and construction would take some time. De Bell told him to prepare a letter for his signature. Sweeney did so, and De Bell signed it.

The letter reads as follows:

"Menlo Park, Calif.
"July 11, 1950.
"To Walter R. Vidler, Realtor
"2666 El Camino Real
"Redwood City, Calif.
"Dear Sir:

"This will serve to acknowledge the introduction of Mr. and Mrs. A. E. Cramer by your salesman, Martin Sweeney.

"Sweeney advised me that he has shown Mr. and Mrs. Cramer our homes. Our firm will build a house for these people on any property owned by us.

"Our understanding is that 5% of the selling price will be paid to you as commission on any sale of our property to Mr. and Mrs. Cramer.

"Yours very truly,
"/s/ Jack De Bell"

Sweeney testified that he thereafter introduced Cramer to Mr. Vidler, and went to the De Bell tract with Cramer in Cramer's car. They picked up De Bell and De Bell showed Cramer what lots were available for building. Cramer asked if lots were sold outright, but De Bell said not, that he did the building on them. Cramer pointed out two lots which he liked best. De Bell informed him that it would be a long time until he built on those lots because he had building materials on them, but Cramer said he was not in a hurry, that he liked those lots. De Bell said he would have to wait until he cleared the material. Those were lots 29 and 30 of the tract. De Bell informed Cramer that a four bedroom home would cost somewhere between $30,000 and $34,000. De Bell said that $10,000 would handle the buying of the house. Then plans were discussed. De Bell told Sweeney to get in touch with Mr. Merryman, an architectural engineer, and make arrangements for Cramer to see him. This meeting lasted for about one hour and fifteen minutes. Sweeney called Mr. Merryman to get an appointment for Mr. Cramer, who said that any day would be all right.

Sweeney stated that he came up to San Francisco to see Cramer at his office, but that he was very busy so he didn't stay long. Cramer said he would see Sweeney later. When he called him later, near the end of July, he said he was going on a vacation, to let it ride until he returned. Later when he called Cramer, he was told to let it ride, that he would call him later. Sweeney went back to see De Bell who said: "Don't keep after him any more. You are going to lose him * * * You have got a letter to protect you * * * I will handle it. Let him believe that I'm taking care of it myself * * * Leave him go now. Otherwise you are just going to mess the whole thing up * * * I will take care of it myself. You have got your letter to protect you * * * Leave him alone. I will take care of him. You will get your commission whenever the deal is made." Sweeney said that he followed these directions. Thereafter he saw Cramer's car out in the tract, but he didn't approach Cramer thereafter. Later, when Sweeney had sold another house in the tract, he asked De Bell how it was coming along. De Bell said, "Just leave them alone; don't bother about him."

Six plans were prepared for Cramer by the architect, bearing completion dates from October 3, 1950 to October 7, 1950, consisting of five sheets of house plans and one sheet, a plot plan for lot 30. Mr. Cramer first appeared in the architect's office about two or three weeks before the plans were dated.

When construction was completed on the Cramer home, Mr. Vidler and Sweeney demanded the commission which De Bell refused, contending that the agency did not make the sale. The transaction between De Bell and the Cramers was completed when the deed for lot 30 was recorded on June 19, 1951.

Appellant admitted in his testimony that no commission was due on the sale of real property until the purchase price had been paid by the buyer.

There was testimony on the part of De Bell that although he did advise Sweeney to stop pestering Cramer, he did not tell Sweeney that he would take care of any sale to the Cramers himself. Cramer testified that he was primarily interested in renting, and not in buying when he first viewed the property, that in late July or early August he advised Sweeney to drop the matter, that he was not interested. He then gave up any thought of renting or buying, and later about Labor Day located a lot in another tract which was held for him for a week, but as it could not be held longer, he had to look elsewhere. Two or three weeks later they returned to Oakdell Manor and looked at lots 29 and 30. Mr. Cramer said these lots were still not for sale, but he invested in building plans, and after negotiations the Cramers and De Bell executed a written agreement on November 29, 1950 for the sale of lot 30 and construction of a house, the total price of house and lot being $32,500. Construction began in January 1951 and was completed in late May of that year.

The trial court found that prior to July 11, 1950, plaintiff through his agent, and at the request of defendants, procured Mr. and Mrs. Cramer as purchasers of property owned by defendants; the letter quoted heretofore was found to have been signed by defendant Jack De Bell; that a contract was entered into on November 29, 1950, between Mr. and Mrs. Cramer and defendant De Bell for the purchase of lot 30 and for the building of a house thereon according to plans and specifications provided by the Cramers; that on June 21, 1951, said lot and improvements were sold to the Cramers for a total sale price of $32,500; that plaintiff and plaintiff's agent were the procuring cause of the said sale. It was further found that the letter of July 11, 1950, had not been revoked, that it contained no termination date, and that subsequent to the signing thereof, a reasonable time for consummating a sale to the Cramers had not elapsed before a sale was consummated. It was further found that the commission became due and payable to plaintiff on June 21, 1951. These findings are amply supported by the evidence in the record.

[1] It is contended that the evidence does not support the finding that respondent's agent was the procuring cause of the sale of appellant's property. Appellants argue that the broker must perform the services required of him in accordance with the terms of the employment contract, and must in the absence of a special contract, be the procuring cause of a sale or transaction in order to be entitled to a commission thereon. (9 Cal.Jur.2d pp. 240–242, §§ 79, 80). The letter of July 11, 1950, is in itself sufficient evidence that it was Sweeney, respondent's agent, who brought the ultimate purchasers in contact with defendants. Sweeney's testimony, which has all intendments in its favor on this appeal, was that he arranged the appointment at which he Cramer and De Bell inspected the property and at which meeting Cramer indicated a preference for lots 29 and 30. Sweeney telephoned the architect to arrange for a discussion of prospective building plans with the Cramers. He called on Mr. Cramer in San Francisco and made other phone calls to him. He was then requested by Mr. De Bell to allow him to handle the matter personally, for Sweeney to stay out of it as he might lose Cramer, to let Cramer believe that De Bell was handling it himself, that Sweeney would get the commission when the deal was made. Appellants argue that uncontradicted evidence shows that Sweeney abandoned the deal because he admitted that he ceased pursuing the Cramers in August of 1950, that he had no part in the negotiations resulting in the agreement of November 29, 1950. This testimony is, of course, adequately explained by the fact that Sweeney had been requested to desist and to allow De Bell to continue negotiations with the Cramers. Cramer's testimony that he told Sweeney to drop the matter that he was not interested, was not necessarily believed by the trial court.

It is contended that the uncontradicted evidence shows a break in the chain of events. Sweeney was in touch with the Cramers for about one month, and the agreement to purchase was executed some four months after Sweeney's last contact with them. The interpretation was for the trial court as to whether or not this was a break in the chain of events. The period of inactivity is not as great as appellant would have us believe, however. Sweeney's last contact with the Cramers was some time in August, and in the latter part of September the architect whom Sweeney had contacted for Cramer, began drawing the plans and specifications for the house for which a building contract was entered into on November 29, 1951, by De Bell and the Cramers.

Appellant cites authorities to the effect that "procuring cause" is the cause originating in a series of events that without break in their continuity result in the accomplishment of the prime object of the employment of the agent. Roth v. Thomson, 40 Cal.App. 208, 215, 180 P. 656; Bail v. Glantz, 78 Cal.App. 49, 53, 248 P. 258. The court here found the ultimate fact that plaintiff and plaintiff's agent were the procuring cause of the sale. The probative facts as reviewed above support this finding.

It is contended that cases involving similar facts have denied recovery to brokers whose efforts have not been the predominating effective cause of subsequent sales by vendors. Haines v. Wooster, 22 Cal. App. 197, 133 P. 998, is clearly distinguishable. In that case the broker was denied the commission by the trial court, it having been found that he had abandoned his contract of employment. It was held on appeal that since there was a substantial conflict in the evidence as to whether or not plaintiff had abandoned his contract, the appellate court could not interfere with that conclusion. Hill v. Knight, 209 Cal. 14, 285 P. 691, is distinguishable. In that case plaintiff broker called the attention of the purchaser to the property, but did nothing further upon the purchaser saying he was not interested. Furthermore plaintiff never communicated with the defendants concerning this prospective purchaser, and the purchaser did not disclose to sellers that he had contacted plaintiff. Hence defendants made the sale in good faith without any knowledge that plaintiff had called it to the attention of the purchaser. Fitzpatrick v. Underwood, 17 Cal.2d 722, 112 P.2d 3, was an appeal on the judgment roll alone in a case where the court found against plaintiff broker on his claim to a commission. The ultimate facts found that it was not true that plaintiff produced for defendant a purchaser ready, willing or able to purchase on terms satisfactory to defendant, nor that defendant had sold the property to any purchaser produced by plaintiff. Since this appeal was on the judgment roll, findings of probative facts which appeared to conflict with the ultimate facts found, had to be disregarded.

[2, 3] It is said in 9 Cal.Jur.2d 255, § 87, that "Where a broker's employment agreement does not contemplate that he shall procure a customer on certain terms, he is not obliged to bring the minds of the principal and the customer to an agreement. He earns his commission when he procures a customer on terms to be arranged with the principal." See Tucker, Lynch & Coldwell v. Hawley, 23 Cal.App. 460, 138 P. 358; Merwin v. Shaffner, 31 Cal.App. 374, 160 P. 684. The present contract appears to be of this latter type, for defendants stated that they would build a house for the Cramers on *any* property owned by them (and lot 30 was then owned by them) and would pay 5% of the selling price (not specified) on *any* sale of their property to the Cramers.

Appellants urge error in the trial court's failure to find upon the issue of abandonment arguing that this is a material issue and that therefore the absence of a finding thereon is reversible error. James v. Haley, 212 Cal. 142, 297 P. 920; Taylor v. Taylor, 192 Cal. 71, 218 P. 756, 51 A.L.R. 1074; Hagge v. Drew, 73 Cal.App.2d 739, 167 P.2d 263; Clements v. Lanning, 89 Cal. App.2d 817, 202 P.2d 98. Appellants in their second defense alleged that the Cramers told Sweeney to drop the matter, that they were not interested, that six or seven months after the signing of the letter of July 11, 1951, the Cramers sought out defendant Jack De Bell, that solely as a result of De Bell's efforts the property was sold to the Cramers, and that at no time did plaintiff or his agents procure the Cramers as purchasers of real property belonging to defendants.

[4–6] It is the rule that where findings are made upon issues which determine a cause, other issues become immaterial and do not constitute prejudicial error. Where the matters alleged in the answer do no more than contradict some allegation of the complaint as to which findings are complete, it is unnecessary to make specific findings thereon. (24 Cal.Jur. 947–950, § 190). The complaint alleged that respondent through his agent procured the Cramers as purchasers of the property owned by defendants. The essence of the second defense is that respondent did not procure the purchasers. There is a finding that he did. The ultimate fact having been found, there is no necessity for a finding on every evidentiary fact alleged in the defense.

[7] There was no error in the failure to find upon the issue of whether authority was granted to sell lot 30. The letter of July 11, 1950, was found to have been executed by appellant Jack De Bell, and it clearly covers any property owned by appellants. If a finding had been made on the particular issue, it would have to have been made in favor of respondent.

[8, 9] Finally, it is contended that the evidence does not support the finding that the sale was made while the letter of authority of July 11, 1950, was in effect.

What is a reasonable time is ordinarily a question of fact, and that fact was decided by the trial court in favor of respondent upon substantial evidence. Furthermore, it is interesting to note that appellants in their answer state that "a reasonable time (six months)" elapsed after the signing of the writing, and no sale was consummated. By appellants' own admission six months would have been a reasonable time. From July 11, 1950 until November 29, 1950—the date established at the trial as the date of the execution of the written agreement for the sale of lot 30 and for the construction of the house—is a little more than four months and a half, well within the six month period.

All of the trial court's findings herein appear to be amply supported by the evidence, and the attacks thereon by appellants are without merit.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

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125 Cal.App.2d Supp. 888

HAUPT
v.
LA BREA HEATING & AIR CONDITIONING CO. et al.

C. A. 8224.

Appellate Department, Superior Court,
Los Angeles County, California.

May 4, 1954.

Rehearing Denied May 18, 1954.

Action wherein judgment was entered by the Municipal Court of Inglewood Judicial District, Lester O. Luce, J., without supporting findings of fact. Defendants appealed. The Appellate Department of the Superior Court, Los Angeles County, Bishop, J., held that where taking of testimony had terminated and case had been submitted for decision, but permission had been given counsel to file briefs, defendant's request for supporting findings of fact was timely when made in his first filed brief.

Reversed with directions.

1. Trial 🔑367

A case may be submitted on completion of taking of testimony and before filing of briefs.

2. Trial 🔑392(2)

For purposes of statute requiring request for findings to be made at the time of "trial", a "trial" continues until the issues of a case have been adjudicated. Code Civ.Proc. § 632.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

3. Trial 🔑392(2)

For purposes of statute requiring request for findings of fact to be made at the time of trial to avoid waiving them, the submission of a case for decision does not end trial and findings of fact may be requested until adjudication of the issues. Code Civ.Proc. § 632.

4. Trial 🔑392(2)

Where taking of testimony had terminated and case had been submitted for decision, but permission was given counsel to file briefs, defendant's request for supporting findings was timely when made in his first filed brief. Code Civ.Proc. § 632.

On Denial of Rehearing.

5. Appeal and Error 🔑112

A void judgment is appealable.

R. F. Neuman, Los Angeles, for appellants.

William M. Haupt, in pro. per.

BISHOP, Judge.

We are reversing the judgment because it was entered without any supporting findings of fact, although evidence was received and findings were not waived. The issue of this appeal is whether there was a timely request for findings. We have concluded that the request was timely.

[1] Concurrently with the filing of this opinion, we are filing one in the case of Engleman v. Green, Cal.Super., 270 P.2d 127, another case where findings were requested but the judgment was entered without them. In principle the two cases are identical, but at one point the facts do not run parallel. The request for findings in the Engleman case was made in open court, immediately after the trial court had announced its decision, while the court, counsel and the contestants were still centering their attention upon the business at hand. In the case now before us, after the taking of testimony had terminated, permission was given counsel to file briefs, and the request for findings was contained in the first brief filed by the defendant. Another circumstance should be noted. In spite of the fact that, until the last brief was received, the trial court could not, in all fairness, render a decision, nevertheless it was made quite clear that the submission was not deferred until the briefs were all in, but was made *now*. This may be done. See Franks v. Cesena, 1923, 192 Cal. 1, 3, 218 P. 437.

[2, 3] It will be noted that the main distinction between the Engleman case and this one was that in the companion case it could be said that the request for findings was made "at the trial," meaning at the occasion and place where the testimony was taken, whereas in the instant case the ceremony of the trial was over. This, however, must be kept in mind: the dead line for requesting findings—to avoid waiving them—is fixed by section 632, Code of Civil Procedure, not by reference to a place or occasion, but by reference to a time. The request must be made "at the time of the trial." And, as we have seen in the accompanying opinion, the trial continues until its purpose is accomplished, that is, until there is an adjudication of the issues of the case. There is no such adjudication until the judgment is entered. The submission of the case for decision, therefore, does not put an end to the trial. Probably nobody would have ever thought it did had it not been for the cases holding that the term "before trial" formerly found in section 581, Code of Civil Procedure, meant before submission. But as noted in the Engleman opinion, the interpretation of that section was determined by the common law practice it was held to perpetuate. Those cases do not govern section 632.

[4] Our conclusion that a request for findings in a brief that is filed, pursuant to court order, prior to the entry of a judgment, is a timely request, has been arrived at, obviously, after a reconsideration of the problems involved, and not on the doctrine of *stare decisis*, although it does agree with the conclusions reached in some four decisions filed by us over the years. Another of our decisions is out of harmony with the position we are stating, that in Wesslund v. Andrews, 1948, Civ.A. 6826 (not published), where we gave undue heed to the cases construing "before trial." We disapprove it.

The judgment is reversed, with directions to the trial court to proceed to make and file findings of fact and conclusions of law.

SHAW, P. J., and STEVENS, J., concur.

Order Denying Rehearing

PER CURIAM.

The petition of respondent for a rehearing after judgment of this court on appeal, in the above entitled matter, having been filed, and having been duly considered,

Said petition is hereby denied.

Memorandum

[5] We prefer to follow such cases as Petroleum Midway Co. v. Zahn, 1944, 62 Cal.App.2d 645, 652, 145 P.2d 371, 375, holding that an appeal will lie from a void judgment, rather than those that favor a dismissal of an appeal from such a judgment.

125 Cal.App.2d Supp. 882

ENGLEMAN v. GREEN et al.

Civ. A. 8345.

Appellate Department, Superior Court,
Los Angeles County, California.
May 4, 1954.

Action wherein judgment was entered by the Municipal Court of Los Angeles Judicial District, Ida May Adams, J., without supporting findings of fact. Defendant appealed. The Appellate Department of the Superior Court, Los Angeles County, Bishop, Acting P. J., held that even though taking of evidence has been completed and counsel had made their arguments, defendant's request for findings of fact was timely, when made immediately after court announced its oral judgment and before judgment had been entered in clerk's official minutes.

Reversed with directions.

1. Judgment ⟾270

A judgment that is neither in writing and filed with the clerk nor entered in the clerk's minutes is not completed.

2. Judgment ⟾297

Where findings are required and have not been waived, a judgment, until entered, is not effectual for any purpose, and, at any time before entry, the court may change its conclusions of law and enter judgment different from that first announced.

3. Trial ⟾400(1)

A judge who has heard the evidence in a case may, at any time before entry of judgment, amend or change his findings of fact.

4. Judgment ⟾270

Any oral judgment must be entered in the clerk's minutes to be effective.

5. Judgment ⟾210

Where findings of fact are required, a judgment is not rendered until findings have been signed by trial judge and filed with clerk.

6. Judgment ⟾210

Whenever findings of fact are waived or are not required, a judgment is rendered when entered in the minutes of the court.

7. Trial ⟾18

The term "trial" as applied to one of the steps in the disposition of an action is the trial of the issues of fact, the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk unless findings have been waived.

See publication Words and Phrases, for other judicial constructions and definitions of "Trial".

8. Trial ⟾392(2)

Even though taking of evidence had been completed and counsel had made their arguments, defendant's request for findings of fact was timely, when made immediately after court announced its oral judgment and before judgment had been entered in clerk's official minutes. Code Civ.Proc. §§ 632, 647; Code Civ.Proc.1941, § 581; Const. art. 6, § 4½.

9. Appeal and Error ⟾1071(1)

The entry of a judgment without findings of fact, where findings are required and not waived, is not an immaterial error in procedure, and such judgment must be reversed.

10. Appeal and Error ⟾265(1)

Even though defendant did not enter an exception to ruling of court when defendant requested findings of fact, defendant was not thereby barred from asserting error on appeal. Code Civ.Proc. § 647.

* * *

Joseph W. Fairfield and Ethelyn F. Black, Los Angeles, for appellants.

Kopald & Mark, Beverly Hills, for respondent.

BISHOP, Acting Presiding Judge.

The defendant appeals from a judgment that contains these words: "findings not having been requested." This recital is contrary to the fact shown by the record. Findings were requested, but they were refused on untenable grounds and findings were never filed. The result is a judgment without foundation, which must be reversed.

After the taking of evidence had been completed, counsel made their arguments and then, with introductory observations, the trial court announced its judgment. Thereupon this dialogue took place, opened by the attorney for the defendant: "May we have findings on that, Your Honor?" The Court: "It is too late now. Judgment has already been completed. Findings must be asked for prior to trial. The trial is over."

The trial court made three errors in stating its conclusions why "It is too late now": (1) The judgment was not "completed"; (2) the trial was not over; and (3) there is no requirement that findings must be asked for prior to trial.

[1–3] The judgment was not "completed," that is, it was not a judgment that could not be changed at the will of the trial court, for it was neither in writing and filed with the clerk nor entered in the minutes. It is thoroughly settled that where findings are required, "Until a judgment is entered, it is not effectual for any purpose, Code Civ.Proc., § 664, and at any time before it is entered, the court may change its conclusions of law and enter a judgment different from that first announced. * * * Moreover, a judge who has heard the evidence may at any time before entry of judgment amend or change his findings of fact." Phillips v. Phillips, 1953, 41 Cal.2d 869, 874, 264 P.2d 926, 929.

[4–6] The rule is much the same if, for any reason, findings are not required; to be effective, any oral decision must be entered in the minutes. In Aspegren & Co., Inc., v. Sherwood Swan & Co., 1926, 199 Cal. 532, 537, 250 P. 400, 402, after a review of several cases, the Supreme Court dealing particularly with the matter of a judgment's "rendition," stated: "These several authorities indicate the rule to be that whenever findings are required the judgment is not rendered until they are signed and filed. But, whenever findings are waived or are not required the judgment is rendered when entered in the minutes of the court. With this rule we are in accord." A similar conclusion was stated in Smith v. Ross, 1922, 57 Cal.App 191, 193, 207 P. 55, 57: "Where, as in the present case, findings are waived, the entry of the court's decision in the clerk's minutes constitutes the rendition of the judgment. Until the minute order is entered in the clerk's regular minute-book—not in the courtroom clerk's so-called 'rough minutes'—no judgment is 'rendered.'" See also Brownell v. Superior Court, 1910, 157 Cal. 703, 708, 109 P. 91, Jablon v. Henneberger, 1949, 33 Cal.2d 773, 774–775, 205 P.2d 1, 2, and Wyman v. Municipal Court, 1951, 102 Cal.App.2d 738, 740, 228 P.2d 89, 90, 229 P.2d 491.

To sum up this phase of the case—as it is quite obvious that the trial court's decision had not been entered in the clerk's official minutes at the time it announced its judgment, its decision was not then effectual for any purpose; the judgment was not "completed" in any significant sense.

[7] This being so, the trial was not over. In the early case of Hastings v. Hastings, 1866, 31 Cal. 95, after pointing out that findings were not required (since Stats.1861, p. 589), the Supreme Court continued: "Still until the decision itself has been entered in the minutes, or reduced to writing by the Judge and signed by him and filed with the Clerk, the case has not been tried to a legal intent." We find many statements in the cases recognizing the principle that until the judgment is entered the trial is not over. See Warring v. Freear, 1883, 64 Cal. 54, 28 P. 115; Connolly v. Ashworth, 1893, 98 Cal. 205, 206, 33 P. 60; Broder v. Conklin, 1893, 98 Cal. 360, 33 P. 211; Reclamation Dist. No. 556 v. Thisby, 1901, 131 Cal. 572, 574, 63 P. 918; Dore v. Southern Pac. Co., 1912, 163 Cal. 182, 195, 124 P. 817; Coos Bay Mfg. Co. v. California S. Co., 1916, 29 Cal. App. 407, 155 P. 817; Bublitz v. Reeves, 1919, 40 Cal.App. 75, 78, 180 P. 28; Martello v. Superior Court, 1927, 202 Cal. 400,

408, 261 P. 476; People v. Daniels, 1948, 85 Cal.App.2d 182, 193–194, 192 P.2d 788, 794. We quote from two cases only: "It is quite clear that, when a case requiring findings is tried, the trial is not complete but is still in process of determination until findings are signed and filed. Until that time, the trier of the fact may change his mind, and, even though an order has been made directing the entry of judgment, may order a different judgment to be entered." Reimer v. Firpo, 1949, 94 Cal.App.2d 798, 800, 212 P.2d 23, 25. "The term 'trial' as applied to one of the steps in the disposition of an action is well understood in the practice in this state. It is the trial of the issues of fact (Perrin v. Miller, 35 Cal.App. 129, 169 P. 426), the purpose of which is to determine the cause on the merits, and it is not completed until the decision of the court is made and filed with the clerk * * * unless findings be waived * * *. Whether made and filed or waived, judgment may then be entered and the cause thus be disposed of on the merits." Superior Oil Co. v. Superior Court, 1936, 6 Cal.2d 113, 116, 56 P.2d 950, 952.

We come now to the statutory provisions that govern the problem under review. Section 632 Code of Civil Procedure, so far as it is immediately of interest, provides: "In superior courts and municipal courts, upon the trial of a question of fact by the court, its decision must be given in writing and filed with the clerk * * *. In municipal courts written findings of fact and conclusions of law shall be deemed waived unless they shall be expressly requested by one or more of the parties at the time of the trial * * *."

[8] The provision of section 632, with its "at the time of trial" is not to be confused with section 581, Code of Civil Procedure, which, prior to 1947, read: "An action may be dismissed * * * by the plaintiff * * * at any time before the trial". As early as Hancock Ditch Co. v. Bradford, 1859, 13 Cal. 637, where like words in section 148 of the Practice Act were under consideration, it was held that "before trial" meant before the submission of the case for decision, the Supreme Court explaining: "At common law, the right of the plaintiff was to take a nonsuit at any time before the jury retired, and we do not construe the statute as altering the rule." Section 632 is not, to our knowledge, an attempt to codify a common law practice; it does not require a request for findings "before trial" nor indicate that "trial" has any other than the usual meaning given it in the cases. It follows that even though the case may have been submitted to the trial court for its decision, inasmuch as the trial had progressed no further than the oral pronouncement of the court's judgment, and the attention of the parties, counsel and court, was still centered upon the case, beyond any doubt, at the time findings were requested, it was still "at the time of the trial".

Twice before, dealing with situations closely paralleling the circumstances of this case, we held (in unpublished opinions) that the request was timely; findings had not been waived. Smith v. Bernard, 1933, Civ.A. 2020; Kysela v. Higgins, 1942, Civ.A. 5351. A reexamination of the problem leaves us still of this opinion.

[9] We have, then, a judgment entered where findings are not waived, but required. It would seem that a judgment so entered is void. Easterly v. Cook, 1934, 140 Cal.App. 115, 35 P.2d 164; Supple v. Luckenbach, 1938, 12 Cal.2d 319, 323, 84 P.2d 52, 53; Estate of Dodds, 1942, 52 Cal.App.2d 287, 288–289, 126 P.2d 150. In any event, it may not be allowed to stand. Dowd v. Clarke, 1876, 51 Cal. 262, 263; Petroleum Midway Co. v. Zahn, 1944, 62 Cal.App.2d 645, 652, 145 P.2d 371, 374; Gilmore v. Gilmore, 1950, 99 Cal.App.2d 186, 187, 221 P.2d 123, 124. "It has been said by this court that 'the right to findings is a substantial right, as inviolate, under the statute, as that of trial by jury under the Constitution.'" These words taken from Estate of Ingram, 1929, 99 Cal.App. 660, 662, 279 P. 208, 209, were quoted in Estate of Pendell, 1932, 216 Cal. 384, 386, 14 P.2d 506, 507, another of the many cases where judgments (or orders) were reversed because findings were required but had not been filed.

There are four cases, Demartin v. Demartin, 1890, 85 Cal. 71, 75, 24 P. 594; In re Connors' Estate, 1895, 110 Cal. 408, 413, 42 P. 906; Greer v. Greer, 1939, 31 Cal.App.2d 39, 41, 87 P.2d 388, 389, and Wyman v. Municipal Court, supra, 102 Cal.App.2d 738, 740–741, 228 P.2d 89, 90, 229 P.2d 491, where the failure to file findings, where required, is looked upon simply as an error, which may or may not be prejudicial. These cases, we conclude, are out of harmony with the great majority of cases, which look upon the failure to file findings, not as an error in the proceedings leading up to judgment, but as a proceeding which stops short of a judgment. In the first case listed, some six cases were relied upon, but none of them involved a situation where no findings had been filed. In re Connors' Estate cites three cases, one of which was Demartin v. Demartin. The other two were cases where findings had been filed. The only case cited in support of the holding in Greer v. Greer is In re Connors' Estate. No authority is cited in the last of our four cases Wyman v. Municipal Court other than Article VI, section 4½. We are persuaded that we are on much more solid ground if we stand upon the principle in Petroleum Midway Co. v. Zahn, supra, 62 Cal.App.2d 645, 652, 145 P.2d 371, 375: "The entry of a judgment without findings, where findings are required and not waived, is not an immaterial error in procedure. (Citing cases.)"

[10] It may well be that appellant may not complain of the ruling made when he requested findings, because he failed to enter an exception. Basically, however, the wrong that has been done him is the entry of a judgment without findings where findings were not waived. Of this he may complain without taking an exception. Sec. 647, Code of Civil Procedure.

The judgment is reversed, with directions to the trial court to proceed to make and file findings of fact and conclusions of law, and to enter judgment thereon.

PATROSSO and STEVENS, JJ., concur.

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125 Cal.App.2d Supp. 890

HARDY v. FOSTER.

Civ. A. 8358.

Appellate Department, Superior Court,
Los Angeles County, California.
May 4, 1954.

Action wherein judgment was entered by the Municipal Court of the Los Angeles Judicial District, Elisabeth Eberhard Zeigler, J., without supporting findings of fact, which were requested by plaintiff in a letter addressed to trial judge and filed by clerk a week before judgment was entered. Defendant appealed from the judgment and from an order denying his motion for a new trial. The Appellate Department of the Superior Court, Los Angeles County, Bishop, J., held that court erred in failing to file findings of fact as requested.

Judgment reversed with directions; appeal from order denying motion for new trial dismissed.

1. Trial 🔑392(2)

For purposes of statute requiring findings of fact to be made at the time of "trial" the submission of a case for decision does not end trial and findings of fact may be requested until adjudication of the issues. Code Civ.Proc. § 632.

2. Trial 🔑392(2)

Where plaintiff requested findings of fact in letter, which was addressed to trial judge, and which was filed by clerk a week before judgment was entered court erred in failing to file findings of fact as requested. Code Civ.Proc. § 632.

3. Appeal and Error 🔑265(1)

Even though plaintiff requested findings of fact, which were not filed by trial court, defendant could assert such error on appeal. Code Civ.Proc. § 632.

Guerin & Guerin, Los Angeles, John J. Guerin, Los Angeles, of counsel, for appellant.

Greenbaum, Wolfe & Baker, Los Angeles, for respondent.

BISHOP, Judge.

[1] It does not clearly appear whether this case was or was not submitted by the trial court at the time briefs were ordered, but as appears in Haupt v. La Brea Heating, etc., Co., Cal.Super., 270 P.2d 125 and in Engleman v. Green, Cal.Super., 270 P.2d 127, that fact is an immaterial one. It does appear, that by a letter addressed to the trial judge by plaintiff's counsel and filed by the clerk a week before the judgment was entered, findings were requested.

[2, 3] We also consider the fact to be of no consequence that the request for findings was made by the plaintiff, whereas it is the defendant who is appealing. As pointed out in Engleman v. Green, supra, section 632, Code of Civil Procedure, requires findings, unless they are waived, and provides that in municipal courts they are waived "unless they shall be expressly requested by one or more of the parties * * *." Here, they were expressly requested by one of the parties; they were not waived; either party could complain that, under the circumstances, a judgment was entered without findings. The basic error was not in failing to heed plaintiff's request, but in failing to file findings when they were required.

A request made by letter, or made in the briefs, may not become a part of the record of the case, in which event the fact that findings were requested may fail to appear. The record before us, however, reveals the letter making a timely request for findings, and so the judgment entered without them must be, and it is, reversed, with directions to the trial court to proceed to make and file findings of fact and conclusions of law. The appeal from the order denying motion for a new trial is dismissed.

SHAW and PATROSSO, JJ., concur.

BLOTTER et al.

v.

FARRELL, Mayor, et al.

L. A. 23084.

Supreme Court of California.
In Bank.

May 18, 1954.

As Modified on Denial of Rehearing
June 16, 1954.

Proceeding for writ of mandate to compel city governing body to submit councilmanic redistricting ordinance to city electorate. The Superior Court, Riverside County, Thomas P. O'Donnell, J., entered judgment denying writ, and plaintiffs appealed. The Supreme Court, Carter, J., held that the power of the electorate of a city of the sixth class to establish councilmanic districts for such city includes, by implication, the power to redistrict.

Reversed.

Shenk and Edmonds, JJ., dissented.

Prior opinion 263 P.2d 847.

1. Mandamus 🔑154(7)

On issue as to whether special election might be required for submission of proposed initiative ordinance for councilmanic redistricting, petition for writ of mandate sufficiently complained of council's failure to act on supplemental initiative petition increasing number of signers from 11 per cent to 16 per cent of city's eligible voters. Government Code, § 34870 et seq.; Elections Code, §§ 1711, 1712.

2. Statutes 🔑316

Statute providing for the filing of a supplemental initiative petition where an original initiative petition is insufficient is permissive in nature and does not prohibit supplemental initiative petitions in other cases. Elections Code, § 1709.

3. Municipal Corporations 🔑108.5
Statutes 🔑342

The power of initiative and referendum is the exercise by the people of a power reserved to them and not the exercise of a right granted to them, and, in order to protect the exercise of such power, statutory or charter provisions dealing with the referendum should be afforded the same liberal construction afforded election statutes generally.

4. Municipal Corporations 🔑108.3

Even though plaintiffs' original initiative petition for councilmanic redistricting ordinance contained signatures of 11 per cent of the voters on filing date, plaintiffs were not thereby prevented from filing a supplemental petition increasing the number of signatures to 16% of the registered voters and thereby obtain submission of ordinance to voters at a special election rather than its submission at the next regular municipal election. Elections Code, §§ 1709, 1711, 1712.

5. Municipal Corporations 🔑108.2

An ordinance proposed by the electors of a city under the initiative law must constitute such legislation as the legislative body of such city has the power to enact under the law granting, defining and limiting the powers of such body.

6. Municipal Corporations 🔑115

The power to enact ordinances implies power, unless otherwise provided in the grant of a charter, or by statute, to repeal them.

7. Municipal Corporations 🔑108.2

The power of electorate of a city of the sixth class to establish councilmanic districts includes by implication the power to redistrict. Government Code, §§ 34870 et seq., 34871, 34876, 35322, 35323; Const. art. 4, § 1; Elections Code, §§ 1701, 1709, 1711, 1712.

8. Municipal Corporations 🔑108.2

The electorate of a city of the sixth class may propose by initiative petition legislation for the redistricting of the councilmanic districts of such city. Government Code, §§ 34870 et seq., 34871, 34876, 35322, 35323.

9. Municipal Corporations 🔑108.3

Where electorate of city of the sixth class obtained 16 per cent of the signatures of the eligible voters of the city to initiative petition for legislation in regard to councilmanic redistricting of the city, city governing body was required to either pass proposed ordinance immediately or to call a special election to submit such legislation to the voters of the city. Government Code, §§ 34870 et seq., 34871, 34876, 35322, 35323; Const. art. 4, § 1; Elections Code, §§ 1701, 1709, 1711, 1712.

10. Mandamus ⚷74(2)

Where a city council refuses to discharge its duty and fix a proper time for an election as requested by initiative petition, it may be compelled to do so by mandamus.

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Leonard A. Bock, Palm Springs, for appellants.

Thompson & Colegate, Riverside, Roy W. Colegate, City Atty., and Jerome J. Bunker, Asst. City Atty., Palm Springs, for respondents.

CARTER, Justice.

Plaintiffs, who are citizens of the City of Palm Springs, appeal from a dismissal of their petition for writ of mandate and a judgment on the pleadings in favor of the defendants, Mayor Charles D. Farrell, the City Council of the City of Palm Springs, et al.

During February and March of 1952, plaintiffs, as citizens of the City of Palm Springs, circulated two initiative petitions in said city. These petitions, which called for a special election for the purpose of adopting a proposed ordinance changing the boundary lines of the councilmanic districts, were presented to the city council on or about March 26, 1952, and by it referred to a committee for study and recommendation. The council failed to act on the petitions, and on or about April 15, 1952, refused to submit the proposed ordinance to a vote of the electors or call an election for that purpose. Thereafter the plaintiffs commenced this proceeding to obtain a writ of mandate compelling the mayor and City Council of the City of Palm Springs (hereinafter referred to as the defendants) to submit the proposed ordinance to the vote of the city electors.

The record indicates that the City of Palm Springs, a city of the sixth class, was incorporated in April, 1938. That as a part of the petition for incorporation, and pursuant to section 852d of the Municipal Corporations Act (now covered by sections 34870 et seq. of the Government Code), the city was laid out in seven councilmanic districts numbered one through seven. In their inception, these original districts each contained as nearly as possible the same voting strength.

During the years following the city's incorporation, some of the councilmanic districts experienced a large increase in population while the population of other districts increased very little. As a result of these population changes, the voting strength of the various councilmanic districts became seriously disproportionate. The extent of this inequality may be illustrated by the fact that in 1951 over 5,000 of the city's inhabitants resided in the first and second districts while the combined population of the fourth and seventh districts totaled less than 600 persons. This unequal distribution of population and voting strength among the various councilmanic districts (as of October, 1951) gave the 1,046 registered voters of the five smallest districts the power to elect five councilmen while the 1,978 registered voters of the two largest districts could only elect two councilmen.

In an effort to bring about a redistricting and to equalize the population of the various councilmanic districts, plaintiffs circulated the aforementioned initiative petitions, which were eventually signed by more than 16% of the city's registered voters. The defendants refused to act on the petitions and took the position that the city council was without authority to adopt an initiative ordinance for redistricting. Following this refusal to submit the proposed ordinance to a vote of the electors or to call an election for that purpose, plaintiffs commenced this proceeding to compel the defendants to act. Both plaintiffs and defendants moved for a judgment on the pleadings and after the oral arguments on said motions the trial court determined that the petition for writ of mandate failed to state facts sufficient to constitute a cause of action. The petition was dismissed and a judgment on the pleadings rendered in favor of the defendants.

Defendants' argument that the initiative petition can only be considered as one containing the signatures of not less than 10% more of the voters so as to come within section 1712[1] of the Elections Code rather than section 1711,[2] is without merit. The argument of the defendants is based upon two separate grounds: First that the petition for writ of mandate only covered the original initiative petition and secondly that plaintiffs had no authority to file a supplemental initiative petition.

In support of their argument that the petition for writ of mandate only covered the original initiative petition, defendants pointed out that plaintiffs' original initiative petition was certified by the clerk on March 11, 1952, to contain the signatures of 11% of the voters; that the supplemental initiative petition, bringing the number of signers up to more than 16% of the registered voters was not certified until March 29, 1952; and that since Paragraph XV of the petition for writ of mandate stated that the initiative petitions were submitted by the clerk to the council "on or about March 26, 1952" it could only refer to the original initiative petition. It is thus argued that since the action of the city council complained of was the action taken on the 26th of March, only the original initiative petition was at issue and therefore section 1712 of the Elections Code rather than section 1711 should be applicable.

[1] Defendants' reasoning fails to take into consideration Paragraph XVI of the petition for writ of mandate which provided in part that "although formal demand was, on the 15th day of April 1952 made on said Mayor and Council, the said Mayor and Council did fail, neglect and refuse to consider said proposed ordinance and petition and have refused to submit the same to the vote of the electors. * * *" Thus it appears that the petition for writ of mandate complained not only of the inaction at the council meeting of March 26 but also of the inaction after the demand of April 15, 1952, and therefore the demand involved both the original and the supplemental initiative petitions.

[2, 3] Defendants also argue that the supplemental initiative petition was unauthorized by the Elections Code and therefore section 1711 of the Elections Code (regarding initiative petitions which are signed by 15% or more of the registered voters) is not applicable. This argument is based upon the fact that the original initiative petition containing the signature of 11% of the voters was sufficient for the application of section 1712 and that therefore under section 1709 of the Elections Code a supplemental petition was not authorized. Defendants cite no authority upon which to base such a contention but merely refer us to the code section. Section 1709 provides that "If the clerk's certificate shows the petition to be insufficient, a supplemental petition, in form a duplicate of the original petition, bearing additional signatures, may be filed within ten days of the date of the certificate of insufficiency." This section permits a supplemental initiative petition when the original one is insufficient. The wording is permissive and does not appear to prohibit supplemental initiative petitions in other cases.

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[1] "If the initiative petition is signed by not less than ten per cent of the voters of the city, and the ordinance petitioned for is not required to be, or for any reason is not, submitted to the voters at a special election, and is not passed without change by the legislative body, then the ordinance without alteration, shall be submitted by the legislative body to the voters at the next regular municipal election."

[2] "If the initiative petition is signed by not less than fifteen per cent of the voters of the city and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, then the legislative body shall either:

"(a) Pass the ordinance without alteration at the regular meeting at which it is presented and within ten days after it is presented.

"(b) Immediately call a special election at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city."

As stated by this court in Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713, 715, "It is well settled that the power of initiative and referendum, as exercised in this state, is the exercise by the people of a power *reserved* to them, and not the exercise of a right *granted* to them. * * * (Citations.) For that reason, and in order to protect the people of this state in the exercise of this reserved legislative power, statutory or charter provisions dealing with the referendum should be afforded the same liberal construction afforded election statutes generally." See, also, Laam v. McLaren, 28 Cal.App. 632, 153 P. 985.

[4] In view of the permissive wording of section 1709 and the rule of liberal construction, which is applicable to statutes dealing with the initiative power, it would appear that plaintiffs were not prohibited from filing a supplemental initiative petition in the instant case. The net result was a legally sufficient initiative petition containing the signatures of more than 16% of the registered voters of the City of Palm Springs.

On appeal plaintiffs contend that the power of the electors of the city to district includes, by implication, the power to amend or change those districts; that an ordinance providing for a redistricting is available by way of initiative; and that the city council was under a duty to either pass the proposed ordinance or submit it to the voters at a special election.

In regard to the power to redistrict, plaintiffs allege that it is based upon sections 34871, 34876, 35322, and 35323 of the Government Code. Section 34871 of the Government Code provides that "At any municipal election, or special election held for that purpose, the legislative body may submit to the electors an ordinance providing for the election of members of the legislative body by districts." Under the provisions of this section a city of the sixth class which has been electing the members of its legislative body from the city at large is authorized to submit to the electors an ordinance under which such members would be elected by districts. Section 34876[3] provides that where a city of the sixth class incorporates, the petition for incorporation may provide for the election of members of the legislative body by districts. By the enactment of section 35322[4] the Legislature gave to cities of the sixth class authority to alter by ordinance the boundaries of wards or to create additional wards where new territory is annexed to said city. This is followed by section 35323 which provides that "In altering the boundaries of wards, or creating new wards, each ward shall contain, as nearly as possible, an equal number of inhabitants eligible to citizenship."

In substance the foregoing sections set forth the authority whereby a city of the sixth class may be divided into councilmanic districts and whereby the districts may be altered or new districts added when new territory is annexed to such city. No other specific reference to redistricting is made.

[5] It is well recognized that "an ordinance proposed by the electors of a county or of a city in this state under the initiative law must constitute such legislation as the legislative body of such county or city has the power to enact under the law granting, defining and limiting the powers of such body", Hurst v. City of Burlingame, 207 Cal. 134, 140, 277 P. 308, 311, and therefore it must be determined whether any power or authority to redistrict existed. Granting that the power to divide a city

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[3] "Inclusion of provisions in petition for incorporation. If the petition for incorporation of a sixth class city provides for the election of members of the legislative body by districts and includes substantially the provisions required to be included in an ordinance providing for such election, the members shall be elected pursuant to this article."

[4] "Territory annexed to city divided into wards: Alteration or addition of wards. Where territory is annexed to a city divided into wards, or to a city which later divides itself into wards, the legislative body, by ordinance, shall alter the boundaries of the city wards to include the annexed territory in one or more wards adjoining the territory, or make one or more additional wards out of the annexed territory. The number of wards shall not be increased to exceed the number which the city is allowed by law."

into councilmanic districts is amply provided for under the foregoing sections, we are confronted with the problem of whether the power to district gives, by necessary implication, the power to redistrict. To put it another way, does the power to legislate on a particular subject include the power to repeal or amend such legislation or must such power be specifically spelled out in each instance?

In Foster v. Board of Police Com'rs, 102 Cal. 483, 489, 37 P. 763, 764, this court stated that the power to legislate on a particular subject "necessarily includes the power to amend an existing regulation upon the same subject, * * *." In discussing the repeal of municipal legislation it has been stated that "It will be presumed that an ordinance duly passed continues to exist, and the burden is upon one claiming a repeal to show it. However, it is clearly within the power of the council of a city to repeal any ordinance passed by it which does not affect the contractual relation of the city." 18 Cal.Jur. 215.

[6] Frequently a municipal corporation is given the express power by charter or statute to make, repeal or amend ordinances; however, such is not necessary since "it is the general rule that power to enact ordinances implies power, unless otherwise provided in the grant, to repeal them. It is patently obvious that the effectiveness of any legislative body would be entirely destroyed if the power to amend or repeal its legislative acts were taken away from it. * * * The power of repeal extends, generally speaking, to all ordinances. Indeed, a municipal corporation cannot abridge its own legislative powers by the passage of irrevocable ordinances. * * * Accordingly, in the absence of a valid provision to the contrary, a municipal council or assembly, having the power to legislate on, or exercise discretionary or regulatory authority over, any given subject may exercise that power at will by enacting or repealing an ordinance in relation to the subject." McQuillin, Municipal Corporations, 3rd Ed., Vol. 6, § 21.10.

[7] Thus it would appear that the power to legislate generally includes, by necessary implication, the power to amend or repeal existing legislation. This implied power to amend and repeal is especially necessary in regard to establishment of councilmanic boundaries since our democratic system of government requires, whenever possible, equality of representation. The problem of population equality among election areas is not confined to state or national levels, it exists whenever divisions of territory and population are made for the purpose of electing popular representatives. Thus as a necessary consequence of our democratic system of government, the councilmanic districts must be changed periodically to prevent drastic population differences from destroying the representative system of government. In the instant case the Government Code contains no provision prohibiting redistricting, and, therefore, the specific power to district should, by necessary implication, include the power to redistrict.

Granting that the power to redistrict does exist, it must be determined whether or not such proposed redistricting legislation is available by way of initiative petition. In this respect it should be noted that the power to district under sections 34871 and 34876 of the Government Code is given exclusively to the electors, while the power to district or redistrict under sections 35322 and 35323 (when new territory is annexed) is given directly to the city council and indirectly to the electors under their initiative powers granted by the Constitution of California. It is therein provided that "The initiative and referendum powers of the people are hereby further reserved to the electors of each county, city and county, city and town of the State to be exercised under such procedure as may be provided by law." Calif. Const., art. IV, § 1.

It is generally accepted that most forms of legislation may be proposed, repealed or amended by the proper exercise of the initiative, see McQuillin, Municipal Corporations, 3rd Ed., supra, Vol. 6, § 21.11, and under the provisions of section 1701 of the Elections Code "Any proposed ordinance may be submitted to the legislative body of the city by a petition filed with the clerk of the legislative body after being signed by not less than the number of voters specified in this chapter. * * *"

[8-10] In view of the foregoing authorities it appears that the power to redistrict did exist and that such legislation could be proposed by initiative petition. The only remaining question is whether or not the city council was under any duty to call a special election, when requested to do so, for the purpose of submitting the proposed ordinance to the electors. Section 1711 of the Elections Code provides that "If the initiative petition is signed by not less than fifteen per cent of the voters of the city and contains a request that the ordinance be submitted immediately to a vote of the people at a special election, then the legislative body shall either: (a) Pass the ordinance without alteration at the regular meeting at which it is presented and within ten days after it is presented. (b) Immediately call a special election at which the ordinance, without alteration, shall be submitted to a vote of the voters of the city." In the case at bar, the original and supplemental initiative petitions were signed by more than 16% of the registered voters; the request was made that the ordinance be submitted to an immediate vote of the people; and the published notice of intention to circulate the initiative petition provided that "the purpose of circulating this petition is to have placed upon a ballot at a special election to be held in this city, a law providing for redistricting. * * *" It would thus appear that the city council was under a duty to either pass the proposed ordinance immediately or to call a special election for that purpose. Where a city council refuses to discharge its duty and fix a proper time for the election, it may be compelled to do so by mandamus. See Locher v. Walsh, 17 Cal.App. 727, 121 P. 712.

We conclude, therefore, that the power to redistrict did exist by necessary implication; that an initiative petition was a proper method of proposing such legislation; that the petition here involved was sufficient for that purpose; and that when properly submitted the city council was under a duty to take immediate action.

The judgment is therefore reversed.

TRAYNOR, SCHAUER, and SPENCE, JJ., and BRAY, J. pro tem., concur.

SHENK, Justice.

I dissent.

It is of course conceded, as a general proposition, that an ordinance proposed by the electors of a city under the initiative law must constitute such legislation as the legislative body has the power to enact. Conversely it is true that if the City Council was without power to adopt the redistricting ordinance here involved it could not be compelled to do so through the medium of an initiative petition, and likewise would not be authorized to submit it to the electorate of the City for adoption. Hurst v. City of Burlingame, 207 Cal. 134, 140-141, 277 P. 308.

In the present case the majority discover an implication in the provisions of the Government Code relating to the districting of cities to the effect that such cities also have the power to redistrict their territory. Sections 34871 and 34876, Government Code. Those sections are contained in that part of the Government Code setting out the procedures and conditions under which a city of the sixth class may provide for the election of its legislative body by districts, either at the time of its incorporation or at a time after the city has functioned with a legislative body chosen at large. If it be true that those and other sections imply a power to redistrict, as held by the majority, then the mode and method prescribed by the legislature for districting a city should be followed when redistricting is sought to be brought about. Such special procedures are in substance set forth in Government Code Section 34874 as follows: "If three-fourths of the qualified electors of the city vote in favor of the ordinance [to district a city then functioning with a legislative body chosen at large], at the expiration of the terms of office of the members of the legislative body or when a vacancy occurs, members of the legislative body shall be elected by districts." However, redistricting the city as proposed by the ordinance in the present case would become valid and binding, if enacted under the initiative law, if "a majority of the voters * * * vote in its favor," and it would "be considered as adopted upon the date that the vote is declared by the canvassing board, and shall go into effect ten days thereafter." Elections Code, § 1715. The discrepancies in procedure between the proposed method of redistricting and the one provided for in the Government Code are obvious and substantial. The initiative process does not accord applicable procedural safeguards afforded by the special legislation on the particular subject.

In Hurst v. City of Burlingame, supra, 207 Cal. 134, 277 P. 308, this court held invalid a zoning ordinance of the City of Burlingame enacted by initiative. Procedural provisions of The Zoning Act of 1917, Stats.1917, p. 1419, had not been complied with. The court stated at pages 140 and 141 of 207 Cal., at page 311 of 277 P.: "It is too clear for controversy that, if the board of trustees of the city of Burlingame had adopted the ordinance in question without compliance with the requirements of the Zoning Act above outlined, said ordinance would have been inoperative and void. It is equally clear that the infirmity would not be cured by the purported adoption of the ordinance by the electors of the City under the initiative law. * * * The Zoning Act is a special statute dealing with a particular subject and must be deemed to be controlling over the initiative, which is general in its scope." The failure to comply with the districting provisions of the Government Code by the method through which the defendant city is sought to be redistricted in the present case creates a situation which cannot be materially distinguished from that in the Hurst case, and there is no reason why the same principles of law should not apply.

There is another good reason why the City Council was not required to submit the proposed ordinance to the electorate. The effect of the ordinance, if enacted either by the council or under the initiative process, would be to oust the incumbents from a portion of the districts they now represent, leave some areas with two councilmen and others with none, create confusion within the newly created districts as to the right of recall by electors therein, and reduce to an absurdity the residential requirements of both councilmen and electors. This would cast in doubt the validity of the status of the membership of the City Council and any legislation or other official action of that body. It was never intended that an ordinance with the foregoing consequences could be passed by the council or be subject to the initiative process. In commenting on the scope of the reservation to the people of the power to enact legislation by initiative, it has been correctly stated that consideration must be given to the consequences of applying it to a particular act of legislation. Thus if it be found that the inevitable effect of direct legislation would be greatly to impair or wholly destroy the efficacy of some essential or indispensable govermental power, then in such case it is said that the courts may and should assume that the people intended no such result to flow from the application of those powers and that they do not so apply. Chase v. Kalber, 28 Cal.App. 561, 569–570, 153 P. 397; 18 Cal.Jur. 946–947; see also Starbuck v. City of Fullerton, 34 Cal.App. 683, 168 P. 583.

The City Council properly refused to pass or to submit to the electorate a provision which, if enacted, would not constitute proper legislation, Hyde v. Wilde, 51 Cal. App. 82, 84, 196 P. 118, and mandamus should not be invoked to compel the performance of an act when, as here, there is no duty to perform it. I would affirm the judgment.

EDMONDS, Justice (dissenting).

Admittedly, the Legislature has made no express provision for redistricting cities of the sixth class by an initiative measure, and to imply such a procedure, in my opinion, requires the court to reason from analogies which do not fit.

The conclusion that such a procedure is a proper one appears to be based upon this reasoning; (1) certain provision of the Government Code permit the legislative body of the city to enact or submit to the voters measures relating to councilmanic districting; (2) as a general rule, the power to enact includes the power to amend or repeal legislation; (3) the initiative process includes those measures which the legislative body may enact.

I do not believe that a general power of redistricting properly may be implied from the limited situations provided for districting the city in the first instance. The situations relied upon as permitting districting are limited in number, and in each instance, a procedure is required which differs from that of the others. But in each case, the result is the same—the city is divided into councilmanic districts. Accordingly, it is impossible to state, and the majority do not attempt to delineate, the exact basis and the proper procedure for implying a power to redistrict.

It seems clear that the fault lies not in the failure of the Legislature to indicate clearly a method of redistricting, but in its failure to provide for such a procedure at all. Rather than to attempt to create such a procedure by judicial legislation, it would be preferable for the court to await the action of the Legislature to enact a measure for redistricting with the procedural safeguards it may deem appropriate.

I would affirm the judgment.

Rehearing denied; SHENK and EDMONDS, JJ., dissenting.

CITY & COUNTY OF SAN FRANCISCO
v.
ROSS. *

Civ. 16105.

District Court of Appeal, First District, Division 1, California.

May 20, 1954.

Rehearing Denied June 18, 1954.

Hearing Granted July 14, 1954.

Proceeding in mandamus to compel controller of City and County of San Francisco to certify the availability of funds to be used by City and County for acquisition by eminent domain of certain land for use as parking facilities. The District Court of Appeal, Peters, P. J., held that the acquisition of land in city for purpose of leasing it to an entrepreneur for construction of parking facilities, the city, by terms of lease, abdicating its right to control charge for parking and leaving entrepreneur free to charge what traffic would bear, was for a private, not a public use, and was not a proper exercise of right of eminent domain.

Application for writ denied.

1. Eminent Domain 🔑19

The use of public property for parking purposes is a "public use," and eminent domain may be used to acquire property for such use.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

2. Municipal Corporations 🔑722

The city of San Francisco has power, as a general proposition, to lease its properties, but this power is restrained by limitations in charter.

3. Eminent Domain 🔑19

The acquisition of property for the purpose of leasing it to a private operator for 50 years for the construction and operation of public garage, where the city retains supervisory control over rates to be charged, is acquisition for a "public use."

See publication Words and Phrases, for other judicial constructions and definitions of "Public Use".

4. Eminent Domain 🔑19

The acquisition of land in city, for purpose of leasing it to an entrepreneur to construct parking facilities, the city, under terms of lease, to abdicate its right to control charges for parking, leaving entrepreneur free to charge what traffic will bear, was for a private use, not a "public use" and was not a proper exercise of right of eminent domain. Streets and Highways Code, §§ 32500–33552; Const. art. 1, § 14.

5. Eminent Domain 🔑13

To justify impairment, by exercise of eminent domain, of the important constitutional right to own property, the use intended must be clearly and definitely a public one. Const. art. 1, § 14.

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* Subsequent opinion 279 P.2d 529.

6. Eminent Domain ⚷13

If a use is predominantly private in nature, the facts that some members of the public will be benefited by such use or that a public use is incidentally involved will not justify the impairment of the private owner's rights by exercise of eminent domain. Const. art. 1, § 14.

7. Eminent Domain ⚷19

Statutes providing for the acquisition of land by municipalities for use as parking facilities disclose a general state public policy to require control over rates as a condition precedent to leasing projects constructed on property acquired by eminent domain, and an awareness on the part of the legislature that such control is indispensable under constitutional limitation on the power of eminent domain. Streets and Highways Code, §§ 31500–31907, 32500–33552, 33800–34859, 35100–35705; Government Code, §§ 37394, 54300–54672; Health and Safety Code, §§ 32000–32313, 33000–33954; Code Civ.Proc. § 1238.1; Const. art. 1, § 14.

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Dion R. Holm, City Atty., John Elmer Barricklo, Deputy City Atty., San Francisco, for petitioner.

Jesse H. Steinhart, B. J. Feigenbaum and John H. Steinhart, San Francisco, for respondent.

PETERS, Presiding Justice.

By this proceeding in mandamus the City and County of San Francisco seeks to compel Harry D. Ross, the Controller, to certify to the availability of funds from the 1947 Off-street Parking Bond Fund to be used by the petitioner for the acquisition by eminent domain of a proposed public off-street parking garage site at Ellis and O'Farrell Streets in San Francisco. The site is now privately owned. The City intends to lease it to a private operator who will construct and operate a parking garage thereon. By the terms of the proposed lease the City will not retain any control over the rates to be charged by the lessee. The Controller, on many grounds, has refused to make the requested certification. His most important objection is that the proposed use is not a "public use" within the meaning of Article I, section 14, of the Constitution, relating to eminent domain. We agree with this contention.

The background leading up to this controversy is not in dispute. On November 4, 1947, the electorate of San Francisco approved a parking bond proposition in the amount of $5,000,000. The precise proposition submitted to the voters was worded as follows: "$5,000,000 to pay the cost of public parking lots, storage space, garages, single or multi level structures, and other off-street parking facilities on, under or above the surface of any property, including public parks, squares, lands, easements or rights of way to be acquired by purchase or condemnation, together with buildings, structures, equipment, approach roads, entrances, exits, fencing, off-street parking meters, and other works, property or structures for the accommodation of automotive vehicles, and necessary or convenient for adequate parking facilities, to relieve the congestion and to facilitate traffic in the metropolitan district of the City and County of San Francisco, provided that all lands and sites so acquired be subject to the approval of the Planning Commission of the City and County of San Francisco."

There still remains in this fund, unappropriated and unallocated, approximately $4,000,000 available to be used for the purposes for which the bonds were authorized. On October 3, 1949, purporting to act under the Parking Law of 1949, Sts. & Hy. Code, §§ 32500–33552, the Board of Supervisors took the necessary steps to create a Parking Authority in this area. This Authority, by formal resolution, approved the "Ellis-O'Farrell Midblock Site" as a site needed for off-street parking purposes, after first securing the determination of the City Planning Commission that such project would not conflict with the master plan of the Commission. The resolution requested the Board to designate the site as one needed for public parking purposes and to appropriate the $1,750,000 estimated as necessary to acquire it. The Board of Supervisors, by resolution, determined that the site was necessary and convenient as an off-street parking site, and requested the Parking Authority to submit to it a proposed joint working agreement between the City and the Authority by which the site was to be acquired and a public garage constructed and operated thereon. The Parking Authority and the City executed such a joint working agreement. The Authority thereupon recommended to the Board the acquisition of the site in question under the San Francisco charter and the general eminent domain statutes. It also recommended that the Board request the Controller to certify the availability of $1,750,000 for such acquisition, and requested the Board to submit an appropriation ordinance therefor. The Board, by appropriate resolution, concurred in the recommendation of the Parking Authority and directed the clerk of the Board to request an appropriation of the $1,750,000 for the purposes involved. The clerk of the Board submitted to the Controller a request for an appropriation from the bond fund, and an appropriation ordinance of the Board, requesting him to certify the availability of funds in that fund for the desired purpose. The Controller refused to comply, contending that the money in the fund could not be used for the proposed expenditure. His approval is necessary before such money can be lawfully appropriated from the fund. § 86, par. 1, of the Charter of San Francisco. This refusal by the Controller resulted in the filing of this petition aimed at compelling the Controller to act.

The plan of the City is to acquire, by condemnation, a portion of the Ellis-O'Farrell midblock between Powell and Stockton Streets, and to lease that site to a private operator who will agree to construct and operate thereon an off-street parking garage, with a capacity of not less than 900 cars, and a number of retail commercial stores. The resolution of the Board recommends the acquisition of the site "for the purpose of a public off-street parking garage and uses necessary or incidental thereto and that the inclusion of retail commercial stores be permitted in said structure." The major portion of the site is presently occupied by a privately-owned parking facility with ability to accommodate not over 225 automobiles. The plan provides that the City will own the condemned site but will lease it for not less than twenty-five years and not more than fifty years for a rental based on a percentage of the gross income, and with a minimum fixed flat rental. The lessee must build according to the specifications of the City as lessor. The completed structure will face on both Ellis and O'Farrell Streets. It is provided that the lessee will construct on the ground floor of such frontages some retail stores, not exceeding twenty-five per cent of the total area of the structure, and will be permitted to lease these to private persons for commercial purposes. The City estimates that not more than four per cent of total area of the garage will be devoted to this purpose. The lease intentionally omits any provision conferring on the City the right to control or restrict, in any way, the rates exacted by its lessee from the public for parking privileges. The City expressly disavows any intention to exercise such control.

There are various state statutes authorizing, by alternative means, the acquisition by eminent domain of property by a city that may be leased by it for purposes of off-street parking. These statutes will be referred to later in this opinion. In the instant case the City and County of San Francisco has elected not to proceed under any of these alternative statutes, apparently because most of them expressly require as a condition to the exercise of the conferred power that the City retain control over rates. In the instant case the City, admittedly, is purporting to act under the authority of its charter and the general law of eminent domain.

The city charter, § 2, par. 1, authorizes the City "subject to the restrictions contained in this charter" to "lease and convey real and personal property." For possible "restrictions contained in this charter" see §§ 91 and 93. The City argues that as a chartered city it has full control over its municipal affairs, possesses all powers not specifically denied to it, and that, since it has power to lease its property, the terms contained in such lease are solely within its control. As general propositions these contentions are not challenged by respondent. The City next argues that section 1238.1 of the Code of Civil Procedure declares the use of land acquired by eminent domain for off-street motor vehicle parking is a public use. Putting the two arguments together, it is contended that the City may acquire off-street parking premises by eminent domain, and, once acquired, may operate such premises itself or lease them, subject to whatever terms it may determine.

These arguments are predicated on three basic premises:

1. That the use of property for the construction of parking facilities by a city is a public use;

2. That the city possesses the power to lease its properties; and

3. That, since San Francisco is a chartered city, possessing local autonomy with full control over municipal affairs, the terms of such leases are mere procedural matters resting entirely within the power of the city.

[1] The first of these arguments is undoubtedly sound. Although there are a few early cases in other states holding that the acquisition of property by a city for the operation by it of a public parking lot or garage is not a public use, in the year 1954 there can be no doubt but that the use of public property for parking purposes is a public use, and that eminent domain may be used to acquire such property for such use. See Wayne Village President v. Wayne Village Clerk, 323 Mich. 592, 36 N.W.2d 157, 8 A.L.R.2d 373 for a collection of the earlier cases; for later cases directly or indirectly involving the question see Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523; Denihan Enterprises v. O'Dwyer, 302 N.Y. 451, 99 N.E.2d 235; Bowman v. Kansas City, Mo.Sup., 233 S.W.2d 26; Brodhead v. City & County of Denver, 126 Colo. 119, 247 P.2d 140; City of Richmond v. Dervishian, 190 Va. 398, 57 S.E.2d 120; Cleveland v. City of Detroit, 324 Mich. 527, 37 N.W.2d 625, 11 A.L.R.2d 171; De Lorenzo v. City of Hackensack, 9 N.J. 379, 88 A.2d 511; Lenzner v. City of Trenton, 22 N.J.Super. 415, 91 A.2d 896; Lowell v. City of Boston, 322 Mass. 709, 79 N.E.2d 713; McSorley v. Fitzgerald, 359 Pa. 264, 59 A.2d 142; Poole v. City of Kankakee, 406 Ill. 521, 94 N.E.2d 416; Parr v. Ladd, 323 Mich. 592, 36 N.W.2d 157, 8 A.L.R.2d 357; State ex rel. Gordon v. Rhodes, 158 Ohio St. 129, 107 N.E.2d 206; for two California cases generally discussing the problem see Alexander v. Mitchell, 119 Cal.App.2d 816, 260 P.2d 261; City of Whittier v. Dixon, 24 Cal.2d 664, 151 P.2d 5, 153 A.L.R. 956. Respondent does not challenge this premise.

[2] The second premise, that the City possesses the power to lease its properties, as a general proposition is also sound, and unchallenged by respondent. Such power to lease, however, by section 2 of paragraph 1 of the San Francisco charter, is limited "to the restrictions contained in this charter." Section 91 of the charter places the power to lease city property in the hands of the Director of Property. There is no showing in the present record that the City has violated or intends to violate this provision. Section 93 of the charter contains a more important limitation. It provides: "When the head of any department in charge of real property shall report to the board of supervisors that certain land is not required for purposes of the department, the board of supervisors, by ordinance, may authorize the lease of such property. The director of property shall arrange for such lease for a period not to exceed twenty years, to the highest responsible bidder, at the highest monthly rent. The director of property shall collect rents due under such lease." This section limits leases executed under it to a term of twenty years, while the proposed lease here involved is for not less than twenty-five nor more than fifty years. Respondent argues that under this section the City may lease only that city property that has been reported by a department head to be not required by his department, and that the City cannot acquire property by eminent domain for the purpose of immediately declaring it to be surplus property and then leasing it. Petitioner argues that state law

permits a lease for fifty years, Gov.Code, § 37394, for parking purposes, that section 93 only applies to "surplus" property, and that as to property that is not surplus, the charter contains no limitations. This is an interesting problem of interpretation. It is not controlled by the case of City and County of San Francisco v. Linares, 16 Cal.2d 441, 106 P.2d 369, which involved the lease for fifty years for parking purposes of the subsurface beneath Union Square in San Francisco, because that was city-owned park land which was covered by old section 41, now section 42, of the charter, authorizing the City to lease park lands for fifty years.

We do not find it necessary to pass on this question of interpretation because we are of the opinion that, regardless of the applicability of section 93 of the charter, the use here contemplated is not a public use, and that, therefore, the power of eminent domain may not be used to acquire the land. This involves the third premise advanced by petitioners. This is the basic question involved.

[3] Inasmuch as the use of property for public parking is a public use, and, assuming the City may lease its properties for fifty years, it may be conceded that the acquisition of property for the purpose of leasing it to a private operator for fifty years for the construction and operation of a public garage, where the city retains supervisory control over the rates to be charged, is also a public use. See, generally, Paso Robles War Memorial Hospital Dist. v. Negley, 29 Cal.2d 203, 173 P.2d 813; City of Oakland v. Williams, 206 Cal. 315, 274 P. 328; see also Barnes v. City of New Haven, 140 Conn. 8, 98 A.2d 523. In other words, leasing to a private operator does not *per se* determine that the proposed use is not a public one. But respondent argues that where the proposed lease of a parking facility intentionally fails to provide for control over rates, a different legal proposition is presented. It is urged that while a chartered city possesses complete control over procedural matters, and while many of the terms of any lease are procedural in nature and therefore within the control of a city (Laurent v. City & County of S. F., 99 Cal.App.2d 707, 222 P.2d 274), the failure to retain control over rates to be charged by a parking facility results in the project becoming primarily for the benefit of the private operator and the use no longer is public. If this argument is sound, and we think that it is, then this is not a matter of procedure but is one of substance controlled by state constitutional provision.

[4] In arguing this question both parties refer to the recent decision of this court in Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 266 P.2d 105. There we upheld a state statute permitting a city to condemn land, not necessarily a slum area, but which constituted a social and economic liability to the city because of unsound planning, and which authorized the city to work out a master plan based on sound planning, and then to sell the land into private ownership, the owners agreeing to use the property in accordance with the master plan. This was upheld as a public use although the condemnation contemplated the sale of the condemned property to private owners. In so holding this court, in discussing the meaning of "public use" stated, 122 Cal.App.2d at page 803, 266 P.2d at page 122: "In California our courts have followed the broader definition of 'public use' and the cases hereinbefore cited have held that if property is taken for a public use, the fact that it is later to be returned to private ownership *subject to restrictions protecting the public use,* does not make it any the less a public use." (Italics added.)

That language supports respondent. There the public use was to take the area involved, abolish conditions such as poor street planning, lack of public areas, etc., replan the area on a sound economic and social basis, and then sell the remainder of the land to private owners "subject to restrictions protecting the public use." With the replanning of the area the main public use was ended as long as the new owners agreed to comply with such new plan. Thus, selling into private ownership, subject to such restrictions, did not destroy but, in fact, carried out, the public use. But in the instant case the intent is to condemn the land and then to lease it to a private operator who will construct and operate a parking facility thereon without "restrictions protecting the public use," i. e., the control of rates. When land is acquired for parking purposes the public use which gives validity to the condemnation necessarily looks forward to the continuing operation of furnishing the public service involved. Such continuing operation ceases to be primarily a public use when the parking garage is operated for the benefit of a private operator who is permitted to charge the public what the traffic will bear.

[5, 6] The right of a citizen to own private property is a most important constitutional right. That right is subject, among other things, to the right of governmental bodies to seize and condemn the property against the will of the owner when the seized property is to be devoted to a public use. But to justify the exercise of this impairment of the right, the use intended must be clearly and definitely a public one. If the use is predominantly private in nature, the fact that some members of the public will be benefited by such use, in other words, that a public use is incidentally involved, will not justify the impairment of the private owner's rights. That is this case.

The fallacy in petitioner's position is in its failure to analyze the nature of the need of the public for parking facilities, and the nature of the need that makes the use of property for such purposes predominantly a public one. With the increased use of motor cars and the failure of public transportation in many areas to meet the needs of the citizens, more and more persons drive their cars into the central district for the purpose of shopping or to work. In San Francisco, present parking facilities, privately operated, at the rates now charged, many of them requiring the purchase of other services before a car can be parked, have not met the needs of the great majority of motorists. Until the problem of traffic congestion and its related problem of cheaply parking automobiles in the downtown area are solved, there is constant pressure for decentralization. This affects not only the operators of downtown stores, whose customers go elsewhere for service, but government itself is directly affected, not only by the lowering of the tax base in the downtown areas, but by the increasing frustration of its citizens that business or pleasure has brought downtown but who are delayed or prevented from accomplishing their objectives by inability to park their automobiles at a rate they can afford.

The need to be satisfied is not solely the need for more parking space *per se*. The primary need is to supply parking at a rate that the people who want short time parking while they shop or transact their business, can afford, or all day cheap parking for the worker in the downtown areas. If the automobile driver can only secure parking space in a garage at a rate a private operator sees fit to charge and in an amount the traffic will bear, the public use nature of the enterprise becomes extremely remote and private benefit to the operator the dominant factor. Many cities have solved this problem by furnishing the public with cheap parking in publicly-operated facilities. Others do so through facilities leased to private operators but with some government agency controlling rates. In such cases the use is a public one. But when the City seeks to condemn property for the purpose of leasing it to a private operator for garage purposes and no control of rates is retained, the enterprise is not being operated for the general public good but for the benefit of a privileged few and primarily for private gain. The use then becomes a private one.

A problem somewhat analogous to the instant one was presented when San Francisco contemplated purchasing Angel Island for use as a public recreation area to be operated by a private individual under a lease from the City. Under date of May 9, 1949, the City Attorney advised the government agencies involved that such lease could not be executed lawfully unless the City retained control over the enterprise. In the course of this opinion the City Attorney stated: "If in their [board of supervisors'] further judgment and discretion, they determine that the most efficient, economical, and desirable method of effectuation of the public purpose of the acquisition is through the medium of a lease to private operators it is my further opinion that they may validly and legally execute such a lease therefor but that under such lease or agreement they must retain or delegate to other city officials supervisory control of the manner and method of the operation of the island under reasonable rules and regulations to be adopted so that at all times there will be insurance that the island will be operated for the general public good and not primarily for private gain or for the benefit of a privileged few." That reasoning is equally applicable to the instant case.

A similar holding is to be found in Opinion to the Governor, 76 R.I. 365, 70 A.2d 817. There the court held unconstitutional a statute authorizing a development authority to acquire land by eminent domain for a marina and auditorium to be operated by a private individual under a lease from the authority. Invalidity was adjudged because the provisions of the lease "in substance it would permit the spending of public money and the exercise of the right of eminent domain to acquire private property ostensibly for a public purpose but actually for profit in the operation of the marina as a private enterprise." 70 A.2d at page 820. This would have involved permitting a private person to "operate it for his own profit by fixing the fees and charges for its use and for services rendered, without regulation in the public interest as a public utility * * * and would remove the element of primary public use or purpose * * *." 70 A.2d at page 820.

This reasoning is equally applicable to the operation of a parking garage by a private operator proceeding under a lease with no limitation or control over rates. Petitioner seeks to distinguish these opinions by pointing out that the enterprises there involved, by their very nature, were monopolies, while a parking garage exercises no such exclusive right. It is argued that "the economic law of supply and demand will govern a reasonable operation of the proposed project insofar as public rates and charges are concerned." (Pet.Rep.Br., p. 17.) The so-called "law of supply and demand" means nothing more than that the operator will charge what the traffic will bear. That is no real protection to the parking public. Once the enterprise is turned over to a private operator who can and obviously will charge what the traffic will bear, the public use involved becomes remote and the benefit to the private operator becomes the predominant factor.

Petitioner argues that it will cost the private operator some $2,000,000 to construct the garage, and that no business man would invest that sum under a fifty-year lease if the lessor, the City, had control over rates. This is, in effect, a concession that cheap parking is not intended. The argument has no connection at all to the problem of whether the proposed use is public or private. It is simply a contention that the end justifies the means, that is, that the claimed practical aspects of the problem should control. This is not only unsound law, but it is contrary to settled state policy.

As already pointed out, there are several alternative procedures in the state law under which the City could have proceeded had it so desired, and under which eminent domain could have been employed and the project operated by a private operator under lease. But these statutes would have required that the City maintain control over rates. If the practical argument now advanced by the City is sound it means that the state Legislature in passing these alternative procedures was authorizing methods of operation that never could become practical or operative. Such cannot be presumed.

[7] A brief reference to several of these alternative procedures authorized by state law may be helpful in understanding the public policy involved.

One such procedure is set forth in Vehicle Parking District Law of 1943. Sts. & Hy. Code, §§ 31500–31907. This statute permits the formation of a vehicle parking district which is authorized to acquire land by condemnation and to construct garages thereon for parking purposes. The Board of the district is authorized to operate such projects directly or by means of a lease to a private operator. But as to operation under a lease, section 31788 of the Streets and Highways Code provides: "The maximum rentals, fees, and charges to be collected by the operator shall be fixed by the board after public hearing following such notice as the board prescribes, and shall be recited in the lease or franchise. No higher rentals, fees, or charges shall be collected by the operator without amendment of the lease or franchise agreed to by the board after like public hearing."

The Parking District Law of 1951, Sts. & Hy. Code, §§ 35100–35705, provides for the creation of a parking district, authorizes acquisition of land by eminent domain, and authorizes direct operation or operation by a lease, but, if operated by a lessee, section 35569, in language almost identical with section 31788 above quoted, requires that the rates to be charged be controlled, regulated and fixed by the governing body.

The act under which the petitioner here created its Parking Authority is Parking Law of 1949. Sts. & Hy. Code, §§ 32500–33552. Under section 33116 the Authority is given authority to control rates to be charged by a private operator operating under a lease where the revenues from such operation are to be used to pay a bond issue. Similarly, the Municipal Parking Revenue Bond Law of 1949, Sts. & Hy. Code, §§ 33800–34859, provides a method of financing public parking projects by means of revenue bonds, which projects may be directly operated by the City, or leased. Section 34400 provides: "The legislative body shall fix the rates, fees, and other charges for all projects, services, or facilities furnished, acquired, constructed, or completed pursuant to this part for their use by any person, or public or private agency."

The Sanitation, Sewer and Water Revenue Bond Law of 1941, Gov.Code, §§ 54300–54672, provides for a method of financing various enterprises, including, as amended in 1953, parking lots, garages or other automotive parking facilities. § 54309(d). Eminent domain and leasing are authorized, and, although the City is empowered to contract upon any terms it may desire, it may not restrict its power to fix rates, fees or tolls.

It is worthy of note that other statutes providing for the furnishing of facilities other than parking, and for the use of eminent domain and the leasing of the property so acquired, generally require the governmental agency to maintain control over rates. See, for example, Local Hospital District Law, Health & Saf. Code, §§ 32000–32313, particularly § 32125; The Community Redevelopment Law, Health & Saf. Code, §§ 33000–33954, particularly section 33272.

These statutes are important because they disclose a general state public policy to require control over rates as a condition precedent to leasing projects constructed on property acquired by eminent domain, and an awareness on the part of the Legislature that such control is indispensable under constitutional limitations on the power of eminent domain.

Many other points are raised by the parties. It is not necessary to discuss them. The power of eminent domain may be exercised only where the land condemned is to be devoted to a public use. If the public use is intermingled with a private one, the power may not be exercised unless the private use is merely incidental to the public one. In the instant case we are of the opinion that property leased by a city to a private person for garage purposes without the city retaining control over the rates is not being devoted primarily to a public use, but that such use is predominantly private. For this reason the power of eminent domain may not be exercised to acquire the property. The Controller properly refused the requested certification.

The alternative writ is discharged, and the application for the peremptory writ is denied.

BRAY and FRED B. WOOD, JJ., concur.

125 Cal.App.2d 475

COUSER v. COUSER.

Civ. 20106.

District Court of Appeal, Second District,
Division 1, California.

May 25, 1954.

Divorce action wherein the husband was granted uncontested interlocutory decree and the wife's subsequent motion to vacate the interlocutory decree was denied. From the orders of the Superior Court, Los Angeles County, Jesse J. Frampton, J., the wife appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained trial court's implied finding that counsel for husband had in no way taken advantage of fact that wife was not represented by counsel.

Affirmed.

1. Divorce 🔑184(4, 5)

On appeal from order denying motion to set aside interlocutory divorce decree, test to be applied was whether trial court had abused its discretion, and facts would have to be viewed from standpoint of those adduced by prevailing party. Code Civ. Proc. § 473.

2. Divorce 🔑165(1)

Where evidence is conflicting, court has discretion to grant or deny motion to set aside interlocutory decree of divorce. Code Civ.Proc. § 473.

3. Divorce 🔑184(5)

In absence of clear showing of abuse of discretion, order granting or denying motion to set aside interlocutory decree of divorce will not be interfered with on appeal. Code Civ.Proc. § 473.

4. Divorce 🔑165(3)
Husband and Wife 🔑278(1)

Mere fact that wife is not represented by counsel in negotiations respecting property settlement, or in proceedings preliminary to uncontested interlocutory decree of divorce, does not compel court to set aside property agreement or decree. Code Civ.Proc. § 473.

5. Divorce 🔑165(5½)

In proceedings on wife's motion to vacate interlocutory decree of divorce, evidence sustained trial court's implied finding that counsel for husband had in no way taken advantage of fact that wife was not represented by counsel. Code Civ.Proc. § 473.

6. Husband and Wife 🔑278(1)

Both parties to divorce settlement should have independent counsel.

7. Divorce 🔑189, 223

In proceedings on wife's motion to vacate interlocutory decree of divorce, it was within sound discretion of trial court to allow or to deny wife's application for counsel fees and costs. Code Civ.Proc. § 473.

8. Divorce 🔑221

Allowance of counsel fees in divorce cases is not a matter of right, and each case must stand on its own merits, since what might be a proper order in one case might be clearly improper in another.

Arthur A. Jones, Los Angeles, for appellant.

David Lynn, Inglewood, for respondent.

DRAPEAU, Justice.

Plaintiff and defendant lived together as husband and wife for nearly seven years. They had no children. The husband was granted an uncontested interlocutory decree of divorce from the wife March 18, 1953. The two parties had entered into a property settlement agreement, which was approved by the interlocutory decree. The wife had also quitclaimed the family home to the husband.

June 11, 1953, the wife filed notice of motion under section 473 of the Code of Civil Procedure, to vacate the interlocutory decree, and to set aside the property agreement and the quitclaim deed. The wife also asked for an allowance for counsel fees and costs.

The motions were submitted to the trial court on affidavits of the two parties and of others, and the testimony of the husband.

Defendant wife appeals from the court's order denying her motion to set aside her default, the interlocutory decree of divorce, and the property settlement agreement; also from the order dismissing the order to show cause relative to attorney's fees and costs.

Defendant asserts and argues that her husband was much older than she was; that he employed skilled legal counsel while she was at all times without independent legal advice; that before she signed the property agreement and the quitclaim deed in her husband's lawyer's office her husband promised her she would get half of the family home and its furnishings; that her husband said that any papers she signed "were to protect her because she was a young woman and needed protection." The husband's testimony and affidavits controverted all of the wife's assertions, except that she was without independent legal advice.

In the well considered case of Elms v. Elms, 72 Cal.App.2d 508 at page 513, 164 P.2d 936 at page 939, the guiding rules to be followed by trial courts in considering motions under section 473 of the Code of Civil Procedure are stated:

"One may not be relieved from his default unless he makes a showing that he has acted in good faith and demonstrates that his excusable neglect was the actual cause of his failure to attend the trial. Neither one's change of mind nor his inexcusable negligence is ground for vacating a judgment. To warrant relief under section 473 a litigant's neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. Freeman on Judgments, 5th Ed., Vol. 1, p. 482; Shearman v. Jorgensen, 106 Cal. 483, 485, 39 P. 863. It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. Freeman, 483, 5th Ed. Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force, universally applied according to the showing made. Gillingham v. Lawrence, 11 Cal.App. 231, 232, 104 P. 584. The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application of section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary prudence could not have guarded. Neither inadvertence nor neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing. Hughes v. Wright, 64 Cal.App.2d 897, 149 P.2d 392."

[1] The test on appeal is whether or not the trial court abused its discretion. And the facts must be viewed from the standpoint of those adduced by the prevailing party. Davidson v. Davidson, 90 Cal.App.2d 809, 204 P.2d 71.

[2, 3] Where the evidence (including the affidavits) is conflicting the court has a sound discretion to grant or to deny a motion under section 473 of the Code of Civil Procedure. In the absence of a clear showing of abuse of discretion, the order will not be interfered with on appeal. Trujillo v. Trujillo, 71 Cal.App.2d 257, 162 P. 2d 640.

[4–6] The bare fact that a wife is not represented by counsel in negotiations respecting a property agreement, or in proceedings preliminary to an uncontested interlocutory decree of divorce, does not compel a court to set aside the property agreement or the decree. Davidson v. Davidson, supra, 90 Cal.App.2d 809, 204 P.2d 71. As in the Davidson case, the evidence in this case supports the trial court's implied finding that counsel for the husband in no way took advantage of the fact that the wife was not represented by counsel. However, nothing said here is to be deemed an approval of divorce settlements in which one party only has a lawyer. As observed in the Davidson case, it is much better for all concerned if both sides have independent counsel.

[7, 8] It is also within the sound discretion of the trial court to allow or to deny defendant's application for counsel fees and costs. The allowance of counsel fees in divorce cases is not a matter of right. Each case must stand on its own merits. What might be a proper order in one case might be clearly improper in another. McClure v. Donovan, 86 Cal.App.2d 747, 195 P.2d 911.

In this case no abuse of discretion appears in the denial of any of defendant's motions or in the dismissal of the order to show cause.

The orders are, and each of them is affirmed.

WHITE, P. J., and DORAN, J., concur.

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125 Cal.App.2d 314

In re COROTTO.

COROTTO et al.

v.

BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 15722.

District Court of Appeal, First District, Division 2, California.

May 19, 1954.

Rehearing Denied June 18, 1954.

Hearing Denied July 14, 1954.

Probate proceedings involving propriety of awards to coexecutor of sum for extraordinary services, and to guardian ad litem for services rendered by him. The Superior Court, County of Santa Clara, O. K. Morton, J., entered orders from which certain of the heirs and legatees appealed. The District Court of Appeal, Kaufman, J., held that in probate proceedings, involving an allowance to a coexecutor in connection with defense of suit of widow to quiet title to one-half of estate, of fees for their attorneys, and for extraordinary services, record sustained an award of $11,000 to the bank as coexecutor, but that fees of guardian ad litem from minor beneficiary could not properly be paid from the estate.

Order allowing compensation to guardian ad litem reversed; all other orders appealed from affirmed.

1. Executors and Administrators 🔑216(2)

Where, after admission of will to probate without contest, widow filed suit to quiet title to one-half the estate as her separate property, bank as coexecutor and trustee of testamentary trust, not yet distributed, had duty as executor to defend corpus of estate for benefit of all the heirs, including the widow, even though as beneficiary of trust she would pay a share of extraordinary expenses of compensation to attorney for coexecutor from her half of community property and from her interest under trust, and, upon successfully defending against such suit, a fee was allowable to coexecutor, payable from the estate.

2. Executors and Administrators 🔑216(2)

In probate proceedings involving an allowance to a coexecutor, which defended suit of widow to quiet title to one-half of estate of $650,000, for extraordinary services rendered by its attorneys record sustained an award of $11,000 to the bank as coexecutor.

3. Courts 🔑198

Probate proceedings are statutory, and although the Superior Court is general in its jurisdiction, it is circumscribed in probate cases by statutes conferring such jurisdiction, and cannot proceed in a manner other than provided. Code Civ.Proc. §§ 372, 373.

4. Infants 🔑77

Provision of Probate Code that a general guardian is a guardian of person or of general estate of ward, while every other guardian is a special guardian, indicates that Probate Court has inherent power to appoint guardians other than general guardians, in accordance with provision of Code of Civil Procedure declaring that guardian ad litem may be appointed in any case, when it is deemed by court in which action or proceeding is prosecuted, expedient to represent the infant. Code Civ.Proc. §§ 307 et seq., *372, 373, 373.5*; Probate Code, §§ 1230–1233, 1401, 1607.

5. Infants ⚷77

Under statute providing that when infant is defendant, upon application of infant, if he be of age of 14 years, made within 10 days after service of summons, a guardian ad litem may be appointed, and authorizing appointment upon application of a relative or friend if infant neglects to apply, or by court of its own motion, or application of any other party to the action, when minor over 14 years of age, a beneficiary of trust established by will, did not apply in suit by widow to quiet title to one-half the estate, court could appoint a guardian to safeguard the interests of the minor, when natural guardian of minor failed to do so. Code Civ.Proc. §§ *373*, 1908.

6. Infants ⚷115

An order appointing a guardian ad litem is not appealable.

7. Infants ⚷113

Where guardian ad litem was appointed for minor who was named a beneficiary of testamentary trust, as to suit by widow to quiet title to one-half of the estate, minor could not disaffirm settlement made on her behalf by guardian when it was incorporated in decree of distribution which had become final. Code Civ.Proc. §§ 373, 1908.

8. Infants ⚷78(1)

Testamentary trustee which was also a coexecutor was required to maintain a neutral position between beneficiaries in controversy, both in its capacity as coexecutor and cotrustee, and thus appointment of guardian ad litem for minor beneficiary was not obviated on theory that it was duty of the trustee or coexecutor to represent her.

9. Infants ⚷116

Where widow filed suit to quiet title to one-half of decedent's estate, as to which decedent's will had established a testamentary trust, but concerning which one-half of the estate was not a part of the trust, and guardian ad litem was appointed for minor beneficiary of trust, allowance of fees to guardian ad litem out of the estate was improper, since guardianship expenses and fees should only be paid out of the ward's estate or out of funds due and payable directly to the ward, and not from the property of other heirs and legatees. Probate Code, § 1232.

◆

David E. Lombardi and Renzo Turco, San Francisco, for appellants.

James F. Boccardo, San Jose, Edward J. Niland, San Jose, of counsel, for respondent Alfred Aram, etc.

Burnett & Burnett, San Jose, for respondent Bank of America, etc.

KAUFMAN, Justice.

This is an appeal from a portion of an order settling First and Final Account of Executors; Order correcting and amending Inventory and Appraisement; Order of Allowance of Compensation for Extraordinary Service rendered by Attorneys for Executor, Bank of America; Order of Allowance of Compensation of Guardian ad Litem; and Decree of Final Distribution entered on May 28, 1952. The coexecutor, Bank of America, was awarded $11,000 for extraordinary services, and the guardian ad litem, $7,500 for services rendered by him.

Decedent, John Corotto, a director of the Bank of America for many years, died in San Jose, California, on January 17, 1950. He was survived by his widow Catherine; his daughter, Genevieve Turco; two grandchildren, John E. Turco, Jr. and Maria Jane Turco. At the time of his death the grandson was nineteen years of age, and the granddaughter, sixteen.

The estate, consisting of real estate, securities and other personal property was appraised for inheritance tax purposes at approximately $650,000. Respondent Bank and decedent's daughter, Genevieve Turco, were appointed coexecutors of the estate. Catherine Corotto, named as coexecutor by the will, declined to act.

Decedent's will provided that all of the estate with the exception of $5,000 given in trust for the benefit of the grandchildren, should go to respondent and the widow as co-trustees in trust for the benefit of the widow, daughter and grandchildren. Trust income was to be paid to the widow for the remainder of her life, then to the daughter for the remainder of her life, then equally to the two grandchildren until the youngest should reach the age of forty years. In event either grandchild should die before forty, leaving lawful issue, then the trust was to remain in effect until each such issue should reach the age of twenty-one years.

Decedent's family sought to have the entire trust declared invalid on the ground that it violated the rules against perpetuities and restraints of alienation, and asked that the property be distributed directly to the widow and daughter. Respondent Bank resisted these objections and asked that the trust be upheld. After several hearings in the Probate Court, a settlement was reached under which it was agreed that the trust provisions would be considered valid except for the provisions continuing the trust in favor of the issue of the grandchildren. Decedent's estate was therefore distributed to respondent Bank and decedent's daughter as co-trustees by the Decree of Final Distribution entered on May 28, 1952. The efforts of the Bank in upholding the validity of the trust is one of the matters for which it was awarded the fee for extraordinary services.

Another matter for which the fee for extraordinary services was allowed arose shortly after the administration of the estate was commenced. Half of the property in the estate was claimed by the widow to be her separate property as the result of an agreement which she and decedent had entered into in 1939 which purported to divide the community property equally between them. Respondent Bank contended that the only effect of this agreement was to convert pre-1927 community property into post-1927 community property, and that all of the property remained community property. The widow contended that the agreement converted one-half of decedent's property into her separate property. She filed an action in Superior Court to quiet title to the property of the estate. The action was tried and judgment was rendered in favor of respondent Bank as coexecutor. All of the property was adjudged to be community property. Burnett and Burnett, attorneys at law, represented the Bank in this action.

The guardian ad litem, Alfred Aram, an attorney, who was awarded $7,500 for his services as guardian for Maria Jane Turco, in the matter determining the validity of the trust, was appointed at the request of respondent Bank. On July 26, 1951 it asked the court to appoint such guardian for minor grandchildren and the issue not in being. The court took the matter under submission and on the following day made a minute order appointing Aram guardian ad litem for Maria Jane. The other grandchild was to become 21 years of age within a few days, hence no guardian was appointed for him. Nor was an appointment made for the issue not in being. The guardian, Aram, was not related in any way to the Corotto family. There was no written petition for the appointment of said guardian, and no written order was made, the only proceedings being the oral request of respondent Bank and the Minute Order of the court. The ward, who was over fourteen years of age did not nominate the guardian nor affirmatively approve the appointment. When the request for a guardian was made, Renzo Turco, as attorney for all members of the Corotto family, objected to the appointment as being unnecessary and improper, and not in accordance with required procedure. On July 27, he wrote a letter to the Judge in support of his objections, but meanwhile the Minute Order had been made. On September 7, 1951, a motion to vacate the appointment was made and denied.

On June 20, 1951, the Executors filed their petition for the settlement of the first and final account, for the allowance of the compensation for extraordinary services by attorney for an executor, and for final distribution. On the same date Messrs. Burnett and Burnett, attorneys for the Bank filed a separate petition for allowance of attorney's fees for extraordinary services. The petitions requested allowance of the fees for extraordinary services rendered to the co-executor. Decedent's widow, his daughter and her husband, the father of the grandchildren as their natural guardian, joined in filing objections to the request for fees for extraordinary services. Burnett and Burnett filed a supplemental petition clarifying the first petition, and requesting compensation in the sum of $12,500. On October 1, 1951, Alfred Aram, filed his petition for compensation with an affidavit in support thereof, asking $7,500 for his services.

On April 8, 1952, the court rendered an opinion that the requests were proper, and that $11,000 should be awarded to Messrs. Burnett and Burnett, and $7,500 to Alfred Aram. This decree of final distribution entered on May 28, 1952 ordered that fees in the amounts above stated be paid to said attorneys and the guardian ad litem out of funds of the estate.

Appeal From Order Awarding Compensation to Attorney for Coexecutor.

Appellant contends that the services for which compensation was awarded were for the benefit of one side in a dispute between legatees under the will and that it is therefore not chargeable to the estate.

It is the theory of appellant that it was not the duty of the respondent Bank as executor to step in and resist the claim of the widow to half of the assets of the estate in her quiet title suit. Appellant presents the issue here as a dispute by one legatee with the executor aligned on his side against all the members of decedent's family. If the widow succeeded the $650,000 estate would be reduced by one-half. The trust for decedent's heirs would then consist of one-fourth of $650,000, rather than one-half.

Sec. 902 of the Probate Code provides that the Probate Court may allow fees for extraordinary services to the executor for "such other litigation or special services as may be necessary for the executor or administrator to prosecute, defend or perform." Appellant cites Estate of Higgins, 158 Cal. 355, 111 P. 8; Estate of Hite, 155 Cal. 448, 101 P. 448, and Estate of Pryor, 51 Cal.App.2d 735, 125 P.2d 511, as authority that the fees were improperly allowed. However, as pointed out by respondent these cases are not applicable to the situation herein. Here the will had already been admitted to probate without contest. The cited cases were all contests before probate. In the Estate of Higgins, supra, it was said that the executor is not bound to engage in litigation for the purpose of establishing the document offered by him for probate and that if he voluntarily assumes the burden of a contest properly belonging to the legatees or devisees, he must look to them for reimbursement. In Estate of Pryor, supra, it was considered that the contest, for which fees for extraordinary services were said to have been improperly allowed, was one in reality between individuals, and not such a contest as that which the statute allows to be defended at the expense of the estate. There, in a contest before probate, the executrix greatly benefited by receiving approximately one-third of the estate, while she would have received nothing if the contest had been upheld. Estate of Friedman, 176 Cal. 226, 168 P. 21; Estate of Ross, 179 Cal. 358, 182 P. 303; Estate of Murphey, 7 Cal.2d 712, 62 P.2d 374, and Estate of Jessup, 80 Cal. 625, 22 P. 260, cited by appellant, are likewise clearly distinguishable from the situation herein.

It is earnestly contended that the case of Estate of McSweeney, 107 Cal.App.2d 140, 236 P.2d 846, 849, is parallel to the case now before this court. In the cited case the services were rendered in defense of a civil suit, Ryan v. Welte, 87 Cal.App.2d 897, 198 P.2d 357, instituted by one of the devisees under the will, against defendants both individually and as executors to impress a trust on properties left by decedent in favor of plaintiff, including properties which decedent had devised to the Weltes. Plaintiff also sought to impress a trust upon properties conveyed to the Weltes by decedent during his lifetime which were no part of the estate in probate. The court there stated that the suit "affected and bore upon the title of the devisees, legatees, and heirs of McSweeney to their respective portions of that residue and thus was of concern to them only in their individual capacities. The circumstance that two of them happened to be the executor and the executrix did not alter and should not obscure that fact. It follows that the cost of that litigation should be borne by them in their individual capacities."

[1] The quiet title suit was, of course, not a contest of the will after probate, but is an attempt to deprive the estate of one-half of its assets. It would appear that the respondent executor, not a legatee or devisee under the will, except as trustee for all of the heirs, had the duty to defend the corpus of the estate for the benefit of all the heirs against this attack. It is true that because the widow is also a beneficiary of the testamentary trust, she will be paying a share of these extraordinary expenses from her half of the community property and from her interest under the trust. But at least in her capacity as heir, she has been benefited by the executor's successful defense of the suit.

In the quiet title action herein, no heirs, legatees or devisees were joined as defendants. Summons was served on respondent Bank. The basis of the suit was a written contract between plaintiff and decedent. Sec. 573 provides that actions for recovery of any property or for possession thereof or to quiet title thereto may be maintained by and against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates. In 11B Cal.Jur. 818, it is said that it is the duty of the executor to "defend against unjust and illegal attacks which affect the interests of the estate, heirs, devisees, legatees of creditors * * *. He is specially entrusted with the duty and power to defend the rights of all beneficiaries until distribution."

In Estate of Dunton, 15 Cal.App.2d 729, 60 P.2d 159, it is pointed out that it is the duty of the executor, after a will has been admitted to probate, to defend and uphold it against subsequent attack, and that this duty rests primarily upon him and not upon the legatees and devisees. Respondent maintains that it was therefore its duty as executor to defend the trust against the attack on its validity since in effect this was an attack upon the will, as the decedent's entire community half of the estate with the exception of $5,000, was left in trust. We agree that it was the duty of the executor to defend the will and the trust set up therein and to resist the quiet title suit.

Appellant argues that respondent bank acted in the capacity of trustee and not as executor, in defending the validity of the trust, and that the compensation for such services cannot be assessed against the estate. If awarded against the estate, the widow's one-half interest in the estate as distinguished from her interest in the trust, will bear one-half of the fees allowed for this service. In Firebaugh v. Burbank, 121 Cal. 186, 53 P. 560, where the executors and testamentary trustees were identical, as here, the court held that the executors could not charge the estate defending a decree of distribution against an appeal therefrom, since the estate had been distributed to them as trustees, and their defense of the decree would be made by them as such distributees, and not as executors. This case is not in point here because, in the present case, the defense of the trust was made by the executor prior to the distribution to respondent executor as co-trustee. Respondent points out that by upholding the trust no further Federal Estate Taxes or State Inheritance Taxes may be imposed upon the deaths of the widow or Mrs. Turco, or either of the grandchildren if they die before reaching 40 years of age.

Estate of Duffill, 188 Cal. 536, 554, 206 P. 42, makes it very clear that it is the duty of the trustee to uphold the validity of the trust in this type of situation. In that case extraordinary fees of $75,000 to the attorneys for their work in upholding the trust where the estate was valued at approximately $1,000,000, was held to be large, but not excessive. In the Duffill case the property was distributed to the trustee who had also been the executor, on September 20, 1919, pursuant to the terms of the decree of distribution. On

February 20, 1920 the trustee filed its first account and report in which it requested the $75,000 for attorney fees for services performed in upholding the trust against the objections filed to the distribution in accordance with the will, by one of the beneficiaries of the trust. Respondent herein concedes that in the cited case the compensation was allowed out of the trust but it must be noted that the trustee while acting as executor never requested compensation of the court.

[2] However, in view of the fact that the executor preserved one-half of such a large estate, and in view of the other work shown to have been performed for the direct benefit of the estate, the compensation asked does not appear to be excessive for all the work performed on behalf of the executor and it is properly allowable out of the estate.

Appeal From Order Awarding Compensation to Guardian ad Litem.

[3] Appellant contends that the Probate Court was without power to appoint a guardian since there is no statutory provision giving such power to this court, and that furthermore the appointment was unnecessary. Probate proceedings are statutory, and although the Superior Court is general in its jurisdiction, it is circumscribed in probate cases by the statutes conferring such jurisdiction, and cannot proceed in a manner other than provided. Estate of Wise, 34 Cal.2d 376, 381, 210 P.2d 497. There is no statutory provision in the Probate Code conferring power on the Probate Court to appoint a guardian ad litem. Such a guardian is provided for in Section 372 and 373 of the Code of Civil Procedure. Because those sections refer to the infant as a "party" throughout, and to "actions", it is argued that it is obvious the sections cannot apply in probate. The language of section 372, is, however, "A guardian ad litem may be appointed in *any* case, when it is deemed by the court in which the action *or proceeding* is prosecuted, * * * expedient to represent the infant".

Appellant cites Carpenter v. Superior Court, 75 Cal. 596, 19 P. 174, as holding that Sec. 372, Code of Civil Procedure, does not apply to probate proceedings, but admits that the case was decided at a time when Sec. 1718 of the Code of Civil Procedure was in effect which authorized the Probate Court to appoint an attorney to represent a minor heir. Sec. 1718 was repealed in 1903. Respondent points out that Estate of Carpenter merely held that Sec. 1718 providing for representation of minors was intended to be exclusive. Since its repeal such representation is not otherwise provided. It is admitted that in Estate of Snowball, 156 Cal. 235, 104 P. 446, it is stated that Sec. 372 applies to probate proceedings, but the language is dictum since the court said that it was there immaterial whether a guardian ad litem was appointed and that the proof of the order was harmless.

[4] Sec. 1401 of the Probate Code provides that a general guardian is a guardian of the person or of the general estate of the ward, while every other guardian is a special guardian. This section would indicate that the Probate Court has inherent power to appoint such guardians "other" than general guardians. It is not to be presumed that this language is meaningless.

Sections 1230–1233, Probate Code make applicable to some probate proceedings the rules of practice in civil actions set forth in Part II, Code of Civil Procedure. Sec. 1233 refers not alone to "trials", but to "all other matters of procedure." See O'Day v. Superior Court, 18 Cal.2d 540, 116 P.2d 621.

Sec. 1607, Probate Code, provides that "The provisions of this division do not limit the power of any court to appoint a guardian ad litem to protect the interests of any minor or insane or incompetent person in an action or proceeding pending therein."

Respondent cites numerous cases wherein various sections of the Code of Civil Procedure have been held applicable to probate proceedings. O'Day v. Superior Court, supra; Estate of Morrison, 125 Cal.App. 504, 14 P.2d 102; Estate of Baker, 170 Cal. 578, 150 P. 989; Voyce v. Superior Court, 20 Cal.2d 479, 127 P.2d 536; Lilienkamp v. Superior Court, 14 Cal.2d 293, 93 P.2d 1008; Estate of Kratz, 192 Cal. 494, 221 P. 340. There is no good reason why sections 372 and 373 do not so apply when section 373.5, Code of Civil Procedure, has been held applicable. Estate of Weymouth, 118 Cal.App.2d 505, 258 P.2d 34. Appellant cites other cases where Part II of the Code of Civil Procedure does not apply to civil cases. Estate of Van Deusen, 30 Cal.2d 285, 182 P.2d 565; Estate of Franklin, 133 Cal. 584, 65 P. 1081, In re Sanderson, 74 Cal. 199, 15 P. 753.

[5] Appellant maintains that in any event, the statutory requirements for appointment of a guardian ad litem were not met, since the minor was over 14 years of age and did not apply for the appointment of such guardian. Sec. 373, Code of Civ.Proc. provides that "When the infant is defendant, upon the application of the infant, if he be of the age of fourteen years, *and apply within ten days after the service of the summons,* * * * or if he neglects so to apply, then upon the application of a relative or friend of the infant, or of any other party to the action, or by the court on its own motion." (Emphasis ours.) Here the minor failed to apply within ten days after Exceptions to the Petition for Distribution were filed. This proceeding was adversary to the minor, since if the attack of her family on the trust had been successful, she would not have received the benefits of the trust provided for her by her grandfather. The court could therefore appoint a guardian to safeguard these interests in the proceeding, when her natural guardian, her father, would not do so. Boyd v. Lancaster, 56 Cal.App.2d 103, 108–109, 132 P.2d 214.

There is no merit in the contention that Johnston v. Southern Pacific Co., 150 Cal. 535, 538–540, 89 P. 348, is applicable, for in that case the minor was the plaintiff, and in such case the application for the appointment must be made, apparently in every case, by the infant if over fourteen years.

[6, 7] An order appointing a guardian ad litem is not appealable, In re Hathaway, 111 Cal. 270, 43 P. 754, and the minor herein cannot disaffirm the settlement made on her behalf by the guardian since it is now incorporated in the decree of distribution which has become final. Estate of Loring, 29 Cal.2d 423, 175 P.2d 524; Code of Civ. Proc. § 1908.

[8] Appellant maintains that since the respondent bank was also co-trustee as well as executor, it represented the minor in upholding the validity of the trust, and the work of the guardian ad litem was unnecessary, and a duplication. It was the trustee's duty to defend the trust. Estate of Duffill, 188 Cal. 536, 555, 206 P. 42. Respondent contends that as executor, it must maintain a neutral position between beneficiaries in any controversy, Estate of Kessler, 32 Cal. 2d 367, 369, 196 P.2d 559; Estate of Lynn, 109 Cal.App.2d 468, 240 P.2d 1001, and could not therefore represent Maria Turco. Nor could it properly represent her as co-trustee, for when there is a conflict of interest between beneficiaries, it is well settled that all beneficiaries are entitled to individual representation. Hutchins v. Security Trust & Sav. Bank, 208 Cal. 463, 467, 281 P. 1026, 65 A.L.R. 1059; Bernstein v. Equitable Discount Corp., 8 Cal. App.2d 265, 269, 47 P.2d 518.

It is contended that the compensation of a guardian ad litem cannot be made out of the estate and that such expense cannot be included under Sec. 300, Probate Code, which provides for payment of expenses of administration, debts of decedent and family allowance. Expenses of a legatee in establishing his interest in an estate have never been allowed as an expense of administration. In re Stuttmeister, 75 Cal. 346, 17 P. 223; Estate of Feldman, 78 Cal. App.2d 778, 795, 178 P.2d 498. If chargeable to anyone, such expenses should be charged to the ward, it is suggested.

Respondent argues that although ordinarily, compensation for legal services should be paid by the person for whom they are rendered, an exception exists where the services have preserved or increased a common fund for the benefit of all those interested in such fund, and on this basis the fees asked by the guardian herein, may be legally paid out of the corpus of the trust. Estate of Reade, 31 Cal.2d 669, 671, 191 P.2d 745; Winslow v. Harold G. Ferguson Corp., 25 Cal.2d 274, 153 P.2d 714; Estate of Lundell, 107 Cal.App.2d 463, 237 P.2d 62.

However, the court ordered it paid out of the estate, not out of the corpus of the trust. Respondent attempts to justify this by an argument that it was within the discretionary power of the Probate Court under Sec. 1232 in allowing costs. There is no statutory definition of costs in California. City of Los Angeles v. Vickers, 81 Cal.App. 737, 740, 254 P. 687; 7 Cal.Jur. 280, Sec. 21. Where the guardian who acts as an officer of the court is also an attorney, it is urged that where his legal services are necessary, his compensation should be taxed as one of the costs of the proceedings. Respondent cites Hoffman v. Morgan, 206 Okl. 567, 245 P.2d 67, 30 A.L.R.2d 1141 as authority that guardian ad litem fees may be assessed as costs. Appellant notes that in the Hoffman case because it was a quiet title suit, the appointment was absolutely necessary, and furthermore the minor defendant therein had no assets out of which to pay the fees. Estate of Olmstead, 120 Cal. 447, 52 P. 804, held that attorneys fees were not "costs" within the meaning of Sec. 1720, Code of Civil Procedure, now Sec. 1232, Probate Code.

It is finally contended that the award is excessive, \$7,500 for 20⅔ days of legal work. However we need not pass on this contention because it is our view that the lower court had no authority to make its order for allowance of fees to the guardian out of the estate.

[9] In our opinion the Probate Court was without authority to allow fees to the guardian ad litem out of the estate, when one-half of the estate is no part of the trust.

Guardianship expenses and fees should only be paid out of the ward's estate or out of funds due and payable directly to the ward. Other heirs and legatees can not be called upon to pay guardian fees for services for the benefit of the ward.

We conclude that the order allowing compensation to the guardian ad litem must be reversed and all other orders appealed from affirmed.

Order allowing compensation to guardian ad litem reversed; all other orders appealed from affirmed.

NOURSE, P. J., and DOOLING, J., concur.

Hearing denied; CARTER, J., dissenting.

125 Cal.App.2d 17

ACME PAPER CO. v. GOFFSTEIN.

Civ. No. 15810.

District Court of Appeal, First District,
Division 1, California.

May 14, 1954.

Action for money had and received by defendant while in plaintiff corporation's employ and punitive damages for defendant's alleged oppression, fraud and malice in obtaining corporation's checks, signed by its general manager, for delivery to payee in payment for merchandise falsely represented by defendant to have been purchased from payee, endorsing or having a truck driver who delivered the merchandise to plaintiff endorse payee's name on the checks, cashing them, and dividing the proceeds between defendant and such driver. Plaintiff levied an attachment. From a judgment of the Superior Court, City & County of San Francisco, William T. Sweigert, J., for plaintiff, defendant appealed. The District Court of Appeal, McMurray, J., pro tem., held that the judgment was erroneous as to award of damages for tort, since plaintiff elected to proceed on the contract by levying the attachment, but that such error did not invalidate the entire judgment, as the same facts would support either an action in tort or in assumpsit and the complaint alleged conversion of the checks, though no technical words of conversion were used, and that the action was not barred by the statute of limitations, though it sounded in contract.

Judgment modified and affirmed as modified.

1. Election of Remedies 🔑7(1)

A party availing himself of provisional remedy of attachment in his action on contract and for tort, elects to proceed in contract rather than tort.

2. Election of Remedies 🔑1

The doctrine of election of remedies is based on principle of estoppel, and party instituting action on, or performing any act in pursuit of, one of two remedies which he is entitled to enforce, thereby gaining advantage over other party, elects such remedy and cannot pursue any other remedy for enforcement of his right.

3. Election of Remedies 🔑3(1)

An action for tort, in which exemplary damages are sought, is inconsistent with action for money had and received, so that plaintiff seeking both such remedies must make timely election of remedy. Civ.Code, § 3294.

4. Election of Remedies 🔑7(1)

Pleading of cause of action for tort, in which exemplary damages are sought, and cause of action for money had and received in alternative, does not constitute election of remedy, as inconsistent counts of complaint are permissible and election cannot be forced by demurrer.

5. Judgment 🔑28

Where amended complaint alleged common count for money had and received and cause of action for punitive damages because of defendant's alleged oppression, fraud and malice in obtaining plaintiff corporation's checks, signed by its general manager, for delivery to payee in payment for merchandise which defendant, while in corporation's employ, falsely represented to have been purchased from payee, and endorsing or having truck driver who delivered merchandise endorse payee's name on checks, cashing them, and sharing proceeds with such driver, judgment for plaintiff was erroneous, as to award of damages for tort, but not entirely invalid, as same facts would support either action in tort or in assumpsit and complaint stated cause of action for conversion.

6. Limitation of Actions 🔑100(3)

An action for money had and received by plaintiff corporation's employee, alleged to have obtained plaintiff's checks, signed by its general manager, for delivery to payee in payment for merchandise, by falsely representing that it was purchased from payee, and to have endorsed or had truck driver who delivered merchandise endorse payee's name on checks, cashed them, and divided proceeds with such driver, was not barred by statute of limitations, though it sounded in contract, where action was filed promptly on plaintiff's discovery of fraud.

7. Limitation of Actions 🔑100(2)

Fraud tolls running of statute of limitations on cause of action for breach of contract when accomplished underhandedly by secret confederacy with another and use of his name to cloak defendant's movements.

8. Money Received 🔑18(3)

In action for money had and received by defendant while in plaintiff corporation's employ, evidence supported trial court's findings that defendant's false representations that merchandise for purchase price of which corporation's checks, signed by its general manager, were given defendant for delivery to payee, was purchased from payee, who was reputable established salvage merchandise dealer, and use of payee's name in procuring checks, on which defendant endorsed or had truck driver who delivered merchandise endorse payee's name before cashing checks and dividing proceeds with such driver, induced manager to execute checks.

9. Bills and Notes 🔑6

The provision of Negotiable Instruments Act that instrument is payable to bearer when payable to order of fictitious or non-existing person or living person not intended to have any interest therein, with knowledge of maker or his employee or other agent supplying payee's name, does not deal with rights as between maker and his employee and gives employee no right to obtain checks and money from employer by falsely representing that checks are to be delivered to and cashed by an existing person when employee knows that he or a confederate will receive, endorse and cash checks for their own benefit. Civ.Code, § 3090(3).

10. Trover and Conversion ⚷35, 50

The measure of damages for conversion of checks is face value thereof, and presumption of such damage cannot be repelled in favor of one wrongfully in possession of checks from beginning by subsequent application thereof to owner's benefit without his consent. Civ.Code, § 3337.

11. Money Received ⚷12

The fact that merchandise, for price of which corporate buyer's checks, signed by its general manager, were given to employee of corporation for delivery to payee, falsely represented by such employee to be seller of merchandise, which was purchased from and delivered by another, with whom employee divided proceeds of checks, which he cashed after endorsing or having such seller endorse payee's name thereon were received and later sold by corporation, did not preclude recovery thereby from employee, in action against him for money had and received, because of failure to show any damage to corporation. Civ. Code, § 3337.

12. Appeal and Error ⚷1064(1)

In action for money had and received, based on defendant's conversion of plaintiff corporation's checks by fraud and deceit in representing that merchandise, in payment for which checks were delivered to defendant for delivery to payee, were purchased from payee instead of person with whom defendant divided proceeds of checks, whether trial court erred in applying law of principal and agent, instead of that of master and servant, was immaterial, as neither of such relationships gave defendant right to convert plaintiff's property.

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J. W. Ehrlich, San Francisco, for appellant.

Freed, Gebauer & Freed, San Francisco, for respondent.

McMURRAY, Justice pro tem.

Defendant appeals from a judgment for plaintiff in the amount of $6954.90 together with exemplary damages of $500.

Appellant was employed as warehouse foreman by respondent in its coarse paper goods jobbing and distributing business. On March 4, 1948, respondent purchased certain merchandise from Zel R. Kahn, a salvage merchandise dealer. In the latter part of April appellant told the general manager of respondent company that Kahn had some items to sell. A purchase order was made out and signed by the manager as was a check payable to Kahn. The check was given to appellant to deliver to Kahn. This he did not do, as his representation that the merchandise was purchased from Kahn was false. In fact, the merchandise was delivered by one Ratto, a truck driver. The check was endorsed with Kahn's name, either by appellant or Ratto, and was cashed at a nearby restaurant and the proceeds were divided between appellant and Ratto, appellant receiving 10 to 20 per cent of the total price. This course of conduct was repeated in substantially the same manner on thirty-three subsequent occasions, continuing until March of 1952. In April, 1952, respondent's manager met Mr. Kahn at a luncheon and commented upon the series of supposed transactions between them. Upon Kahn's statement that he had not had any of the dealings above set forth, respondent first learned that the various purchases had not been made as represented by appellant.

Complaint was filed within two weeks of this discovery, alleging a common count for money had and received. An attachment was levied upon filing this action. Thereafter, the complaint was twice amended, the first cause of action remaining upon the common count and the second cause of action alleging facts substantially as above set forth, and seeking punitive damages by reason of the alleged oppression, fraud and malice of appellant.

Appellant contends that the judgment is erroneous as based on tort; that the evidence is insufficient to support the findings; that it was error to apply the rules of principal and agent here; that it was error to award punitive damages. The first and last points are so closely related that they will be considered as one contention.

Appellant vigorously urges that the issuance and levy of the attachment constituted an election to proceed upon an action based on contract, an that receiving evidence and making findings on tort are fatal errors. He also urges that since formal allegations of conversion are not contained in the second amended complaint no findings are justified thereon, and further, that since the action is one on contract it is barred by the statute of limitations. Respondent objects to appellant raising the question of election for the first time on this appeal and contends that by failing to raise it sooner the defense has been waived. Respondent also contends that the same proof and findings often support either a common count or a tort count for conversion and that where, as here, a plaintiff does not discover wrongful conduct because of the fraudulent concealment thereof by the wrongdoer the running of the statute of limitations is tolled until the plaintiff receives notice of the existence of the cause of action.

[1-4] Where a party avails himself of the provisional remedy of attachment, he does thereby elect to proceed in contract rather than tort. In Steiner v. Rowley, 35 Cal.2d 713, at page 720, 221 P.2d 9, at page 13, it is said: "Concerning the effect of the writ of attachment obtained by the Steiners, the doctrine of election of remedies is based upon the principle of estoppel. 'Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained any advantage over the other party, * * * he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.' De Laval Pac. Co. v. United C. & D. Co., 65 Cal.App. 584, 586, 224 P. 766, 767. * * * An action for tort in which exemplary damages are sought is inconsistent with one for money had and received. Civ.Code, sec. 3294. The Steiners were therefore required to make a timely election of remedies. Pleading the two causes of action in the alternative did not constitute an election because inconsistent counts are permissible (citing cases) and an election cannot be forced by demurrer (citing case). But the Steiners also obtained an attachment. This was a positive act of a plaintiff 'in pursuit of * * * (the contractual remedy) * * * whereby he has gained * * * advantage over the other party * * *.' "

The case of Klinger v. Modesto Fruit Co., Inc., 107 Cal.App. 97, 290 P. 127, which is relied upon by respondent to stand for the proposition that appellant cannot for the first time urge an election on appeal, was one wherein the court held that where no demand for election was made before the appeal, the defense would be deemed waived. At page 105, 107 CalApp., at page 130 of 290 P. of that opinion it is said: "* * * where an agent or an undisclosed principal defends in an action against them jointly, *where the conduct of the plaintiff does not amount to an election,* and the defendants permit a judgment to be rendered and entered against both of them, without raising the question of an election by demurrer, motion, demand, or otherwise, the right to compel an election is thereby waived and may not be raised for the first time on appeal." (Italics added.) This language clearly is not in conflict with the Steiner case. Neither is Wells Fargo & Co. v. Robinson, 13 Cal. 133, in conflict with the Steiner case. There the plaintiffs sued at law after an administrator had rejected a claim in probate, recovered judgment for the full amount, and thereafter brought a suit in equity to recover securities as beneficiaries of a constructive trust. The court held the action at law did not estop plaintiffs from the action at equity since it did not appear that at the time of the action at law plaintiffs knew the use to which the funds had been put, and, moreover, that the judgment at law amounted to little more than an allowance of the claim by the administrator and approval thereof by the probate judge and that the equitable action was merely ancillary to the judgment at law.

[5] So far as the judgment here makes an award in the tort measure of damages it must be held to be erroneous, but this does not mean that the entire judgment must fall. The same facts will support either an action in tort or in assumpsit, Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990, and here, although technical words of conversion are not used, in stating the second cause of action there are assuredly facts alleging a conversion. There are allegations of fraud on the part of appellant in that he obtained certain checks of respondent and exercised dominion over them in a manner not contemplated by respondent. By either signing or having Ratto sign the name "Kahn" thereto and sharing the proceeds with Ratto, rather than delivering the checks to Kahn in accordance with his representation to respondent, appellant clearly converted the checks.

[6, 7] The statute of limitations is not a bar to this action, although it sounds in contract. Even where an express contract was the subject of the action, rather than a contract implied in law, the Supreme Court has held that fraud would toll the running of the statute on the cause of action for breach thereof when "The breach was accomplished underhandedly, by secret confederacy with another, and the use of his name to cloak the movements of the defendant * * *." Gregory v. Spieker, 110 Cal. 150, 153, 42 P. 576, 577. When, as here, the contract sued upon relies for its existence upon the rule of law that implies a contract to repay money that should not in good conscience be kept by appellant, the language quoted is strikingly apposite. Appellant used Kahn's name and his own false representations as to the source of goods purchased to "cloak the movements of the defendant" and concealed the fact that checks given to him for delivery to Kahn were in fact delivered to another and the proceeds divided with defendant. Upon discovery of the fraud this action was promptly filed.

[8] The next point urged by appellant is that the evidence is insufficient to support the findings. In support of this he argues that there is no evidence that his representations induced respondent to act; that all items purchased were fast moving items which respondent would have purchased from anyone and that his use of the name Kahn was no inducement. This argument is somewhat weakened by the fact that appellant used the name "Kahn" in thirty-four separate instances and also by the fact that Mr. Kahn was a reputable, established salvage dealer. It might well be asked why, if appellant felt the use of the name Kahn was no inducement, he did not disclose the true name of the seller of the items to respondent, when by so doing he would have avoided the inconvenience of endorsing that name on several of the checks and would also have relieved Ratto of the same inconvenience. Had he done this he would not be called upon to now contend that he did not convert the checks to his own use by forgery; his next argument.

[9] Civil Code section 3090(3) provides: "The instrument is payable to bearer * * * (3) When it is payable to the order of a fictitious or nonexisting or living person not intended to have any interest in it and such fact was known to the person making it so payable *or known to his employee or other agent who supplies the name of such payee*; * * *." (Italics added.) Appellant therefore contends that his and Ratto's signing of the name Kahn to the checks was not a forgery in view of this section. The section is found in the title dealing with negotiable instruments and admittedly defines an instrument payable to bearer and defines the risk of loss thereunder. It does not, however, deal with the rights as between the maker and his employee and cannot be construed to give an employee the right to obtain checks and money from his employer by falsely representing that such checks are to be delivered to and cashed by an existing

person, whereas that employee knows that he or a confederate will receive, endorse and cash such checks for their own benefit.

[10, 11] Appellant complains that no damage to respondent was shown; that all items, with the possible exception of 12 bales of twine, were received and later sold by respondent. This plaint is based upon appellant's staunch assertion that the second cause of action is for fraud and deceit and that damages must be proved. The action is one for money had and received, based upon a conversion perpetrated by fraud and deceit. The subject matter of the conversion is the checks received by appellant and applied to his own use or that of Ratto. The measure of damage caused by the conversion of checks is the face value thereof (65 C.J. 151) and the presumption that this is the damage "* * * cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent." Civ.Code Section 3337. Under this view it is unnecessary to determine whether or not the merchandise was received. The respondent did not consent to the purchases from Ratto and has never ratified them after discovery.

[12] Appellant next urges as error the fact that the law of principal and agent was applied where appellant was only an employee. In view of what has been said heretofore it becomes unimportant whether appellant was an agent or an employee. Neither of these relationships gives him the right to convert his principal's property.

In view of the foregoing it is apparent that the portion of the judgment awarding exemplary damages must be reversed, as such damages are only consistent with an action on tort. The judgment is modified by striking therefrom that portion which provides that plaintiff recover from defendant $500 for exemplary damages, and, as so modified, is affirmed, each side to bear its own costs on appeal.

PETERS, P. J., and FRED B. WOOD, J., concur.

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125 Cal.App.2d 502

In re ALLEN'S ESTATE.

Civ. 8422.

District Court of Appeal, Third District, California.

May 25, 1954.

Rehearing Denied June 22, 1954.

Hearing Denied July 21, 1954.

Petition to determine interests in testatrix' estate. The Superior Court, Amador County, Moncur, J., entered judgment from which the aggrieved parties appealed. The District Court of Appeal, Peek, J., held that where testatrix' will provided for distribution of greater share of her estate to her son by her first husband than to her children by second husband so that son would receive the same amount from testatrix' estate as the other children received from testatrix' estate and the estate of testatrix' second husband, and stated that it was testatrix' intention that her son should receive exactly the same share and interest in the assets of both estates as the other children, there was sufficient direction that federal estate tax should not be prorated, and such tax would be paid out of residuary estate.

Affirmed.

1. Wills ⚷525

Under will stating that it was testatrix' intention that as result of the will her son by first husband should receive exactly the same share and interest in assets of estates of her second husband and herself as her children by her second husband, child by first husband was entitled to that portion of testatrix' estate which would equal the property received by the other children from both estates. Probate Code, § 101.

2. Internal Revenue ⚷1746

Where testatrix' will provided for distribution of greater share of her estate to her son by her first husband than to her children by second husband so that son would receive the same amount from testatrix' estate as the other children received from testatrix' estate and the estate of testatrix' second husband, and will stated that it was testatrix' intention that her son should receive exactly the same share and interest in the assets of both estates as the other children, there was sufficient direction that federal estate tax should not be prorated, and such tax would be paid out of residuary estate. Probate Code, § 970.

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Lewis, Lewis & Lewis, Sacramento, for appellant Allen.

Pierce Deasy, Jackson, for appellant Swift.

Neumiller, Ditz, Beardslee & Sheppard, Stockton, for respondent Ferretti.

G. Gard Chisholm, Jackson, for respondent Ferretti as executor.

PEEK, Justice.

This is an appeal by George Allen and Mildred Allen Swift, legatees under the will of Caroline Allen, deceased, from a decree determining interest in said estate made pursuant to a petition under Probate Code section 1080.

Appellants are the natural children of decedent and her deceased husband, George Edward Allen, who died intestate March 18, 1934. Respondent is the decedent's son by prior marriage. At the time of his death, the bulk of George Edward's estate consisted of 666⅔ shares of Allen Estate Company. By the terms of the decree of distribution made therein, 186⅔ shares of said stock were distributed to each of the appellants, and to the decedent herein. In addition thereto testatrix received 106⅔ shares of said stock which were determined by the court to be the community property of herself and her deceased husband. On August 6, 1934, during the pendency of the probate proceeding in the estate of George Edward, the decedent herein made her will wherein she stated that—"* * * during all of the years since then [1898] he [Clarence Ferretti, respondent herein] has been mutually accepted as a son by G. E. Allen, who frequently during his lifetime stated that Clarence Ferretti was to share equally with his own children, George Allen and Mildred Swift, in the division of his estate." The testatrix then went on to say that she was advised that because George Edward died without leaving a will, then under the law of succession of this state the respondent would not be entitled to share in his estate, and the whole thereof would be distributed entirely to herself and her two other children, appellants herein. She further stated that, "* * * under the circumstances * * * it is unjust and inequitable that my son Clarence Ferretti shall receive nothing from the estate of my husband and [I] therefore make this will in order to correct this unjust situation." She then made alternative provisions that if the property were determined to be the separate property of her husband, and if distribution were made to herself and appellants herein in equal one-third shares, then "* * * I give, devise and bequeath the entire one-third share which I shall receive * * * to my son Clarence Ferretti, and for the reasons stated above I give nothing to my two other children, George Allen or Mildred Swift." But if the court determined that a portion of George Edward's estate was his separate property and the remainder thereof their community property, then in that event "* * * I give, devise and bequeath to my son Clarence Ferretti, out of the share of the property which shall come to me, regardless of whether the same comes to me as my interest in the community or as my interest in the separate property of my husband, the same number of shares of the capital stock of Allen Estate Company as shall be distributed by the Court in these probate proceedings of my husband's estate to my other two children, George Allen and Mildred Swift. In the event that the determination of the Court described in this paragraph shall result, I give, devise and bequeath all of the rest, residue and remainder of my estate in equal shares and proportions to my three children, Clarence Ferretti, George Allen and Mildred Swift." After so disposing of her entire estate testatrix stated as a final expression of her wishes that, "It is my intention that as a result of this will, my son Clarence Ferretti shall receive exactly the same share and interest in the assets of the estates of my husband and myself as shall be received by my other children, George Allen and Mildred Swift."

Following the admission of decedent's will to probate, respondent filed a petition pursuant to Probate Code section 1080 to determine the interests of himself and appellants in the estate. A statement of facts setting forth their claims was filed by each. Respondent claimed that in view of the expressed intentions of decedent in her will, the federal estate tax must be paid out of the residue of decedent's estate; and appellants claimed that said tax should be ratably charged against all parties under Probate Code section 970, including a pro rata charge against the specific bequest of the 186⅔ shares to respondent. Thereafter the court by its order determined that by the terms of said will the whole of said estate was devised as follows:

> "One hundred Eighty-six and two-thirds (186⅔) shares of the capital stock of the Allen Estate Company to Clarence Ferretti;
>
> "All of the residue of said estate, after payment of the Federal Estate Tax therefrom, to Clarence Ferretti, George Allen, and Mildred Swift, share and share alike, that is, in equal amounts in value to each."

It is appellants' contention that the court erred in failing to prorate the federal estate tax in accordance with the provisions of section 970 of the Probate Code. This is true, they say, since by her will testatrix failed to "otherwise direct" in clear and explicit terms that the federal estate tax be paid from the residue of her estate.

The pertinent portion of said section 970 is that—

> "* * * the amount of the tax [federal estate tax] so paid, *except in a case where a testator otherwise directs in his will,* * * * shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." (Emphasis added.)

Two basic questions are thus presented: (1) What was the intention of the testatrix as expressed in her will (Probate Code section 101); and (2) if she intended complete equality among her three children, did she otherwise direct that the estate tax not be prorated among the beneficiaries of her will but that it be paid out of the residue of her estate.

[1] As the trial court observed in its memorandum opinion, it appears the provision in her will that respondent should receive exactly the same share and interest in the assets of her husband's estate as well as her own, as might be received by her other children (the appellants herein), "* * * is a clear statement of her intention as to what her three children should receive." In further discussing the question so presented the trial court noted that if the federal estate tax were prorated among the three children, respondent would be compelled to pay a substantially greater tax than either of the appellants. The court also noted that by reason of the fact that respondent received nothing from the G. E. Allen estate and that appellants had received the rents, issues and profits on their distributive shares for several years, it would be an added reason in support of her intention that the federal estate tax should not be prorated.

Appellants, however, first argue that the equality desired by the testatrix between her children was not as to the federal estate tax but was in respect to the number of shares each would eventually hold in the Allen Estate Company; and secondly, that the language used was not sufficiently clear and explicit direction to avoid the proration provided in said section 970.

We conclude as did the trial court that the holding in Re Estate of Hotaling, 74 Cal.App.2d 898, 170 P.2d 111, 113, is equally applicable here. There the will was executed prior to the enactment of section 970. Although the will did not specifically refer to federal estate taxes, it did direct that inheritance taxes be paid out of the residue "'* * * so that said bequests * * * shall be paid and delivered in full and without deduction.'" The probate court ordered that the federal estate tax be prorated in accordance with section 970. In reversing that order the District Court held that—"Any language fairly indicating that he does not intend proration would suffice, without further elaboration 'as to which legatees or devisees shall be charged', for as long as it is clear that he 'otherwise directs', the tax burden will remain, in any given case, where it has always rested, i. e., on the corpus or residue." Furthermore, said the court: "Under the law then in effect in this state, which must be referred to and consulted in arriving at a testator's intention (citing cases and authorities), a testator would have had to make a special direction to lift the burden of inheritance taxes from individual legacies; but not so as to federal estate taxes, for they were not then spread or prorated." Hence, as the court noted in the Hotaling case, if distribution had been made when the will herein was made, the result would have been precisely the same as the order actually made by the court herein. In a later case, In re Estate of Pearson, 90 Cal.App.2d 436, 203 P.2d 52, 53, this court held that a devise of realty "'* * * free and clear of all liens of any kind and character and description, * * * if there are any such liens at the time of my death * * *'" meant that the beneficiary was to receive the property clear of federal and state inheritance taxes. We further held in the Pearson case that failure to express one's desires with legalistic nicety "should not be allowed to defeat what appears to this court to have been the clear intent of the testator * * *." See also In re Estate of Parker, 98 Cal.App.2d 393, 220 P.2d 580.

After noting the Hotaling case and its interpretation of section 970, the trial court herein properly concluded that—

> "Taking the will of the decedent herein by its four corners, I am satisfied that the testator has clearly expressed the intention that Clarence Ferretti should receive the interest devised to him as if, in the Hotaling case, it was said that the interest would be paid and delivered in full and without deduction. If there was proration in this case, the intention of the testator would not be carried out."

[2] We are convinced as was the probate court that the intent of the testatrix was to provide a disposition, not only as to the shares of stock in the estate company but of her entire estate, so that the end "result" of her will would be that all of the children, as she stated, would receive "exactly the same share and interest in the assets of the estates of my husband and myself." Bearing in mind that in addition to the above, the will was executed in 1934, approximately nine years prior to the enactment of section 970, we conclude as did the trial court that the testatrix fairly indicated her intention not to prorate the federal estate tax.

The decree is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 507

PEOPLE v. SPRECKELS.

Cr. 965.

District Court of Appeal, Fourth District, California.

May 25, 1954.

Rehearing Denied June 7, 1954.
Hearing Denied June 23, 1954.

Defendant was charged with crime of assault by means of force likely to produce great bodily injury, and was convicted, in the Superior Court of Orange County, Robert Gardner, J., of simple assault, and his motion for new trial was denied, and he appealed. The District Court of Appeal, Mussell, J., held, inter alia, that where defendant was charged with the felony of assault by means of force likely to produce great bodily injury, giving the Superior Court jurisdiction, he could properly be convicted therein of the included misdemeanor of simple assault, even though original jurisdiction of that misdemeanor would have been in an inferior court.

Judgment and order affirmed.

1. Criminal Law 🔑93

Where defendant was charged with the felony of assault by means of force likely to produce great bodily injury, giving the

Superior Court jurisdiction, he could properly be convicted therein of the included misdemeanor of simple assault, even though original jurisdiction of that misdemeanor would have been in an inferior court. Pen. Code, §§ 242, 245, 1159, 1425; Const. art. 11, § 5.

2. Assault and Battery ⚷55

Constitutional Law ⚷258

Statute defining the felony of assault by means of force likely to produce great bodily injury, and statute defining the included offense of simple assault, are not so vague and indefinite as to deny an accused procedural due process. Pen.Code, §§ 240, 245.

3. Criminal Law ⚷193½, 199

An acquittal of the higher offense of assault by means of force likely to produce great bodily injury is a bar to a subsequent prosecution for any lower offense necessarily included therein, including the offense of simple assault, and the conviction of any lower offense necessarily included in the higher would operate as a bar to a subsequent prosecution for the higher offense.

4. Criminal Law ⚷1170(1)

In prosecution for felony of assault by means of force likely to produce great bodily injury, wherein it appeared that defendant had beaten his former wife, refusal to permit certain witness to testify did not constitute reversible error, when the evidence sought to be introduced related to activities of complaining witness between certain dates and was offered to rebut her testimony that she was then suffering constant headaches and neck pains and from double vision, since testimony was not so relevant and material as to require that injury be presumed from the adverse ruling.

5. Criminal Law ⚷1170½(5)

In prosecution for felony of assault by means of force likely to produce bodily injury, allegedly committed by defendant on his former wife, the limiting of cross-examination of complaining witness as to whether she was attending parties and staying out late at night for certain period, such examination being for purpose of contradicting her testimony upon direct examination that she was suffering at time of trial from severe headaches and double vision, did not constitute prejudicial error.

6. Witnesses ⚷268(1)

It is the duty of the trial judge in a criminal case to restrict the cross-examination of witnesses to reasonable limitations.

Daniel Schnabel and Royal M. Galvin, Beverly Hills, George C. Bliss, Beverly Hills, of counsel, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of assault by means of force likely to produce great bodily injury, a felony, Penal Code section 245, committed upon Kay Williams Spreckels on or about August 20, 1953. A jury trial was had which resulted in a verdict finding the defendant "Guilty of the crime of Misdemeanor, to wit, Simple Assault, a lesser offense necessarily included within the crime charged." Defendant's motion for a new trial and application for probation were denied. Judgment was rendered that the defendant be confined in the Orange county jail for a period of thirty days, and he appeals from the judgment and order denying his motion for a new trial. His contentions on appeal are that the Superior Court had no jurisdiction to convict him of a misdemeanor; that his conviction and sentence violates the due process clause of the Fourteenth Amendment to the United States Constitution; that the trial court erred in refusing to permit a witness (Hughes) to testify and in limiting cross-examination of the complaining witness.

The sufficiency of the evidence to sustain the verdict and judgment is not urged as a ground of appeal. However, a statement of the salient facts viewed in the light most favorable to the People, People v. Renek, 105 Cal.App.2d 277, 281, 233 P.2d 43, is as follows:

Appellant and Kay Williams Spreckels were divorced. Mrs. Spreckels had custody of their two small children, with reasonable visitation rights granted to appellant. On August 19, 1953, Mrs. Spreckels was occupying an apartment four or five blocks distant from appellant's residence on Balboa Island in Orange county. The children were staying with appellant temporarily and Mrs. Spreckels spent the afternoon and evening of that day at his residence. At about 9:00 P.M. appellant, who appeared to be intoxicated, called Mrs. Spreckels and her mother vile names; whereupon Mrs. Spreckels threw a glass in the direction of appellant and then left the house. She returned later and told the children's nurse that she would be over to take the children home in the morning. The following day, August 20th, around 6:30 or 6:45 A.M., Mrs. Spreckels, together with a Mrs. Reed, drove to appellant's residence to get the children. They entered the house, Mrs. Spreckels picked up some of the children's toys and went upstairs to pack them in a duffle bag. She then came downstairs and saw appellant standing in the living room. He called her vile names, grabbed her by the right arm, knocked her down, pulled her by the hair of her head over to the door, kicked her, removed one of her shoes or slippers and struck her with it several times on her head and arms. She screamed for help and lost consciousness. When she regained consciousness, she was bleeding from cuts on her forehead and arms. Doctors were called and she was taken to a hospital where she remained for a period of ten days. Her calls for help at the time of the assault were heard by neighbors and her condition shortly thereafter was observed by the doctors and others. Testimony of these witnesses corroborated her testimony as to the injuries which she had received.

Defendant testified that Mrs. Spreckels threw a glass at him; that she started after him with a slipper; that he jerked it out of her hand, shoved her and she fell backwards; that he hit her on the hand with the slipper; that when she was on the floor, he tried to roll her to the door, that "I used the slipper and hit her on the arms several times. She would try to scratch and claw me."

[1] Much of the voluminous evidence introduced at the trial was as to the extent of the injuries suffered by Mrs. Spreckels. However, there was ample evidence to support the verdict and judgment of conviction of simple assault and the principle questions for our determination are whether the Superior Court had jurisdiction to convict appellant of a misdemeanor and whether his conviction and sentence violated the due process clause of the Fourteenth Amendment to the United States Constitution.

Section 1159 of the Penal Code provides as follows:

> "The jury * * * may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense."

This section was enacted in 1872 and insofar as material here, has not been amended since its enactment.

In Ex parte Donahue, 65 Cal. 474, 4 P. 449, the defendant was charged with the offense of assault with a deadly weapon and the judgment was rendered upon a verdict of simple assault. It was there contended that the judgment was void because the court had no original jurisdiction of the offense of which the petitioner was convicted. The court held that while justices' courts were given jurisdiction in criminal cases of assault, they had no jurisdiction of the offense of assault with a deadly weapon, that being a felony under section 245 of the Penal Code, and that the Superior Court is the only court which has jurisdiction over it; that the offense was one which necessarily included within it the offense of assault and a person accused of the greater offense may be convicted of the lesser. Citing Section 1159 of the Penal Code. Apparently this case has not been overruled.

In People v. Carmen, 36 Cal.2d 768, 773, 228 P.2d 281, 285, it is held that "It is the duty of the court to instruct the jury in regard to any included offense which the evidence tends to prove", (citing numerous cases) and that "'It is undoubtedly the rule that, where there is any evidence from which a reasonable inference may be drawn that the crime of which the defendant was convicted was of a lesser degree * * * it is *prejudicial* error to withdraw from the jury the consideration of such evidence and confine the instructions to the crime (charged).'"

In 13 Cal.Jur.2d 756–757 it is said:

> "The fact that a felony charge includes a lesser offense in no way affects the jurisdiction of the superior court to try and determine the cause. Nor does the fact that a defendant is convicted of a misdemeanor that is a lesser included offense deprive the superior court of jurisdiction to pronounce judgment imposing a punishment fixed by law for the offense of which he is convicted."

In People v. Fuentes, 74 Cal.App.2d 737, 169 P.2d 391, the defendant was prosecuted on the charge of assault by means of force likely to produce great bodily injury. Penal Code section 245. This court there held that the defendant was guilty of the crime of battery; that as battery is a crime included in the one charged, the appellate court may reduce the judgment and direct the resentence of the defendant. Citing People v. Kelly, 208 Cal. 387, 281 P. 609; People v. Cowan, 38 Cal.App.2d 231, 101 P.2d 125, 135. The crime for which the defendant was found guilty was reduced from assault by force likely to produce great bodily injury, as defined in section 245 of the Penal Code, to battery, as defined in section 242 of the Penal Code, with instructions to the trial court to pronounce judgment on defendant for the lesser offense.

Appellant argues that Article XI, Section 5, of the California Constitution vests the exclusive jurisdiction of felonies in the Superior Courts as well as misdemeanors not otherwise provided for by the legislature; that it has been definitely held that the legislature may vest jurisdiction of misdemeanors in the inferior courts established by the legislature within the county, the effect of which is to entirely deprive the Superior Courts of jurisdiction of all misdemeanors within the county. Citing In re Application of Luna, 201 Cal. 405, 257 P. 76 and People v. Mulholland, 16 Cal.2d 62, 64, 104 P.2d 1045. In the Luna case the petitioner was convicted in the Superior Court in the County of Los Angeles for a violation of the statute known as the Wright Act, Stats.1921, p. 79 (a high misdemeanor). There were two municipal courts in the county and, by statute, jurisdiction was conferred upon said courts over offenses such as that with which the defendant was charged. It was held that under the provisions of sections 1, 5 and 13 of Article 6 of the Constitution it was within the power of the legislature to confer jurisdiction on an inferior court such as a police or justice court of all misdemeanors, high and low, and such jurisdiction, when so conferred, thereby divested the Superior Court of all jursidiction in the premises. Section 1159 of the Penal Code was not discussed by the court and the question of jurisdiction of the Superior Court over an included offense was not there involved or passed upon. In the Mulholland case, 16 Cal.2d at page 64, 104 P.2d at page 1046, we find the following language:

> "'Article VI, section 5, of the Constitution vests the exclusive jurisdiction of all felonies in the superior courts, as well as all misdemeanors not otherwise provided for by the legislature. It has been definitely held that the legislature may vest the jurisdiction of all misdemeanors in inferior courts established by the legislature within the county, the effect of which is to entirely deprive the superior court of jurisdiction of all misdemeanors within the county. In re Luna, 201 Cal. 405, 257 P. 76; In re Leach and Huggins, 99 Cal.App. 645, 279 P. 157.'"

There is nothing in the language used in the cited constitutional provision prohibiting the legislature from providing, as it did in section 1159 of the Penal Code, that a jury or court might find a defendant guilty of a lesser offense necessarily included in the offense charged. If the offense charged is a misdemeanor under Penal Code section 1425, the justice court has jurisdiction. But where, as here, the offense charged is a felony, jurisdiction is in the Superior Court.

[2, 3] Appellant's contention that his conviction and sentence violated due process of law is likewise without merit. He argues that a statute so vague or indefinite as to fail to give notice of what acts should be punished, violates accused's rights to procedural due process; that a penal statute must set up ascertainable standards so that men of common intelligence are not required to guess at its meaning, either as to persons within the scope of the act, or as to the applicable tests to ascertain guilt; that the essential elements of "due process of law" are notice and an opportunity to be heard; that a defendant does not have notice of what necessarily included offenses are claimed to be embraced in the charge until the court submits the case to the jury by instructions; hence that a defendant is unable to plan his defense with certainty. However, the offense charged herein is a felonious assault by means of force likely to produce great bodily injury, Penal Code section 245, and the included offense is an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another. Penal Code section 240. An acquittal of the higher offense is a bar to a subsequent prosecution for any lower offense necessarily included in it and a conviction of any lower offense necessarily included in the higher, is a bar to a subsequent prosecution for such higher offense. People v. McDaniels, 137 Cal. 192, 199, 69 P. 1006, 59 L.R.A. 578. Under the circumstances presented by the record before us it is apparent that the defendant was not required to guess as to the meaning of the charge and was afforded notice and full opportunity to be heard. It does not appear that he was unable to plan his defense with certainty. As was said in Barbeau v. United States, 9 Cir., 193 F.2d 945, 947:

> "The purpose of specificity in the indictment is, primarily, to give the defendant the benefit of his Constitutional right to be informed of the nature and cause of the accusation against him and, secondarily, to protect him from subsequent prosecution for the same offense. These are practical requirements and the indictment need contain no magic formulae in order to succeed."

[4] Finally, it is argued that the court erred in refusing to permit the witness Hughes to testify and in limiting the cross-examination of the complaining witness. These arguments are without merit. The testimony sought to be introduced by the witness Hughes related to the activities of Mrs. Spreckels between September 23 and October 3, 1953 (after the date of the assault) and was offered to rebut her testimony that she was then suffering constant headaches and neck pains and from double vision. The trial court ruled that such testimony had so little probative value as to not be material to the trial of the case and we find no reversible error in the ruling sustaining the objection to the offered testimony. As was said in People v. Monson, 102 Cal.App.2d 308, 313, 227 P.2d 521, 524:

> "In order to predicate error on sustaining objections to a question it must appear to be relevant and material and its materiality must be so patent that injury will be presumed from the adverse ruling."

[5, 6] On cross-examination of Mrs. Spreckels, counsel for defendant sought to show that the complaining witness was attending parties and staying out late at night from September 22nd through October 3rd for the purpose of contradicting her testimony elicited upon direct examination that she was still suffering, at the time of trial, severe headaches and double vision. The district attorney objected and the court sustained his objection to this line of testimony. Appellant argues that the court erred in limiting cross-examination of the complaining witness as to these matters. However, from an examination of the record it does not appear to us that the defendant was prejudiced by the exclusion of any material evidence. It is the

duty of the trial judge to restrict the cross-examination of witnesses to reasonable limitations, People v. Navarro, 135 Cal.App. 535, 540, 27 P.2d 652, and we find no prejudicial error in the ruling made by the trial court.

Judgment and order affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

125 Cal.App.2d 432

SWEGLE

v.

STATE BOARD OF EQUALIZATION.

No. 15902.

District Court of Appeal, First District, Division 2, California.

May 24, 1954.

Hearing Denied July 21, 1954.

Mandamus proceeding by which liquor licensee sought to set aside decision of State Board of Equalization revoking her on-sale general liquor license. The Superior Court, Alameda County, Cecil Mosbacher, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Kaufman J., held that evidence in proceeding on accusations against licensee, sustained charges that licensee had permitted fights and disturbances to occur on premises, that persons had been permitted to become intoxicated on premises and to remain thereon in such condition, and that licensee had permitted known prostitutes to remain upon premises and solicit acts of prostitution.

Affirmed.

1. Administrative Law and Procedure 🔑476
Intoxicating Liquors 🔑108(9)

In proceedings on accusations against liquor licensee, licensee's counsel should have made an objection in each instance when witness testified as to hearsay, or else should have stipulated that his objection would run to the entire line of testimony, and this was so even though hearing officer had stated that he would strike such testimony if best evidence on subject was not subsequently produced.

2. Trial 🔑105(1)

In ordinary civil actions, incompetent evidence admitted without objection is sufficient to support findings.

3. Intoxicating Liquors 🔑106(4)

Fact that persons of ill repute congregate in a certain bar is not cause for revocation or even indefinite suspension of liquor license, it being necessary that it be proved by competent evidence that solicitation of acts of prostitution actually took place on premises. Government Code, § 11513(c).

4. Evidence 🔑593
Trial 🔑105(2)

A finding cannot rest on hearsay alone, but hearsay evidence may be used to supplement direct testimony when adduced without objection.

5. Intoxicating Liquors 🔑108(5)

In proceeding on accusations against on-sale general liquor licensee, evidence sustained charges that licensee had permitted fights and disturbances to occur on premises, that persons had been permitted to become intoxicated on premises and to remain thereon in such condition, and that licensee had permitted known prostitutes to remain upon premises and solicit acts of prostitution. Business and Professions Code, § 25601.

6. Intoxicating Liquors 🔑106(4)

On issue as to whether liquor licensee has "permitted" her premises to be used for proscribed purposes, whatever is permitted by licensee's agents must be attributed to licensee. Business and Professions Code, § 25601.

Anderson & Peck, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondents.

KAUFMAN, Justice.

Ethel Swegle, the holder of an on-sale general liquor license, appeals from a judgment of the Superior Court of Alameda County denying a writ of mandate by which appellant had sought to set aside the decision of the State Board of Equalization revoking the aforesaid license.

Appellant was charged on October 27, 1952 by amended accusation with the violation of Sec. 58 of the Alcoholic Beverage Control Act (formerly Sec. 58 of Act 3796, Deerings Laws, Vol. 2, now Sec. 25601, Business & Professions Code), in that she "kept and permitted her * * * premises to be used as a disorderly house and place to which people abided or to which people resorted to the disturbance of the neighborhood and for purposes which were then and there injurious to the public morals, health, convenience and safety:

"1. In that during said period of time the licensee permitted numerous fights and disturbances to occur on the premises;

"2. In that during said period of time persons were permitted to become intoxicated at said premises, and intoxicated persons were permitted to remain in and about said premises and to engage in numerous fights and disturbances on said premises;

"3. In that during said period of time licensee premitted known prostitutes to enter and remain in and upon said premises, and licensee permitted solicitation of acts of prostitution to take place upon said premises."

After hearings on January 5 and 15, 1953, the hearing officer made findings of fact substantially in the language of the accusation and recommended indefinite suspension of the license. On February 17, 1953, the Board of Equalization adopted the proposed decision but assessed the penalty as revocation of the license after hearing argument by appellant's counsel.

The trial court found, upon examination of the record of the administrative hearings and after argument by counsel, that licensee kept a disorderly house; that the premises were a disturbance to the neighborhood and injurious to the public morals, health, convenience and safety; that fights and disturbances occurred on the premises; that persons were permitted to become intoxicated on the premises and permitted to remain thereon, and that acts of solicitation by known prostitutes took place upon the premises. It was found that the evidence before the Board constituted good cause for revocation of the license.

The premises owned by appellant, known as Brick's Place was located at 815 Washington Street, Oakland.

Officer Pereira of the Oakland Police Department testified that acts of solicitation by certain known prostitutes whom he named occurred in Brick's place on February 28, 1952, July 8, 1952, July 10, 1952, another on July 10, 1952, and September 2, 1952. These acts of solicitation were addressed to Pereira's plain clothes police partner within the bar and Pereira himself did not witness them. He could not recall the names of any of the partners he had worked with as he had a different one every month. Arrests of the prostitutes were made by Pereira at the time and he stated the sentences that they had received. Objection was made to this testimony as hearsay in the first two instances, since Pereira admitted that the police records could be produced to show what officer was solicited. The hearing officer said he would not make an order at that time striking out the testimony as to solicitation, but would do so unless it was connected up by testimony of the person solicited. The other officer was never produced and there is nothing in the record to show that the hearing officer struck out the testimony. The situation was the same as to the last three instances, but further objection was not made, although counsel brought out that the alleged solicitation did not occur in the presence of the officer testifying.

Pereira also testified that he arrested one Tipton for being drunk in the bar, describing him as noisy and weaving. On February 6, 1952, two women and a man emerged from Brick's Place and went to a car. He arrested the women for being drunk and the man for being drunk in and about an automobile. One of the women he knew to be a narcotics user. On April 10, 1952, he saw Miss Smith and Mr. Gregory come out of Brick's Place and get in a car. He followed them to 10th and Brush Streets where they were arrested for vagrancy and lewd conduct. He had previously arrested Miss Smith several times on charges of prostitution and being a lewd person. The officer knew nothing of what they had done in Brick's Place but assumed that the contact had been made there. He did not know whether or not they had entered the bar together.

On May 9, 1952, Pereira arrested a man and woman at 1:30 a. m. for drunkenness after they had emerged from Brick's Place. On the evening of June 27, 1952, he arrested a young Negress for prostitution who came out of Brick's Place accompanied by an elderly white man. On July 25, 1952, he arrested a couple for prostitution whom he observed leaving Brick's Place and on October 7, 1952, arrested a woman for soliciting after he saw her leave these premises with a man. All these women whom he arrested received jail sentences or fines except one who was confined to Napa State Home because she was a narcotics user.

Jack Garcia who operated a delicatessen and grocery at 821 Washington Street stated that he had seen dozens of people thrown out of Brick's Place, people chased out with knives and guns. He had seen prostitutes soliciting in front of his store, and observed them coming out of the bar, and then running in there from the street when a police officer approached. He had called police when fights occurred in front of Brick's Place, but the participants were usually gone when the police arrived. Two or three had occurred in the last year, and he had been in them himself.

Sergeant Risedorph of the Oakland Police Department had to reprimand the colored bouncer in the bar for standing with his arms around two colored prostitutes. He said that although prostitutes and hopheads frequented other bars in this section of the city, he had not seen them in such great numbers as in Brick's Place.

Officer Skelton observed on numerous occasions that many persons loitered in the bar without either eating or drinking. He had noticed that as soon as a service man went in, prostitutes readily became acquainted with him, and he considered it a place where these women made their contacts.

Officer Shubert of the Oakland Police stated that he had been in Brick's Place every working day while he was on that beat. He had made three arrests there, one for violation of probation, two of parties involved in a fight just outside the bar that had started inside. He had seen drunks in the bar and had arrested them.

Officer Skelton stated that he had arrested between seven and nine drunks within the premises in the last year, but within the immediate vicinity, he had arrested between 250 and 300 drunks, some of whom were patrons of Brick's Place. This was the only bar in this block.

Officer Murphy arrested two Negroes who had just left the bar and commenced a fight on the street.

Officer Berg arrested one patron within the bar for drunkenness. Both Officers Berg and Delaney observed known prostitutes and narcotics users within the bar.

Ethel Swegle, the licensee, admitted that the place was a little rough, that it was a rough place when she took it over, but that they had been trying to make a clean place out of it.

[1–5] Appellant contends that the evidence in the record is insufficient to support the findings. The chief attack is against the hearsay evidence of acts of solicitation by prostitutes upon the premises. It may be said at the outset that a reading of the testimony summarized above will show that the evidence is adequate to support the first two charges concerned with fights and disturbances and intoxication.

The third charge in the accusation charges appellant with permitting known prostitutes to remain upon the premises and solicit acts of prostitution thereon. Both the Board and the trial court found as a fact that the licensee had permitted such solicitation on the premises. The evidence as to the acts of solicitation in the bar appears to be both hearsay and direct evidence. The police officer who was alleged to have been solicited was never brought in to testify, nor were the police records which were available. In the first two instances objection was made, but in the following three instances there was no objection. Counsel was no doubt relying on the hearing officer's statement that he would strike this testimony if the unidentified police officer in each case was not brought in to testify. However, he should have made an objection in each instance, or have stipulated that his objection would run to this entire line of testimony. Furthermore, he could have made a motion to strike the testimony at the end of the hearing. In ordinary civil actions incompetent evidence admitted without objection is sufficient to support a finding. Stickel v. San Diego Electric Ry. Co., 32 Cal.2d 157, 195 P.2d 416; Estate of Pohlmann, 89 Cal.App.2d 563, 201 P.2d 446; 4 Cal.Jur.2d 388, § 534.

Sec. 11513(c) of the Government Code, which is applicable to this type of administrative hearing, provides that "Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence *but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.*" The type of hearsay admitted here was not the type admissible over objection in civil actions.

To support this finding that the third charge of the accusation had been established there must be competent evidence that solicitation took place on the premises. The case of Stoumen v. Reilly, 37 Cal.2d 713, 234 P.2d 969, has established that the fact that persons of ill repute congregate in a certain bar is not cause for revocation or even indefinite suspension of a liquor license under Sec. 58 of the Alcoholic Beverage Control Act. Count one of the accusation in the cited case alleged, as here, that the premises were permitted to be used as a disorderly house for purposes injurious to the public morals. In Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 229 P.2d 27, where hearsay records were admitted it was held that there was no error since it had been used solely for the purpose of supplementing and explaining the direct evidence. Fox v. San Francisco United School Dist., 111 Cal.App.2d 885, 245 P.2d 603, seems to indicate that an objection is of significance, but in that case the hearsay was the type that was admissible over objection in civil actions, so the case does not stand for the proposition that inadmissible hearsay unobjected to is sufficient to support a finding.

However the evidence offered by police officer Pereira to the effect that he made arrests for solicitations that occurred within the bar on statements reported to him by another officer are direct evidence that Officer Pereira performed those acts. He testified also of his own personal knowledge that such persons received sentences for these offenses. This likewise is direct evidence. A finding cannot rest on hearsay alone, but if the hearsay evidence given by the officer may be used to supplement his direct testimony, then it may be said that the finding is supported.

However it is clear the direct testimony of Officer Pereira that acting on information he arrested prostitutes for solicitions on the premises and that the same prostitutes were later convicted and sentenced for these offenses is ample evidence by itself to support the Board's finding on the third charge of the accusation.

This officer's testimony is direct evidence that there is a judgment of conviction based on implied findings that the prostitutes there involved were guilty of acts of solicitation on the premises here involved.

This judgment of conviction then is itself evidence that acts of solicitation for prostitution took place on the premises in question.

In our opinion there is ample evidence in the record to support the Board's findings and the lower court's findings on all three charges of the accusation.

[6] Appellant contends finally that the court misconstrued Section 58 of the Alcoholic Beverage Control Act by indirectly holding that the word "permits" in said section may include an unknowing consent, and further, that a licensee can be held to have permitted acts constituting a violation, to occur upon evidence and a showing that the acts themselves took place. Appellant cites numerous cases from other jurisdictions to the effect that "permit" means knowledge, consent, acquiescence, willingness, as distinguished from passive sufferance. However, in Dorris v. McKamy, 40 Cal.App. 267, 274, 180 P. 645, 649, it is said that "as defined by Webster and others, 'permit' implies no affirmative act. It involves no intent. It is mere passivity, abstaining from preventive action."

Appellant's agents were always present in the bar. It was said in Mantzoros v. State Board of Equalization, 87 Cal.App.2d 140, 144, 196 P.2d 657, 660, that "The licensee, if he elects to operate his business through employees must be responsible to the licensing authority for their conduct in the exercise of his license, else we would have the absurd result that liquor could be sold by employees at forbidden hours in licensed premises and the licensees would be immune to disciplinary action by the board. Such a result cannot have been contemplated by the Legislature. Even in the case of criminal statutes vicarious liability for the acts of employees is not unknown." Therefore, whatever is permitted by appellant's agents must be attributed to her.

We conclude that the trial court's judgment denying the writ of mandate finds support in the evidence and the law and accordingly the judgment must be affirmed.

Judgment denying petition for writ of mandate affirmed.

NOURSE, P. J., concurs.

DOOLING, Justice.

I concur: There is sufficient circumstantial evidence to support the inference that solicitation by known prostitutes was permitted in this tavern. I do not understand that this court is holding that the failure to object to hearsay evidence in an administrative proceeding to which sec. 11513, Gov.Code is applicable would result in the hearsay evidence alone being sufficient to support a finding. The section itself makes hearsay admissible and hence no effective objection to its introduction could be interposed, and the section itself limits the probative value of such evidence: it "shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." I want to make it perfectly clear that this limitation on the effect of hearsay evidence in proceedings to which sec. 11513 is applicable, in my judgment, is not dependent upon whether or not an objection is made to its admission.

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125 Cal.App.2d 515

BEVERLEY v. BISCAILUZ.

Civ. 19924.

District Court of Appeal, Second District, Division 3, California

May 26, 1954.

Hearing Denied July 21, 1954.

Action by one who had acquired property after attachment had been levied and before execution sale to recover from sheriff the difference between amount which sheriff's return showed the property had been sold for at execution sale, and the amount stated in the writ of attachment. The Superior Court, Los Angeles County, Thurmond Clarke, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that where property was sold to levying creditor and no money, except costs of sale, was received by sheriff, plaintiff could not recover.

Affirmed.

Sheriffs and Constables 🔑122

Although sheriff's return stated that real property had been sold under writ of execution for an amount which was greater than the amount stated in writ of attachment that had been levied upon the property, where property was sold to levying creditor and no money, except costs of sale, was received by sheriff, person who acquired the property after attachment had been levied and before execution sale could not recover from the sheriff the difference between the amount stated in sheriff's return and the amount stated in writ of attachment. Government Code, § 26680.

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Jesse A. Hamilton, Los Angeles, for appellant.

Harold W. Kennedy, County Counsel, and Wm. E. Lamoreaux, Deputy County Counsel, Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant, as sheriff, sold certain real property under a writ of execution to a judgment creditor for the amount of the judgment, interest, and costs. That amount was more than the amount stated in a writ of attachment that had been levied, in the same action, upon the property. Plaintiff had acquired the property after the attachment had been levied and before the execution sale. The present action is to recover from the sheriff the amount which was in excess of the amount stated in the writ of attachment, plus interest thereon at 10 per cent per month and 25 per cent thereof as damages, under Government Code, § 26680. Judgment was for defendant. Plaintiff appeals.

The record on appeal consists of the judgment roll and a stipulation hereinafter referred to.

Appellant states in his brief that the matter was submitted for judgment upon a "Stipulation of Facts" and "certain oral stipulations which were embodied in the" findings of fact and conclusions of law. He also states that "he has no quarrel with the Trial Court in so far as the facts it found are concerned," but he does complain about the legal conclusions of the trial court.

The court made findings as follows:

On July 27, 1948, the defendant, as Sheriff of Los Angeles County, levied a writ of attachment in the amount of $5,408.86, upon real property in Los Angeles County owned by E. Hagan, which writ was issued by the Superior Court of Alameda County in an action wherein the Carnation Company was plaintiff, and E. Hagan was a defendant.

On August 19, 1948, Hagan conveyed the property, subject to said attachment, by grant deed to one Streff, and on that date Streff executed a purchase money mortgage in favor of Hagan for $75,000; the deed was recorded August 20, 1948, and the mortgage was recorded August 23, 1948.

On September 23, 1948, Hagan assigned said mortgage, subject to said attachment, to plaintiff Beverley herein; the assignment was recorded on said day; on September 10, 1949, plaintiff acquired said property by grant deed from Streff and since that date plaintiff has been the owner of the property.

On April 10, 1949, the Carnation Company amended its complaint by increasing the amount of its demand from $5,408.86 to $6,216.55; on April 12, 1949, the Carnation Company obtained judgment against Hagan for $7,449.29, including costs.

On September 30, 1949, the defendant herein, as sheriff, caused the writ of execution, which had been issued in the Alameda County case in the sum of $7,658.28, to be levied upon the interest of Hagan in said real property.

On November 7, 1949, pursuant to the writ of execution, the defendant herein, as sheriff, sold the property "to the Carnation Company, the judgment creditor, for the total sum of $7830.24, which said sum consisted of the following:

The judgment as entered	$7449.29
Accrued interest to September 12, 1949	208.99
Accrued interest to date of sale	84.38
Costs of sale	87.58."

On November 7, 1949, the sheriff's certificate of sale was executed and delivered to the Carnation Company; the certificate was recorded on December 12, 1949; on November 28, 1950, the sheriff caused his deed to said property to be executed and delivered to said company.

On November 7, 1949, the defendant, as sheriff, made his return "showing that said property was sold on November 27, 1949, for the sum of $7830.24. That it is true that the only money which came into the hands of defendant upon the sale of said property under execution was the sum of $87.58, costs of sale, and that said sum was paid to the defendant by the Carnation Company."

On October 2, 1950, plaintiff made demand on defendant for payment to plaintiff of the difference between the amount named in the sheriff's certificate of sale and the amount named in said attachment, plus interest and penalties; said difference is $2,421.38.

"It is not true that defendant received the sum of $2421.38, or any other sum, from the said Carnation Company to and for the use and benefit of the plaintiff."

The court made conclusions of law as follows: The writs of attachment and execution were levied in the manner required by law; the execution sale was conducted in the manner required by law; defendant was not required to collect any sum from the judgment creditor, except the costs of sale; and defendant is not liable to plaintiff in any sum.

The stipulation, above referred to as a part of the record on appeal, was that on September 10, 1949, plaintiff herein acquired title in fee simple to said real property by grant deed from Streff, which deed was intended to be a deed in lieu of foreclosure of the mortgage.

Appellant (plaintiff) contends that the Carnation Company had an attachment lien for only $5,408.86, the amount stated in the writ of attachment; that he acquired the real property subject only to that attachment lien of $5,408.86; and that since the sheriff sold the property for $7,830.24, or $2,421.38 in excess of that lien, the sheriff held the amount of said excess for the use and benefit of plaintiff. Appellant argues that the attachment lien was not increased by merely amending the complaint and seeking a larger recovery; the sheriff is bound by his return of sale showing that he sold the property for $7,830.24; he cannot make a defense inconsistent therewith to the effect that he did not sell for cash but merely accepted the bid of the judgment creditor which was the total amount of the judgment, interest, and costs, and he credited that amount in satisfaction of the judgment. In Freemen on Executions, 3rd Edition, Vol. 3, page 2390, and in Harvey v. Foster, 64 Cal. 296, at page 298, 30 P. 849, it was said that such an officer cannot make a defense inconsistent with his return. If it be assumed that a sheriff is bound by his return, it is necessary of course to know the contents of his return in order to know to what extent he is bound. In the present case, the return which the sheriff made is not in the record on appeal, and the record does not show what statements were in the return. It is true that one of the findings was that the sheriff made his return showing that the property was sold for $7,830.24. It is to be noted, however, that immediately following that finding (and in the same paragraph) there is a finding that "the only money which came into the hands" of the sheriff upon the sale was $87.58, costs of sale, paid to him by the Carnation Company. It is also to be noted that there is a finding (in a preceding paragraph) that the sheriff sold the property "to the Carnation Company, the judgment creditor, for the total sum of $7,830.24, which said sum consisted of the following:

The judgment as entered	$7449.29
Accrued interest to September 12, 1949	208.99
Accrued interest to date of sale	84.38
Costs of sale	87.58."

Also, there is a finding that the sheriff did not receive $2,421.38, or any sum, from the Carnation Company for use and benefit of plaintiff. It cannot be determined from the findings what statements were in the return. The first of the findings just referred to (that the sheriff made his return "showing" that the property was sold for $7,830.24) does not expressly recite whether the return stated that the property was sold for $7,830.24 cash or whether it was sold for $7,830.24 which was applied in satisfaction of the judgment. Since the return shows that the property was sold for $7,830.24, and since that amount was the exact amount of the judgment, interest, and costs, and since the property was sold to the judgment creditor, it is obvious that the property was not sold for cash, but the amount bid by the creditor was applied in satisfaction of the judgment. Therefore it would seem that the return by which the sheriff was allegedly bound was a return to the effect that he did not receive cash upon the sale and that the said amount stated therein was applied in satisfaction of the judgment. Such a sale to a judgment creditor is not necessarily equivalent to a sale for cash. There is no evidence here as to Hagan's financial ability, or as to the value of the land, or as to whether there were liens upon the land prior to the attachment lien. It might well be that the judgment against Hagan was practically of no value, and that the land was practically of no value, or that if the land was valuable that it had prior liens upon it to the extent that Hagan had no substantial interest therein. Under such circumstances, the judgment creditor might be willing to satisfy his judgment by bidding the full amount of it for Hagan's practically valueless interest in the land. The purchase money mortgage for $75,000, which Streff placed on the land when the land was conveyed to him by Hagan, might indicate that the land was valuable, but, as above stated, there was no evidence as to whether there were prior liens on the land other than this creditor's attachment lien. The fact that the plaintiff herein did not redeem the land (for the amount of the judgment) after the execution sale, or offer to redeem it for $5,408.86 which he considered to be the amount of the attachment lien, signifies that he did not regard his alleged $75,000 equity in the land as being of much value. It seems that his position was that if he could obtain from the sheriff $2,421.38 and 10 per cent interest thereon and 25 per cent thereof as damages, he would consider that amount as adequate to satisfy his alleged equity in the land.

Assuming that the attachment lien herein was for $5,408.86 only, and assuming that the sheriff was chargeable with having received cash in excess of the amount of that lien, it would not necessarily follow that the sheriff would be required to pay any part of such excess to this plaintiff (Beverley). Other liens or encumbrances might have been placed upon the land after the attachment herein was levied and before plaintiff Beverley acquired the mortgage or land. The stipulation of facts, upon which the case was submitted to the trial court, is not in the record on appeal —the appeal herein being upon the judgment roll and a stipulation, above set forth, to the effect that plaintiff became the owner of the property on September 10, 1949. There is no finding herein that plaintiff's mortgage was not subject to other liens or encumbrances. There is no evidence that the grant deed from Streff to plaintiff (which was intended to be in lieu of foreclosure of the mortgage) was recorded. There is no evidence that, at the time of the execution sale, the sheriff knew, actually or constructively, that plaintiff owned or claimed to own the property. At that time under the evidence here, Streff, who was not the judgment debtor, was the record owner of the property, and plaintiff was owner of the mortgage.

No question is presented here as to the sufficiency of the evidence to support the findings. As above shown, it is conceded that the findings are correct. As to the issue whether the sheriff received money for the use and benefit of plaintiff, the court found that he did not receive "$2421.38, or any other sum," for the use and benefit of plaintiff.

The findings support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

125 Cal.App.2d 466

VILLAFUERTE v. VILLAFUERTE.

Civ. 15745.

District Court of Appeal, First District,
Division 2, California.

May 25, 1954.

Husband's divorce action. The Superior Court, City and County of San Francisco, I. L. Harris, J., entered order granting divorce to husband and awarding wife $2,000, which represented her interest in community property, and $400 and $150 for legal fees, and the husband appealed. The District Court of Appeal, Dooling J., held, inter alia, that fact that wife, several years before marriage, had made monthly payments toward purchase of house, which was fully paid for when parties married, and fact that wife joined in mortgage on house to obtain money with which to purchase other property did not result in wife's acquiring a community property interest in the house.

Affirmed in part, and reversed in part with directions.

1. Husband and Wife ⚷248½

Fact that wife, several years before marriage, had made monthly payments toward purchase of house, which was fully paid for when parties married, and fact that wife joined in mortgage on house to obtain money with which to purchase other property did not result in wife's acquiring a community property interest in the house.

2. Husband and Wife ⚷264

In divorce action, evidence supported trial court's determination that parties intended property, purchased with $2,000 down-payment from loan obtained on husband's separate property pursuant to agreement whereby husband was to make monthly payments out of his earnings and wife was to pay household expenses out of her earnings, to be community property.

3. Husband and Wife ⚷254

Fact that title to realty was taken in joint tenancy would not prevent its being community property if spouses so intended.

4. Divorce ⚷253

It is error to allow sum of money in lieu of community interest in property without finding of value of the property.

5. Divorce ⚷222

Trial court in husband's divorce action had power at trial's conclusion to make order granting motion, made by wife's attorneys at opening of trial, for attorneys' fees.

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Edmund J. Holl, San Francisco, for appellant.

George E. Hammer, Anthony E. O'Brien, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from certain portions of an amended interlocutory decree of divorce. Appellant husband was granted a divorce on the ground of extreme cruelty. The court awarded the respondent wife $2,000 representing her interest in the community property and $400 and $150 respectively for additional legal fees payable to respondent's counsel.

Appellant Cornelio purchased a piece of property in Vallejo for $4,500 in 1942. He met respondent Elizabeth in 1943, but they were not married until 1947. During 1943 they saw each other frequently and planned to get married. Cornelio was living at the house in Vallejo and paying $22 per month on the mortgage. They were both working and therefore decided to double up on the payments for the house. Elizabeth testified that she made one payment of $22 in 1943 and continued to make such payments to the latter part of 1944. They stopped going together in 1944 and did not resume seeing each other until 1947. In the meantime Elizabeth had married another man and obtained an interlocutory decree of divorce in December 1946. Soon after this she moved into the house in Vallejo with Cornelio and lived with him for approximately a year before they married. During this time Elizabeth contributed to the household expenses and kept house for Cornelio. After they were married they decided to purchase some property in San

Francisco. They agreed that he would save his money to invest in the property and she would use her salary to pay the household expenses. They purchased property in San Francisco located on Grove Street in 1952. In order to raise enough money for a down payment they borrowed $2,500 on the home in Vallejo, and both parties signed the mortgage. $2,000 of this was used for the down payment on the San Francisco property. There was also a mortgage on the San Francisco property which was signed by both of them.

The court originally found that the two pieces of real property were the separate property of Cornelio. The defendant was awarded $2,000 payable in sums of $150 per month, $400 additional attorneys' fees and $150 additional to cover expenses of the wife in executing quitclaim deeds to the real property above mentioned. Counsel for appellant moved for a new trial on partial issues. Appellant contended that the award of $2,000 was not correct because the court ruled the real property to be separate and a guilty wife is not entitled to alimony. On the hearing of the motion for new trial the trial court stated that the wife had a definite interest in the real property, and that the $2,000 was not intended to be support money. The court stated that the findings submitted by counsel were signed without examining them, that he had intended to find that the real property was community property and to award $2,000 to the wife for her interest therein. Therefore it was ordered that the findings be amended. Section 662, Code Civ.Proc.

The amended findings are that both parcels of real property are community property and that the wife receive $2,000 payable in monthly installments of $150, which represents her community interest in the real property referred to above.

[1] There is no evidence to support the finding that the wife had a community property interest in the property in Vallejo. At most, giving her own testimony its most favorable construction, she paid $22 per month towards its purchase in 1943 and 1944 for 10 or 12 months. That was several years before her marriage to appellant and in the meantime she married and divorced another man. Whatever claim she might have against appellant for the money so advanced it could not result in her acquiring a community property interest. Her joining in the mortgage on the Vallejo property does not alter its status. Dyment v. Nelson, 166 Cal. 38, 134 P. 988. The Vallejo property was fully paid for when the parties were married and there is no showing that any community funds went into it, nor was there any testimony which would support a finding that this was transmuted to community property by agreement of the parties.

[2, 3] The equity in the San Francisco property occupies a different status. The wife testified that the parties agreed to buy it together, the husband to make the payments while she paid the household expenses out of her own earnings. The court could reasonably conclude that the parties intended the property so purchased to be community property and that the $2,000 down payment was transmuted to community property by agreement. (10 Cal. Jur.2d, Community Property, sec. 58, p. 733.) The fact that title to the property was taken in joint tenancy would not prevent its being community property if the spouses so intended. Tomaier v. Tomaier, 23 Cal.2d 754, 146 P.2d 905; Huber v. Huber, 27 Cal.2d 784, 167 P.2d 708; La Mar v. La Mar, 30 Cal.2d 898, 903, 186 P.2d 678.

[4] The award of $2,000 to the wife must be reversed (1) because it is partly based on an erroneous finding that she had a community interest in the Vallejo property and (2) because the court made no finding of the value of the equity of the parties in the San Francisco property. It is error to allow a sum of money in lieu of the community interest in property without a finding of the value of the property. Forbes v. Forbes, 118 Cal.App.2d 324, 326, 257 P.2d 721; Bailey v. Bailey, 60 Cal. App.2d 291, 140 P.2d 693.

[5] The allowance of $400 attorneys' fees is not excessive. The attorneys moved for an allowance of attorneys' fees at the opening of the trial and the court had power to make the order at the trial's

conclusion. Nelson v. Nelson, 100 Cal. App.2d 348, 351, 223 P.2d 636.

The allowance of $150 to complete transfer of title to the San Francisco property is now premature because of our holding that the community property interests of the parties therein must be readjudicated.

The award of $400 counsel fees is affirmed. The allowance of $150 and $2,000 are reversed with directions to the trial court to retry the issue of community property and to make a new award not inconsistent with this opinion.

NOURSE, P. J., and KAUFMAN, J., concur.

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125 Cal.App.2d 384

PEOPLE v. RAQUEL.

Cr. 2508.

District Court of Appeal, Third District, California.

May 20, 1954.

Defendant was convicted in Superior Court of the County of Yolo, Warren Steel, J., for violation of Penal Code, § 288, and he appealed from judgment of conviction and from order denying motion for new trial. The District Court of Appeal, Peek, J., held that the failure of the trial court to follow the provisions of the sexual psychopath law and find whether defendant was a sexual psychopath before sentencing him was error, and case would be remanded for compliance with statute.

Order affirmed and cause remanded with directions.

1. Criminal Law 🔑1156(3)

Denial of motion for new trial based upon grounds of newly discovered evidence will not ordinarily be disturbed on appeal because trial judge is in better position to determine effect and value of such evidence than is reviewing court but such determination will be reversed if it is affirmatively shown or manifestly appears that there has been an abuse of discretion.

2. Criminal Law 🔑911

On appeal from judgment of conviction of violation of Penal Code, § 288, denial of defendant's motion for new trial was not an abuse of trial court's discretion. Pen.Code, § 288.

3. Criminal Law 🔑1170½(1)

Where defendant took witness stand, he waived protection of statute forbidding allusions to prior convictions, and while district attorney's questions concerning prior conviction of defendant were not wholly proper, they were not prejudicial to him. Pen. Code, § 1025.

4. Mental Health 🔑441

The statutory provision requiring that when any person is convicted of sex offense involving child under fourteen years of age, court should adjourn proceedings and certify person for examination to determine whether person is a sexual psychopath, is mandatory and must be followed. Welfare and Institutions Code, § 5501, Pen. Code, § 288.

5. Criminal Law 🔑1189

Mental Health 🔑441

Where defendant was convicted of violation of Penal Code, § 288, refusal of trial court to follow provisions of sexual psychopath law and determine whether defendant was a sexual psychopath before sentencing him, was improper and case would be remanded with directions to suspend sentence and make the determination. Pen. Code, § 288; Welfare and Institutions Code, § 5501.

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Henry W. Mahan, Benicia, Thomas E. Reynolds, public defender, Davis, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of violation of Section 288 of the

Penal Code and from the order denying his motion for a new trial.

There would appear to be no reason for a detailed summary of the evidence at the trial. It is sufficient to note that an examination of the transcript discloses ample evidence to sustain the judgment. Defendant contends that the court erred in denying his motion for a new trial; that it was error for the court to permit the district attorney to interrogate him concerning prior conviction and his service of time therefor; and that he was denied the right under Welfare and Institutions Code section 5501 to have a determination as to whether or not he was a sexual psychopath prior to judgment and sentence.

[1, 2] In support of his first contention he argues that certain affidavits presented to the court in support of his motion for a new trial show that a different result might have been obtained had such evidence been presented upon the trial. It is the well established rule that the conclusion of the trial court in denying a motion for new trial based upon the grounds of newly discovered evidence will not ordinarily be disturbed on appeal. This is true since the trial judge, because of his familiarity with the facts and circumstances of the entire case, is in a far better position to determine the effect and value of such evidence than is the reviewing court. Dry v. City & County of San Francisco, 83 Cal.App.2d 790, 189 P.2d 761. Consequently such a determination by the trial court will not be reversed unless it is "* * * affirmatively shown or manifestly appears that he has abused the sound discretion confided to him." Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46. We find nothing in the record nor in the briefs of defendant that would in any way show that the trial court in the present case abused its discretion.

[3] While the procedure followed by the district attorney in his examination of the defendant concerning prior conviction was not wholly proper, we cannot say that it was prejudicial. As stated in People v. Cordero, 92 Cal.App.2d 196, 206 P.2d 665, 668—

"When a defendant takes the witness stand, he waives the provisions of § 1025 of the Penal Code. [Citing cases.] As long as the prosecutor does not go beyond the fact of the prior convictions and the nature of the prior crimes committed, the questions are proper. People v. David, 12 Cal.2d 639, 86 P.2d 811. This rule applies even though such evidence may tend to prejudice the defendant in the eyes of the jury."

[4] Appellant's final contention is that the provisions of section 5501, Welfare and Institutions Code, are mandatory and hence he was denied his right to have a determination of that question prior to sentence. His contention in this regard is sound; however, it does not follow that the judgment of conviction of the substantive offense must be reversed and the cause remanded for a new trial. An identical situation was presented in People v. Hector, 104 Cal.App.2d 392, 231 P.2d 916. See also People v. Barnett, 27 Cal.2d 649, 166 P.2d 4. There as in the present case it appeared that that particular section of the code was not brought to the attention of the trial court. On appeal the District Court held the section to be mandatory and that hence it must be followed, but the judgment of conviction was reversed only insofar as it committed the defendant directly to imprisonment.

[5] For the reasons above mentioned the order denying defendant's motion for a new trial is affirmed and the cause is remanded to the trial court with directions to suspend sentence in accordance with the provisions of said section 5501 "'* * * for the purpose of hearing and determining whether or not the defendant * * * is a sexual psychopath'", 27 Cal.2d 649, 659, 166 P.2d 4, 5, and upon the conclusion thereof to commit the defendant to the Department of Institutions or to a state prison as may be determined according to the law, and to make such other and further orders as the court may determine to be just and proper.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

125 Cal.App.2d 462

PEOPLE v. NORDESTE.

Cr. 2471.

District Court of Appeal. Third District.
California.
May 24, 1954.

Defendant was convicted in the Superior Court, Sacramento County, Bedeau, J., of unlawful sale of narcotics, and he appealed. The District Court of Appeal, Van Dyke, P. J., held that information charging that defendant unlawfully sold a "derivative of morphine" was sufficient to state a public offense, even though the section defining narcotics did not include in definition the derivative of any of the specified substances, including morphine.

Judgment and order affirmed.

1. Poisons 🔑9

Information charging that defendant unlawfully sold a "derivative of morphine" was sufficient to state a public offense, even though the section defining narcotics did not include in definition the derivative of any of the specified substances, including morphine. Health and Safety Code, §§ 11001, 11002, 11500.

2. Criminal Law 🔑37

"Entrapment" is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

3. Criminal Law 🔑37

Where an accused knowingly commits a crime by selling to a police decoy, there is no entrapment.

4. Criminal Law 🔑37

Officer, who on two occasions paid defendant money, following which defendant went into a building and returned and gave officer a capsule containing narcotics, did not entrap defendant, and conviction for unlawful selling of narcotics could not be avoided on that ground.

5. Poisons 🔑9

Evidence showing unlawful sale by defendant of a derivative of morphine, was sufficient to sustain conviction of statutory offense of unlawful selling of narcotics. Health and Safety Code, § 11500.

6. Criminal Law 🔑260(11)

Discrepancies in testimony of officer to whom defendant unlawfully sold narcotics did not require reversal, but it was for trial court to say whether such discrepancies rendered the officer's further testimony unacceptable.

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Thomas A. Wahl, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Appellant was charged with having on January 21, 1953 and January 22, 1953, violated the provisions of Section 11500 of the Health and Safety Code in that on those two occasions he unlawfully sold a derivative of morphine. He was defended by the public defender and was tried before the court, a jury having been waived by him. He was convicted on both counts. From the ensuing judgment sentencing him to State prison and from the order denying his motion for new trial he has appealed.

The evidence stated briefly was as follows: On the dates charged John Mendoza, a Deputy Sheriff of San Joaquin County, who was in Sacramento working with the State Division of Narcotic Enforcement, met the appellant at 328½ K Street. Mendoza was in the company of an informant and at that time gave to appellant $8 and was told to wait. Appellant went into the building and returned, giving Mendoza a capsule. On the next day Mendoza met appellant on the street and asked him if he had anything on him. The appellant said he did not, but if Mendoza would come around later he would get some. Later in the day Mendoza again met the appellant at the same place where he had obtained the first capsule. No one was present at that time. Again the appellant went into the building, came back and delivered a capsule to Mendoza who again paid him $8. The two capsules were shown to have contained an unidentified derivative of morphine.

[1] Appellant contends that the information was insufficient as a matter of law to charge the commission of a public offense, particularly in this that while charging that appellant sold a "derivative of morphine" such a substance is not one of the narcotics enumerated in Section 11001 of the Health and Safety Code since that section does not mention a "derivative of morphine". It is true that the section defines narcotics as meaning any of a number of specified substances, including cocaine, opium, morphine, etc., and does not include in the definition the derivatives of those substances. But the following section, 11002, adds a further definition of narcotics and therein includes "any of the salts, derivatives, or compounds of a narcotic or any preparation or compound containing a narcotic or its salts, derivatives, or compounds." Appellant argues further that "opium is the mother of all narcotics and that morphine is an alkaloid of opium and cannot be refined into other narcotics." In short, his argument is that there can be no derivative of morphine. The testimony of the duly-qualified expert witness who analyzed the substance contained in the capsules which the appellant sold to Mendoza testified that the substance was "definitely a morphine derivative" although he further said that he had not determined just which one of the derivatives it was and that it might have been a mixture of several. However, he was definite that the capsules contained a derivative of morphine and this testimony squarely meets and refutes the argument of appellant upon this point. We hold that each of the two counts stated a public offense.

[2-4] Appellant contends that the evidence shows entrapment but this contention is in opposition to all of the evidence. "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. In other words persuasion or allurement must be utilized to entrap." People v. Schwartz, 109 Cal.App.2d 450, 454, 240 P.2d 1024, 1027. We have stated the testimony and it is apparent therefrom that what the officer did does not come within the definition of entrapment. "Where an accused knowingly commits a crime by selling to a police decoy, there is no entrapment." People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114, 1115.

[5] Appellant further contends that the evidence is not sufficient to support the judgment. This contention is really a restatement of the argument that the information did not charge a public offense. Appellant says that since the alleged narcotic was identified only as a derivative of morphine the proof does not support a conviction under the code because according to appellant's argument derivatives of morphine are not defined as narcotics. We have pointed out heretofore the error in this argument.

[6] In further support of his argument that the evidence was insufficient, appellant argues that certain discrepancies in the testimony of Mendoza so far discredited him as a witness that his testimony should be ignored here and should have been ignored by the trial court. Taking the testimony as a whole, and admitting that there were certain discrepancies therein, it is clear that the trial court was not bound to ignore all that the witness said. Appellant points out the following: Mendoza first said that he had not, and later said he had, been shown a picture of appellant before he contacted him; Mendoza was further indefinite as to whether or not he had seen appellant after the second sale. At one time he referred to his informant as a male and at another point as a female and his attempts to clear up this apparent confusion were most unsatisfactory. It is true these discrepancies did exist, but they are not of such nature that an appellate court can say the trial court could not lawfully accept other testimony of the witness as being true. Mendoza, as has been seen, did testify positively as to his purchase of

the two capsules and other testimony was equally positive that they contained derivatives of morphine. It was for the trial court to say whether or not the discrepancies rendered Mendoza's further testimony unacceptable.

The judgment and the order appealed from are affirmed.

SCHOTTKY and PEEK, JJ., concur.

125 Cal.App.2d 209

RYDER v. CITY OF LOS ALTOS et al.

Civ. 15869.

District Court of Appeal, First District, Division 2, California.

May 17, 1954.

Rehearing Denied June 16, 1954.

Hearing Denied July 14, 1954.

Proceeding for writ of mandate to require the calling of a special election on a petition seeking disincorporation of city. The Superior Court, County of Santa Clara, William F. James, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Nourse, P. J., held that provision in Elections Code that no petition for disincorporation may be circulated until after expiration of two years from date of incorporation prevailed over provision in Government Code which contained no limitation as to the time for such an election.

Judgment affirmed.

1. Municipal Corporations 🔑51

Provision in Election Code that no petition for disincorporation may be circulated until after expiration of two years from date of incorporation prevailed over Government Code provision which contained no limitation as to the time for such an election, and petition for election on disincorporation, filed within two years of incorporation, was properly denied. Elections Code, § 1702; Government Code, § 34701.1.

2. Statutes 🔑162

Where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject matter as far as coming within its particular provisions.

3. Statutes 🔑231

The statutes and codes blend into each other and are to be regarded as constituting but a single statute.

4. Statutes 🔑302

The constitutional right to election upon initiative petition is granted under such procedure as may be provided by law, and statute proscribing the circulation of petition for disincorporation of city within two years of incorporation is not an unconstitutional abridgment of that right. Government Code, § 34701.1; Elections Code, § 1702; Const. art. 4, § 1.

Cahill & Casey, San Francisco, for appellant.

Gardner Bullis, Los Altos, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for a writ of mandate to require the defendants to call a special election on a petition seeking an election to vote on the question of the disincorporation of the city. The defendants had denied the petition and had refused to call an election on the grounds that it was barred by the then existing provisions of section 1702 of the Elections Code, which then read:

> "No petition for the dissolution or disincorporation of a city, or city and county, may be circulated until after the expiration of two years from the date that such city, or city and county, was incorporated."

The contention of the appellant is that the action of the council was controlled by the Government Code which contained no limitation as to the time for such an election.

The facts are that the City of Los Altos was duly incorporated as a city of the sixth class on December 1, 1952. The petition to disincorporate was filed on December 8, 1952. The city council rejected the petition on the ground that it had been filed contrary to the provisions of the Elections Code.

At the time of these proceedings, section 1702 of the Elections Code read as above quoted. At that time the Government Code contained no limitation on the date of filing of such petition. Subsequent to the election, and in 1953, the legislature eliminated the time limit from section 1702 and added a new section 34701.1 to the Government Code, reading: "34701.1. No petition for the dissolution or disincorporation of a city, or city and county, may be circulated until after the expiration of two years from the date that such city, or city and county, was incorporated." The legislative explanation of the 1953 Act, found in section 3, reads: "This act is intended merely to rearrange the statutory law relating to disincorporation proceedings and it shall not be construed to effect any substantive change in the law, but shall be construed merely as a rearrangement of existing statutory law."

The effect of this amendment was a legislative determination that there was no change in the substantive law which was that no petition for disincorporation could be filed less than two years after the date of incorporation.

[1, 2] The only question of law suggested by the appellant on this phase of the case is that the Government Code, being a general statute relating to municipal corporations, controls over the special provisions of the old Elections Code which relates specially to initiative petitions seeking an election for disincorporation, The law is to the contrary. The rule is stated in People ex rel. Board of State Harbor Com'rs v. Pacific Imp. Co., 130 Cal. 442, 446, 62 P. 739, 740, as follows: "It is also the rule that where two statutes treat of the same subject, one being special and the other general, unless they are irreconcilably inconsistent, the latter, although latest in date, will not be held to have repealed the former, but the special act will prevail in its application to the subject-matter as far as coming within its particular provisions."

This is specially true where, as here, there is no conflict between the two statutes on the particular subject matter contained in the special statute.

[3] The decision on this point is also controlled by the well settled rule of statutory construction that the statutes and the codes "blend into each other, and are to be regarded as constituting but a single statute." Proctor v. Justice's Court, 209 Cal. 39, 43, 285 P. 312, 313; In re Porterfield, 28 Cal.2d. 91, 100, 168 P.2d 706, 167 A.L.R. 675; Bohn v. Mayor & City Council of Fontana, 121, Cal.App.2d 637, 263 P.2d 836. The latter case is particularly applicable here as it involves the same subject matter of the time within which a disincorporation election may be called.

[4] Appellant argues that the old section 1702 of the Elections Code is unconstitutional as an abridgment of the right of the initiative granted the electors under section 1 of Article IV of the Constitution. The argument is unsound. The right of the initiative is granted the electors "under such procedure as may be provided by law." Art. IV, § 1, subtitle Initiative and Referendum Powers Also Reserved to Cities and Counties. In Mercury Herald Co. v. Moore, 22 Cal.2d. 269, 275, 138 P.2d 673, 676, 147 A.L.R. 1111, the Supreme Court said: "[T]he Legislature may validly limit the time within which an existing right may be exercised if the period remaining for its assertion is a reasonable one. [Citing cases.]"

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

Hearing denied; CARTER, J., dissenting.

125 Cal.App.2d 387

WALES v. GREENE et al.

MULLIGAN v. WALES et al.

Civ. 15751.

District Court of Appeal, First District,
Division 1, California.
May 21, 1954.

Suit to rescind contract to purchase on-sale liquor tavern business. The Superior Court, City and County of San Francisco, Herbert C. Kaufman, J., entered judgment from which the plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that where vendor of on-sale liquor tavern business had performed all of her obligations under sales agreement and escrow contract, and no part of consideration for vendee's obligation had failed through any fault of the vendor, and vendee was not in a position to restore everything of value which was delivered by vendor under contract, vendee was not entitled to rescind.

Judgment affirmed and motion to dismiss appeal denied.

1. Escrows 🔑5, 8(2)

Where escrow agreement relative to sale of on-sale liquor tavern business contained clause stating that if escrow was not in condition to close on certain date, any party who should have fully complied with his instructions could, in writing, demand return of his money or deposit, vendee and not vendor had duty to present to escrow holder evidence as to whether state board had granted new liquor license to vendee, and upon failure of vendee to produce such information, he was not entitled to rescind and procure return of his money.

2. Escrows 🔑8(2)

Where escrow agreement relative to sale of on-sale liquor tavern business, containing clause giving party who had fully complied with his instructions the right to demand return of his money or deposit if escrow was not in condition to close on certain day, contained further clause giving escrow holder the right, in event of demand for cancellation, to withhold and stop all further proceedings until receipt of mutual cancellation instructions, vendee had no absolute right to cancel the agreement, when escrow holder exercised its privilege and no mutual cancellation instructions were received.

3. Sales 🔑113, 124

Where vendor of on-sale liquor tavern business had performed all of her obligations under sales agreement and escrow contract, and no part of consideration for vendee's obligation had failed through any fault of the vendor, and vendee was not in a position to restore everything of value which was delivered by vendor under contract, vendee was not entitled to rescind. Civ.Code, §§ 1689, 1691, 3406.

4. Sales 🔑52(5,

In suit to rescind plaintiff's contract to purchase on-sale liquor tavern business from defendant, wherein an escrow holder and plaintiff's co-purchaser were named as defendants, and plaintiff contended that contract was illegal and that he was a Canadian citizen and not entitled to have a transfer of the license to his co-purchaser in trust for him, a fact known to defendant vendor, evidence warranted finding that the contract was for the benefit of plaintiff's co-purchaser who was not an alien, and that defendant vendor had no knowledge of citizenship of plaintiff. Gen.Laws, Act 3796, § 1 et seq.

5. Contracts 🔑139

A vendor who had not been a party to any scheme to circumvent the law in connection with agreement for sale of on-sale liquor tavern business, would not be denied any of the remedies normally accorded a non-defaulting vendor against vendee who seeks to avoid performance of his contract, even though there may have been such an attempt at circumvention by vendee and his co-purchaser. Gen.Laws, Act 3796, § 1 et seq.

6. Appeal and Error 🔑158(2), 781(7)

Where vendee of on-sale liquor tavern business sought to rescind contract to purchase, and to recover deposit in hands of escrow holder, and pursuant to judgment against vendee, which vendee had failed to stay, seller had received from escrow holders the money, note and chattel mortgage representing purchase price, there was not such a voluntary satisfaction of judgment which would preclude vendee from prosecuting his appeal, and appeal would not be dismissed as moot.

G. H. Van Harvey, San Francisco, for appellant John Wales.

Peart, Baraty & Hassard, Joseph S. Rogers, Robert D. Huber, San Francisco, for respondent Bay Counties Escrow Co.

Sullivan, Roche, Johnson & Farraher, San Francisco, for respondent Mae Mulligan.

FRED B. WOOD, Justice.

John Wales filed his complaint herein to rescind his contract to purchase a certain on-sale liquor tavern business. He joined as defendants the seller, Mae Mulligan, his co-purchaser, Elsie Greene, and the escrow holder, Bay Counties Escrow Company, a corporation. Each of the defendants answered the complaint, and Mulligan, in addition, cross-complained to enforce the contract. Judgment was rendered that plaintiff take nothing from any of the defendants; that Mulligan recover certain moneys and documents from plaintiff; and that the escrow holder deliver certain moneys and documents to Mulligan.

Plaintiff claims (1) that he terminated the transaction by giving timely notice of cancellation of the escrow, and (2) that the contract of purchase is illegal and not yet executed, hence a contract from which he may withdraw.

The Facts.

Defendant Mulligan was the sole owner and operator of the business under a license issued to her in her name. She had listed the business for sale with the Civic Investment Company of San Francisco.

April 24, 1951, Connett, a representative of the Civic Investment Co. arranged for the sale to plaintiff Wales, for $14,750, payable $9,000 in cash, the balance to be evidenced by a promissory note payable in installments of $300 or more per month, stock on hand to be paid for in cash. Wales paid $1,000 as earnest money.

April 25, 1951, escrow instructions to Bay Counties Escrow Company were filled out and signed by Wales, Nolte and Greene as vendee and Mulligan as vendor. These instructions, in addition to the terms already recited, called for a chattel mortgage securing the balance of the purchase price note, Mulligan to pay Civic Investment Company $1,475 as commission for its services, and that the escrow holder give notice of sale under the Bulk Sales Act and conduct the sale on May 7, 1951.

Wales deposited his check covering the $9,000 down payment and the vendee's share of the escrow fee. Wales, Nolte and Greene signed the note and chattel mortgage but on the same day Nolte withdrew with the consent of all, whereupon a new note and mortgage in the names of Wales and Greene as makers, but signed only by Wales, were placed in escrow. Mulligan signed a notice of intended sale, designating Wales, Nolte and Greene as purchasers, and, upon Nolte's withdrawal, she signed a new notice of intended sale, this time designating Greene as the sole purchaser.

April 30, 1951, Mulligan's lease to the premises was assigned by her to Wales with the consent of the landlord, a consent given without waiver of Mulligan's liability.

May 1st and 4th Wales paid Mulligan $2,276.07 for the stock of liquor on hand. This sale was made by Mulligan with knowledge that the liquor license was to be assigned to Greene. Mulligan delivered possession of the premises May 1st. Certain improvements were made. The business was conducted until about June 20, 1951, when it was closed.

Some time in June, 1951, the new on-sale license was issued to Elsie Greene by the State Board of Equalization. June 27, 1951, Wales mailed by registered mail notice of rescission and cancellation of the escrow instructions to Elsie Greene and to Bay Counties Escrow Company. The receipt from Bay Counties Escrow Company shows delivery to it on June 29th and the receipt from Elsie Greene shows delivery to her "6/31/51." Plaintiff neither mailed nor delivered such a notice to defendant Mulligan. He filed his complaint for rescission on July 11, 1951.

As to Cancellation of the Escrow.

[1] Wales predicates his right to rescission upon the fact that evidence that the state board had granted the new liquor license to the vendee had not been received by the escrow holder. All other conditions of the escrow had occurred or been complied with. Wales relies on the following clause of the instructions: "If this escrow is not in condition to close by May 7, 1951, any party who then shall have fully complied with his instructions may, in writing, demand the return of his money and/or instruments deposited in escrow, but if no demand has been so made, then you are instructed to close this escrow at the earliest possible time thereafter." But the instructions did not say whose duty it was to furnish such "evidence." If a duty was cast upon any one to so report to the escrow holder, a fair inference would be that the parties intended to cast it upon the vendee, not the vendor. Non-performance of his own obligation could not give Wales a right to rescind as against Mulligan, the non-defaulting vendor. Also, because of his own default, Wales was not a "party who then shall have fully complied with his instructions," hence, by their very terms, not entitled to cancel the instructions.

[2] Moreover, the escrow instructions did not of themselves give either party the unrestricted right to cancel in the event described. The clause above quoted was immediately followed by a provision which accorded the escrow holder the privilege of holding matters in abeyance until receipt of mutual cancellation instructions by all parties: "However, in the event of any demand to cancel this escrow by any party, your company shall have the privilege to withhold and stop all further proceedings in the performance of this escrow until receipt of mutual cancellation instructions by all parties shall have been deposited in this escrow, including those of the herein named broker(s), if any, whereupon you are then instructed to disburse the escrowed funds and instructions accordingly, less your cancellation charges." In the instant case the escrow holder exercised this privilege and no "mutual cancellation instructions" were received by it.

This leaves Wales' asserted right of cancellation to be determined by the general principles of law applicable to Wales' purported rescission of contract, unaffected by the special cancellation provisions of the escrow agreement.

[3] Tested by those principles, the facts do not disclose a right in Wales to rescind his contract with Mulligan. Mulligan had performed her every obligation under the contract. No part of the consideration for Wales' obligation has failed through any fault of Mulligan. Wales is not in a position to restore everything of value which was delivered by Mulligan under the contract.[1] So, he is unable to meet the requirements for rescission of contract. (See §§ 1689, 1691, and 3406, Civil Code.)

As to Illegality of Contract.

Wales claims that the contract is illegal, that he quit performance while the contract was still executory, and, therefore, is entitled to intercept and recapture from the escrow holder the $9,000 cash deposit and the $4,750 note and chattel mortgage before they reach the hands of Mulligan, the vendor. He further claims that in so doing he is not acting under or in reliance upon the asserted illegal contract.

[4] He presented this issue in his answer to Mulligan's cross-complaint, alleging that he is a citizen of the Dominion of Canada residing in the United States and was not informed until after entering into the agreement in suit that the Alcoholic Beverage Control Act prohibits the sale and transfer of an on-sale liquor license to one not a citizen of the United States; that upon being so informed it was agreed between him and Greene that the on-sale

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[1] The business was terminated about June 20, 1951, due, it would appear, to differences between Wales and Greene in which Mulligan was not at all involved. The license, by Wales' consent, was issued to Greene and has been sold by Greene to another person; hence wholly beyond the power of Wales to restore to Mulligan.

liquor license would be transferred to Greene to be held by her in trust for Wales; all of which Mulligan well knew but did nothing to prevent the transfer of the liquor license held by her and permitted it to be transferred to Greene in violation of law and of the provisions of the Alcoholic Beverage Control Act.

Wales failed to convince the trial court upon this issue. The court found that Wales, as vendee, entered into the contract with Mulligan, as vendor, "to purchase for Elsie Greene" the bar and tavern described, and "pursuant to said contract" deposited the money, the note and the mortgage in escrow. This finding clearly negatives the existence of any intent to evade the statute[2] which proscribes the issuance of a liquor license to an alien. Greene is not an alien and a contract for her benefit is not an illegal contract for the benefit of an alien.

The court also found that "Mae Mulligan, at the direction of John Wales, turned over to Elsie Greene the possession of said premises and business, together with the fixtures, equipment and good will thereof," also at his direction, Mulligan turned over to Greene the stock in trade used in the business; and at his direction Mulligan caused her on-sale general liquor license to be transferred to Elsie Greene; also that "Mae Mulligan had no knowledge of the citizenship of * * * John Wales until a time subsequent to the transfer of the possession and control" of the business, together with stock in trade, fixtures, equipment and good will.

These findings are supported by the evidence, some of which is summarized below. Wales met Greene while the latter was working as a waitress. They then started going out together socially two or three times a week. Wales told her he wanted to buy her a bar business because he felt sorry for her; she was working too hard as a waitress. Wales introduced Greene to Connett and told Connett he was considering getting a business for her. All of the proceeds of the bar were to be Greene's after the bills were paid. The bar was supposed to be a gift to her. Wales had no interest in the license, it was a gift to her. The only reason the license was put in her name was because it was a gift to her. The fact that Wales was not a citizen had nothing to do with it. The bar license was always supposed to be in her name. Upon his deposition, which was introduced in evidence, Wales testified it was not until after his dispute with Greene developed and he had locked the place up (after June 20, 1951) that he learned it was illegal for him to hold the liquor license.

Mulligan testified it was not until the middle of June, 1951, that she learned Wales was an alien. Mulligan's understanding was that Greene was to handle the business. She knew that the license was to be placed in the name of Greene. She signed a notice of intended sale of the business to Greene. Wales told her he would assume the lease but wanted Greene and Nolte on the liquor license; later, Wales informed her he wanted to take Nolte off the license, that Miss Greene was going to be on the license; he wanted Mulligan to put Greene's name on the license.

Under the circumstances there is no basis for a conclusion that illegality tainted the transaction whereby Mulligan sold her business to Wales for the benefit of Greene and in good faith completely performed every obligation upon her part to be performed. Her utter lack of fault was frankly recognized by Wales when, upon deposition, he gave the following answers to the following significant questions:

"Q. And, as a matter of fact, it is your position, is it not, Mr. Wales, that the failure of this deal to go through as contemplated arose directly and unquestionably out of your dispute with Miss Elsie Greene; isn't that right? A. That is correct.

"Q. And Mrs. Mae Mulligan had nothing whatsoever to do with that dispute, did she? A. No.

"Q. That was a dispute that existed solely and entirely between yourself and Elsie Greene, wasn't it? A. Yes, sir.

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[2] Section 12 of Alcoholic Beverage Control Act, Deering Act. No. 3796, now section 23788 of the Bus. & Prof. Code.

"Q. So that to sum the whole thing up, Mr. Wales, isn't this exactly true, now, Mrs. Mae Mulligan did everything that she could possibly do to perform her side of the agreement? A. Yes, sir."

[5] Even if he harbored an intent to evade the statute, she was no party to any scheme to circumvent the law. Without knowledge of any such scheme or of any basis for it, she has done nothing which requires the courts, in furtherance of the public interest, to deny her any of the remedies normally accorded a non-defaulting vendor against a vendee who seeks to avoid performance of his contract. See California Raisin Growers' Ass'n v. Abbott, 160 Cal. 601, 607–609, 117 P. 767; Moore v. Russell, 114 Cal.App. 634, 639–640, 300 P. 479; Gallick v. Castiglione, 2 Cal.App.2d 716, 38 P.2d 858; People v. Brophy, 49 Cal.App.2d 15, 30–31, 120 P.2d 946; 166 A.L.R. 1353–1412. Accordingly, we do not have occasion to determine whether Wales' defense of illegality, if it had been proved as pleaded, would have required a reversal of the judgment.

Wales contends that the question whether he bought the business for the benefit of Greene was not an issue in the case. He is mistaken. He relies upon the fact that Mulligan in her cross-complaint alleged an agreement to sell the business (together with the stock in trade, fixtures and good will), to Wales, Greene and Nolte, an allegation which in his answer he admitted. At the trial, the parties ignored this admission and submitted proof that Nolte withdrew, leaving Wales and Greene to consummate the transaction, and that Wales only, not Greene, signed the note and chattel mortgage for the balance of the purchase price. Also, in his answer he alleged that the sale included the on-sale liquor license, presenting an issue concerning the identity of the transferee contemplated by the parties. Moreover, the defense of illegality which the same answer set up included by necessary implication the very issue which Wales erroneously questions. Finally, Greene and Mulligan's respective answers to the complaint were sufficiently sweeping in their denials to include this issue.

The conclusion is inescapable that the judgment should be affirmed.

The Motion to Dismiss the Appeal.

[6] There remains for consideration defendant Mulligan's motion to dismiss the appeal upon the ground that the issues are moot, the escrow holders having delivered the money, the note and the chattel mortgage to the seller pursuant to the judgment. Appellant had failed to stay the judgment pending his appeal. That does not amount to voluntary satisfaction of judgment which would preclude the party aggrieved from prosecuting his appeal. Moreover, there are factors involved which call for consideration of the merits of the case in determining the issues presented by the motion. Accordingly, the motion should be denied.

The judgment is affirmed and the motion to dismiss the appeal is denied.

PETERS, P. J., and BRAY, J., concur.

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125 Cal.App.2d 417

JAMES v. JAMES.

Civ. 19907.

District Court of Appeal, Second District, Division 3, California.

May 21, 1954.

Defendant was awarded an interlocutory decree of divorce from the plaintiff upon his cross complaint and from portions of the judgment dividing the property of the parties in the Superior Court, Los Angeles County, William R. McKay, J., the defendant appeals. The Court of Appeal, Shinn, P. J., held that where community character of the property was admitted by the parties, contention on appeal with reference thereto was without merit, that in the future the court would dismiss appeals which were clearly without merit and would regard with disfavor the failure of respondent to assist the court by means of an answering brief.

Judgment affirmed.

1. Divorce ⚷249(3)

In divorce action where community character of the property to be divided was admitted by the pleadings, contention that the court was without authority to order it sold and the proceeds divided was without merit.

2. Appeal and Error ⚷786

The policy of the Court of Appeal in the future will be to dismiss appeals which are clearly without merit and which appear to have been taken merely for the purpose of delay.

3. Appeal and Error ⚷755

The Court of Appeal will regard with disfavor the failure of a respondent to assist the court by means of an answering brief.

* * *

A. Brigham Rose, Los Angeles, for appellant.

Thomas G. Neusom, Los Angeles, for respondent.

SHINN, Presiding Justice.

Appellant Isaac Fisher James was awarded an interlocutory decree of divorce from Charlene Bernette James upon his cross-complaint, charging cruelty. Findings were waived. The appeal is from portions of the judgment which awarded household furniture to cross-defendant and ordered the real property which was the home of the parties sold and the proceeds equally divided. There is no appeal from the award of an automobile to appellant or from the direction that he pay $50 per month for the support of the parties' child. Respondent has not filed a brief.

Upon the appeal it is contended that the household furniture was not entirely paid for and that it was error to award it to cross-defendant without attaching the condition that she must complete the payments. It appears to be assumed that appellant purchased the furniture on conditional sales contract and that he may be compelled to pay for it. The court stated that Mrs. James would have to make the payments but the decree contains nothing to that effect. If appellant is compelled to pay the unpaid balance and respondent gets the furniture appellant may have a just complaint, but it is not one to be considered on the present appeal. The record does not show that appellant is bound by contract to buy the furniture.

[1] It is contended further that the real property stood in joint tenancy, was not shown to be community property, and that the court was without authority to order it sold and the proceeds divided. In presenting this point appellant quotes a paragraph of his answer which contains an equivocal and insufficient denial of the allegation of the complaint that an automobile, the furniture and the real property were community property. He fails to call our attention to the allegation of his cross-complaint that "there is a community interest" in the automobile, the furniture and the real property which "will be determined at the time of trial." We shall be charitable and assume that the omission was due to carelessness. Although findings were waived the decree contains a finding that the real property was community property. Appellant has not directed attention to any evidence that it stood in joint tenancy and we find no such evidence. The community character of the property was admitted by the pleadings.

Upon this appeal little respect has been shown for the time of the court. Appellant's points have no merit whatever and respondent has not gone to the trouble of filing a brief.

[2, 3] There are too many civil appeals taken upon flimsy and unsupportable grounds. They delay the decision of appeals that require our serious consideration. It will be the policy of this court in the future to dismiss appeals which are clearly without merit and which appear to

have been taken merely for the purpose of delay. Also we shall regard with disfavor the failure of a respondent in any case to assist the court by means of an answering brief.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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125 Cal.App.2d 383

PEOPLE v. RAMOS.

Cr. 5129.

District Court of Appeal, Second District, Division 3, California.

May 20, 1954.

Defendant was convicted of the infamous crime against nature. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment, and defendant appealed. The District Court of Appeal, Valée, J., held that evidence sustained conviction.

Affirmed.

1. Sodomy 🔑1

Any penetration, however slight, is sufficient to complete the infamous crime against nature. Pen.Code, §§ 286, 287.

2. Sodomy 🔑6

Evidence sustained conviction for the infamous crime against nature. Pen.Code, § 286.

◆

Sisto Ramos, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of having committed the infamous crime against nature. Pen.Code, § 286. He appeals from the judgment. Defendant did not testify or offer any evidence in his behalf.

[1, 2] The only point made is that there was no evidence of penetration. Any penetration, however slight is, sufficient to complete the crime. Pen.Code, § 287. Recitation of the nauseating details would serve no purpose. Suffice it to say that a police officer who witnessed the act testified to facts from which the trial judge could reasonably conclude that there had been penetration.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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125 Cal.App.2d 205

CUMBERPATCH et al. v. NOLAN et al.

No. 15909.

District Court of Appeal, First District, Division 1, California.

May 17, 1954.

Rehearing Denied June 16, 1954.

See 271 P.2d 519.

Action by purchasers for breach of agreement to convey real property wherein default was taken and judgment entered against one vendor. The Superior Court, Marin County, Thomas A. Keating, J., signed an order setting aside default judgment and permitted vendors to answer. On subsequent trial Norman A. Gregg, J., ordered judgment against vendors husband and wife for interest only. Purchasers appealed. The District Court of Appeal, Bray, J., held that where default judgment was set aside without setting aside default, purchasers were entitled to immediate entry of another default judgment and vendor was not entitled to file answer to complaint.

Judgment against vendor and order setting aside default judgment reversed; judgment against vendor's wife affirmed.

1. Vendor and Purchaser 🔑349

Bad faith of defaulting vendor in contract to convey real property need not be specially alleged to make out cause of action for difference between price agreed to be paid and value of property at time of breach.

2. Judgment 🔑175

Where order was entered setting aside default judgment without setting aside default, defendant was not entitled to file answer to complaint and plaintiff was entitled to immediate entry of another default judgment.

3. Appeal and Error 🔑879

Where wife of vendor did not sign agreement to convey real property and there was no evidence in action for breach of agreement upon which to find her liable to purchasers, but she did not appeal from judgment against her, judgment against her would stand.

4. Appeal and Error 🔑1068(4)

Where there was no evidence to support judgment, it was immaterial whether court used correct measure of damages in determining amount of judgment.

5. Costs 🔑18

Where action was commenced as equitable action, but proceeded to trial solely as action for damages, and judgment was below jurisdictional minimum of the Superior Court, judgment did not carry trial costs.

Lorne M. Stanley, San Francisco, for plaintiffs.

Leonard A. Thomas, San Rafael, for respondents.

BRAY, Justice.

Plaintiffs appeal from judgment in their favor in the sum of $63.62.

Questions Presented.

1. Effect of order setting aside default judgment against defendant Ray E. Nolan without setting aside his default.
2. Effect of the judgment against Emily M. Nolan.

Record.

[1] Defendant Ray was served with summons November 16, 1951. On November 28th he obtained an order extending to December 10th his time to appear. December 27th his default was taken and judgment entered against him for, among other matters, damages in the sum of $1,500. January 4, 1952, he filed notice of motion stating he would move "to vacate and set aside the *default judgment* * * *." (Emphasis added.) Likewise he filed a motion in which he moved the court "to vacate and set aside *the default judgment* * *." (Emphasis added.) January 15th "Order Setting Aside and Vacating *Default Judgment*" (emphasis added) was entered, in which order the default judgment only was vacated. Defendant Ray's answer accompanying the application was ordered filed. (Defendant Emily was included in this answer.) The complaint was one for declaratory relief, involving a written agreement in which plaintiffs purchased and defendant Ray sold a certain parcel of real property for $5,250. It alleged the payment by plaintiffs into escrow of that sum and the refusal of defendants to deliver deed to plaintiffs except subject to certain restrictions which were not mentioned in the purchase agreement and which defendants had placed of record subsequently thereto. Plaintiffs asked that the rights of the parties be determined, particularly that defendants be required to convey free of restrictions, and that plaintiffs be awarded damages of $800 expended for architect's fees and $7,500 general damages. Defendants' answer admitted the refusal to deliver the deed without restrictions and alleged an oral understanding between the parties prior to the execution of the contract to the effect that plaintiffs agreed to such restrictions. Plaintiffs gave notice that at the trial they would move to strike as sham and irrelevant the affirmative matters in the answer. The complaint did not in so many words charge bad faith upon the part of defendants. However, "bad faith in a defaulting vendor, in a contract to convey real property, need not be specially alleged in order to make out a cause of action un-

der the last provision of section 3306 of the Civil Code." Johnson v. Schimpf, 197 Cal. 43, 47, 239 P. 401, 402.

Prior to trial the purchase price which plaintiffs had deposited in escrow was returned to them. At the beginning of the trial, after some discussion, plaintiffs abandoned their request for declaratory relief and proceeded solely on their prayer for damages. Defendants claim that in such discussion the issue of defendants' bad faith was waived. In view of the outcome of this appeal as hereinafter set forth, it becomes unnecessary to consider this claim. The only damages which the court awarded plaintiffs were interest on the purchase price while held in escrow.

1. Order Vacating Default Judgment.

[2] Plaintiffs attack that order on many grounds. One of them is decisive, namely, that defendant Ray's default has never been set aside. Therefore it is unnecessary to consider the others, for the reason that "* * * even if there were a sound basis for reversing the order, such a reversal would serve no useful purpose. Neither the motion to set aside the default judgment nor this appeal from the denial of that motion is an attack upon the entry of the default. Even if the judgment were now vacated, such action would be abortive. The entry of default, from which appellant does not seek relief by this appeal, stands of record against him and entitles the city to a judgment upon its complaint." City of Pacific Grove v. Hamilton, 100 Cal.App.2d 508, 511, 224 P.2d 19, 21. "'* * * If the judgment were vacated, it would be the duty of the court immediately to render another judgment of like effect, and the defendants, still being in default, could not be heard in opposition thereto. * *'" Howard Greer Custom Originals v. Capritti, 35 Cal.2d 886, 889, 221 P.2d 937, 938. Thus, the judgment in favor of plaintiffs and against defendant Ray and the order setting aside the default judgment against him will have to be reversed.

This leaves to be considered only the judgment in favor of plaintiffs against Emily.

2. Emily Nolan Judgment.

[3, 4] Emily did not sign the purchase and sale agreement. The complaint states that she claimed an interest in the property, and nowhere sets forth any basis for her liability to plaintiffs in damages. The title to the property stood in both defendants' names but there is no evidence upon which to find her liable to plaintiffs. The court awarded judgment against her for $63.62. She did not appeal. Plaintiffs on their appeal contend that the court used the wrong measure of damages and ask that the case be sent back so that they might obtain more damages against her. But inasmuch as we find no evidence of any liability on her part, it is immaterial whether the court did or did not use the correct rule of measure of damages. Therefore, the judgment against her must stand.

[5] The judgment against her does not carry trial costs, as the judgment is below the jurisdictional minimum of the superior court. While the action was commenced as an equitable action, it proceeded to trial solely as an action for damages. See Himes v. Johnson, 61 Cal. 259, 262: "It is true that the plaintiff prayed an injunction, but that was denied, and the action thereafter should have been treated as one for damages only. It is quite clear that a judgment for fifty dollars damages in such an action would not carry costs." See also Brown v. Delavau, 63 Cal. 303, and McCarthy v. Gaston Ridge Mill, etc., Co., 144 Cal. 542, 78 P. 7.

The judgment appealed from against defendant Ray E. Nolan and the order setting aside the default judgment are reversed. The judgment against defendant Emily M. Nolan is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

125 Cal.App.2d 182

SCHOENER v. WALTMAN.

Civ. 15849.

District Court of Appeal, First District,
Division 2, California.

May 14, 1954.

Rehearing Denied June 11, 1954.

Suit for equitable relief, in nature of foreclosure of judgment liens upon real property, and to set aside declaration of homestead. The Superior Court, County of Contra Costa, Wakefield, Taylor, J., entered summary judgment for plaintiff, and defendant appealed. The District Court of Appeal, Nourse, P. J., held that the undisputed facts, showing that the declaration of homestead purportedly joined in by wife was made after defendant and his wife had obtained a divorce and wife had remarried, met by equivocal denial of falsity of statements in declaration, warranted summary judgment setting aside the declaration of homestead and foreclosing the liens.

Judgment affirmed.

1. Judgment ⚿185

The undisputed facts in suit for equitable relief in nature of foreclosure of two judgment liens upon real property, and to set aside a declaration of homestead thereon upon grounds of false and fraudulent statements in declaration, showing that defendant resided at other premises during homestead period, that declaration of homestead purportedly joined in by wife was made after defendant and his wife had obtained a divorce and wife had remarried, met by equivocal denial of falsity of statements in declaration, warranted summary judgment setting aside the declaration of homestead and foreclosing liens.

2. Judgment ⚿180

Under provision of Code of Civil Procedure authorizing summary judgment in an action to recover an unliquidated debt for money only or to enforce or foreclose a lien, summary judgment could properly be entered in suit to foreclose two judgment liens upon real property, and to set aside a declaration of homestead, since the setting aside of the fraudulent homestead on the property was but an incident of the equitable relief permitted. Code Civ.Proc. § 437c.

◆

Clayton Francis Waltman, in pro. per.
William L. Schoener, in pro. per.

NOURSE, Presiding Justice.

[1] Plaintiff sued for equitable relief—to foreclose two judgment liens upon described real property, and to set aside a declaration of homestead thereon upon grounds of false and fraudulent statements in the declaration. The defendant filed a general denial. Thereupon the plaintiff moved for a summary judgment upon affidavit avering that the declaration of homestead was fraudulent. The undisputed facts supporting the motion are that defendant resided at other premises under lease from one Geringer from April 15, 1948 to May 8, 1950; that these facts appeared in the verified complaint of the defendant herein in another action against the owner of the other premises; that the declaration of homestead was false in two particulars—the statement that this defendant and his wife resided on the premises, and that his wife joined in the declaration; that this declaration was purportedly made by husband and wife on April 27, 1950, whereas the wife was divorced from the defendant herein on April 18th of the same year in the State of Nevada, and remarried to one Swallow on the same day. Appellant's denials of all these pertinent facts are so equivocal that we might well assume that they are not made in good faith. However, the Nevada divorce and the remarriage are admitted, and the question of the residence of the defendant and his wife on the homesteaded premises is met by his verified complaint in the other action that they were *not* living there and his belated affidavit in this proceeding that they *were*, notwithstanding the admitted fact that they were then divorced and the wife had taken another husband in the State of Nevada. These are the facts upon which the motion for a summary judgment was based.

[2] Appellant first contends that this is not a case for a summary judgment under section 437c, Code of Civil Procedure. But the section provides for a summary judgment in an action to recover an unliquidated debt for money only or "to enforce or foreclose a lien". A suit to set aside a fraudulent homestead on the lienated property is but an incident of the equitable relief permitted in the code section. See Haupt v. Charlie's Kosher Market, 17 Cal.2d 843, 112 P.2d 627.

The second point rests on the contention that the trial court should have assumed that defendant and his former wife were actually living on the premises *as husband and wife* ten days after they had been divorced and the wife was then the spouse of another. The facts upon which this amazing contention is based are "such stuff as dreams are made on" and too unrealistic to constitute a controversy between fact and fiction.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

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125 Cal.App.2d 394

KILLAM et al. v. RILEY et al.

No. 15897.

District Court of Appeal, First District, Division 1, California.

May 21, 1954.

Action on contract against corporation, wherein corporation moved for change of venue. The Superior Court, Alameda County, A. J. Woolsey, J., entered order transferring cause to county of corporation's principal place of business. Plaintiffs appealed. The District Court of Appeal, Fred B. Wood, J., held that where allegations of complaint, admitted in evidence in hearing on venue question, that contract was made and indebtedness arose in county in which action was brought, and such allegations were uncontradicted, corporation was not entitled to change of venue.

Order reversed.

1. Trial 🔑105(2)

Where complaint went into evidence without objection in hearing for change of venue, statements therein, verified or unverified, in form of statements of fact or expressions of opinion, and whether within knowledge of pleader or hearsay as to him, were competent evidence.

2. Corporations 🔑503(3)

In contract action, wherein corporate defendant moved for change of venue and complaint was admitted in evidence in hearing on venue question, allegations of complaint that contract was made in Alameda county and indebtedness arose in Alameda county were competent evidence of such facts which was uncontradicted, and corporation was not entitled to change of venue to county of principal place of business. Const. art. 12, § 16.

3. Corporations 🔑503(3)

Where corporate defendant moved for change of venue, it had burden of showing that action was not brought in county authorized by constitutional provision. Const. art. 12, § 16.

Smith & Parrish, John W. Holmdahl, Oakland, for appellants.

Elliot W. Seymour, San Francisco, B. R. Ware, Los Angeles, for respondents.

FRED B. WOOD, Justice.

Upon this appeal by plaintiff from an order transferring the cause from Alameda to Los Angeles County at the instance of defendant C. B. S. Steel & Forge, a corporation, the question is whether or not the evidence supports the implied finding that Alameda County is not a county in which the defendant corporation may be sued upon the causes of action stated in the complaint.

"A corporation * * * may be sued in the county where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs; or in the county where the principal place of business of such corporation is situated * * *." Const. art. XII, § 16.

It appears from the defendant corporation's affidavit that Los Angeles is the county "where the principal place of business of such corporation is situated" and that the only other defendant (Fred Riley, an individual) resides in Los Angeles County. Hence, Los Angeles is a proper county in which to sue the corporate defendant. But that does not prevent Alameda from being a proper county; e.g., as the county "where the contract is made or is to be performed, or where the obligation or liability arises, or the breach occurs." On this issue the defendant has produced no evidence. Its supporting affidavit is totally silent in that regard. So, we turn to the complaint which also was in evidence at the hearing of the motion.

The complaint is in two counts: One, for anticipatory breach of an express oral contract; two, a common count for the value of services rendered, clearly referring to the same transaction as does the first count.

In Count One we find the statement that the parties "entered into" the contract "in the City of Alameda, County of Alameda." That proves that Alameda is the county "where the contract is [was] made," hence a county in which the plaintiffs have the right to sue the defendant corporation upon the cause of action stated in the first count. Defendant does not question this conclusion.

In Count Two we find the statement that "in the City of Alameda, County of Alameda, State of California, defendants became indebted" to plaintiffs for services rendered, proof that Alameda is the county "where the obligation or liability arises [arose]" and as such a proper county for suit upon the second count.

Defendant questions this line of reasoning. It says the expression "became indebted" is but a conclusion and without evidentiary value, especially in an unverified complaint such as here involved; that this leaves uncontradicted that portion of the first count of the complaint which states that the plaintiffs' services were "in operations to raise and salvage a certain barge sunken off Point Orient, California"; the court takes judicial notice of the fact that Point Orient is in Contra Costa County; the place of performance determines the place of "becoming indebted"; hence, there is no showing that Alameda is a proper county under section 16 of article XII of the Constitution. There are several fallacies in this line of reasoning.

[1] Defendant concedes that the complaint went into evidence without objection. That makes competent as evidence the statements which it contains, whether verified or unverified, whether in the form of statements of fact or expressions of opinion, and whether within the knowledge of the pleader or hearsay as to him. Pacific Bal Industries v. Northern Timber, 118 Cal.App.2d 815, 822–823, 827, 259 P.2d 465.[1] Hence the statement that the defendants became indebted in Alameda County is evidence that the obligation arose in that county.

Inferentially, it may well be tantamount to saying that the services were performed in Alameda County upon the theory that in such a case the indebtedness is deemed incurred at the place where the services are rendered. Even if that be so there is still no conflict with the evidence as to the place of performance furnished by the First Count.

Count Two states that the services in suit "consisted of preparing and keeping available to defendants for salvaging operations plaintiffs' vessel the 'Ann L.'; of keeping available for defendants' use the personal services of plaintiffs; and of the operation of said vessel for said purpose of salvaging operations on August 14, 1952." Count One describes these services with greater particularity, stating that the substance of the contract was that "plaintiffs should and would prepare, make available and hold in readiness for defendants' use, plaintiffs' said vessel; that plaintiffs should and would keep their services available for the operation of said vessel; that plaintiffs should and would operate said vessel in operations to raise and salvage a certain barge sunken off Point Orient, California; that plaintiffs should and would purchase the food and fuel necessary in said operations; and further that plaintiffs should and would prepare said food for said operations when said vessel was to be in actual use therein; that in all of the aforementioned activities, plaintiffs should and would submit to said defendants control, direction and supervision." The only *place* here mentioned is Point Orient, judicially cognizable as a place in Contra Costa County, not Alameda County. The reasonable inference, of course, is that the actual work of salvaging the barge was to have been performed in Contra Costa County. There is no necessary inference that any of the preparatory work was to be performed at Point Orient, or at any other place in Contra Costa County,—such as the work of preparing plaintiffs' vessel and holding it in readiness for defendants' use, the purchase of necessary food and fuel, and other preparatory work and standby services. Those services conceivably could have been performed in Alameda County. Significantly, too, it appears from Count One that the actual work of salvaging the barge was not performed by the plaintiffs. The plaintiffs tendered but defendants refused performance. Defendants "are now conducting the salvage operations contemplated in said contract but notwithstanding the terms thereof and said defendants' reaffirmations thereof, said defendants have used and are now using the vessel or vessels and services of one or more persons other than plaintiffs." Thus, for ought that appears in Count One, nearly all, perhaps all, of the services upon which Count Two is based may have been rendered in Alameda County. In short, it appears from the second count that the defendants became indebted in Alameda County, a statement not contradicted by any other evidence in the case.

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[1] Hammond v. Ocean Shore Dev. Co., 22 Cal.App. 167, 133 p. 978, cited by defendant, is not in point. The expression there involved was an allegation in a common count that "defendant *was indebted* in Mono county," which "manifestly is quite different from an allegation that *defendant became indebted*", 22 Cal.App. at page 173, 133 P. at page 981, and was in conflict with certain statements of fact in that count of the complaint which specifically alleged the facts of the transaction.

[2, 3] We are mindful of the principle that it is the function of the trial court, not that of the reviewing court, to resolve conflicts in the evidence, but here *the evidence shows without conflict* that the express contract pleaded in the first count was "made" in Alameda County and that the indebtedness pleaded in the second count "arose" in Alameda County. Also, when, as here, a corporate defendant moves for a change of venue, it bears the burden of showing that the action has not been brought in a county authorized by section 16 of article XII of the Constitution. Chase v. Southern Pac. Coast R. Co., 83 Cal. 468, 23 P. 532; Rowe v. Policy Holders' Life Ins. Ass'n, 131 Cal.App. 339, 21 P.2d 443; Konig v. Associated Almond Growers, 37 Cal.App.2d 360, 363–365, 99 P.2d 678; Swartz v. California Olive Growers' etc. Corp., 56 Cal.App.2d 168, 133 P.2d 20; G. W. McNear, Inc. v. Geo-Physical Service, 90 Cal.App.2d 662, 203 P.2d 550; Pacific Bal Industries v. Northern Timber, 118 Cal.App.2d 815, 826, 259 P.2d 465; 25 Cal.Jur. 909–910, Venue, § 42. Here the corporate defendant has shown merely that the action was not brought in the county of its principal place of business and has failed to controvert in any way the evidence, furnished by the complaint, that the action was brought in a proper county.

In view of this conclusion it is unnecessary to consider other points urged by the plaintiffs.

The order appealed from is reversed.

PETERS, P. J., and BRAY, J., concur.

125 Cal.App.2d 334

CHOSICK et al. v. REILLY et al.

Civ. 16019.

District Court of Appeal, First District,
Division 2, California.
May 19, 1954.

Proceeding for writ of mandate to review order of State Board of Equalization revoking petitioner's on-sale general liquor license because of violation of statute prohibiting the employing of girls upon licensed premises for purposes of procuring or encouraging purchase or sale of alcoholic beverages. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., entered judgment denying the writ and petitioner appealed. The District Court of Appeal, Nourse, P. J., held, inter alia, that alleged fact that Board of Equalization considered deterrent effect revocation might have upon other licensees did not invalidate the revocation.

Affirmed.

1. Administrative Law and Procedure 🔑475

Statute relating to method of making administrative decision in contested cases heard before administrative agency was not applicable where case was originally heard by hearing officer alone and no additional evidence was heard by board, and it was not necessary that hearing officer who prepared proposed decision be present during consideration by board of record and transcript made before hearing officer. Government Code, §§ 11517(a, c), 11512(b).

2. Administrative Law and Procedure 🔑475
Intoxicating Liquors 🔑108(9)

Fact that certain member of Board of Equalization was not present at last meeting of Board during which record, made before hearing officer, was read, was not proof that he was not familiar with the record.

3. Evidence 🔑89

Evidence that member of Board of Equalization was not present at last meeting of Board did not overcome presumption that such member had performed his official duty of familiarizing himself with the record. Government Code, § 11517(c); Code Civ.Proc. § 1963, subd. 15.

4. Administrative Law and Procedure 🔑749
Evidence 🔑83(1)

The presumption that official duty has been regularly performed is applicable to consideration of evidence by administrative board. Government Code, § 11517(c); Code Civ.Proc. § 1963, subd. 15.

5. Constitutional Law 🔑318

Fact that administrative agency is both accuser and judge does not deprive accused of due process of law.

6. Intoxicating Liquors 🔑108(9)

Fact that staff connected with prosecution of case before Board of Equalization for revocation of on-sale general liquor license also gave recommendation and assistance to the Board did not invalidate the Board's decision to revoke the license. Government Code, § 11517(a, c); Code Civ.Proc. § 1963, subd. 15.

7. Administrative Law and Procedure 🔑791, 793
Intoxicating Liquors 🔑108(10)

A reviewing court will sustain decision of Board of Equalization concerning revocation of liquor license for cause in absence of error of law, if evidence before Board, though conflicting, contains substantial evidence supporting Board's findings, and court will not reweigh such evidence. Government Code, § 11517(a, c); Code Civ. Proc. § 1963, subd. 15.

8. Intoxicating Liquors 🔑108(5)

Evidence in prosecution for revocation of on-sale general liquor license supported determination of Board of Equalization that licensee, in violation of Penal Code, employed girls on licensed premises for purpose of procuring or encouraging purchase or sale of alcoholic beverages. Pen.Code, § 303; Government Code, § 11517(c).

9. Intoxicating Liquors 🔑106(4)

Violation of statute prohibiting liquor licensees from employing girls upon licensed premises for purpose of procuring or encouraging purchase or sale of alcoholic beverages constitutes "good cause" for holding by Board of Equalization that continuance of license would be contrary to public welfare and morals. Pen.Code, § 303; Government Code, § 11517.

10. Intoxicating Liquors ⚷106(1)

Alleged fact that Board of Equalization, in revoking on-sale general liquor license because of violation of statute prohibiting employment of girls on licensed premises for purpose of procuring or encouraging purchase or sale of alcoholic beverages, considered deterrent effect revocation might have upon other licensees did not invalidate revocation. Pen.Code, § 303; Government Code, § 11517.

Mervyn Schneider, Anthony E. O'Brien, San Francisco, for appellants.

Edmund G. Brown, Atty. Gen., of Cal., William M. Bennett, Deputy Atty. Gen., for respondents.

NOURSE, Presiding Justice.

This is an appeal from a judgment denying a writ of mandate in proceedings under section 1094.5 Code of Civil Procedure to review an order of the State Board of Equalization revoking appellants' on-sale general liquor license.

The controversy herein relates to the third count only of the amended accusation inaugurating the administrative proceedings, which count in substance charged violation of section 303 Penal Code by employing "B girls" upon appellants' licensed premises for the purpose of procuring or encouraging purchase or sale of alcoholic beverages and by paying those girls commissions on the sales they procured. After an oral hearing the hearing officer filed his proposed decision in which he found true the employment of named "B girls" but not true the payment of a commission to them; it was, however, found that the licensees kept a record on the cash register tape of the sales procured by each girl. The proposed penalty for the violation of section 303 Penal Code was indefinite suspension of license. The board considered the proposed decision at its meeting of April 2, 1953, and informed the licensees that the board itself would decide the case under section 11517 (c), Government Code and give consideration to a greater penalty than the one proposed. At the meeting of the board of May 28, 1953, in which this matter was decided the licensees were represented by counsel who presented argument. The board adopted the proposed decision except that the penalty was increased to revocation of license. After proceedings based on the transcript and record before the board only, the superior court found, among other things, that the findings of the board are supported by adequate and substantial evidence and that the proceedings before the board were conducted in the manner required by law and within its jurisdiction without abuse of discretion or error of law and were neither arbitrary nor capricious.

[1] Appellants' first grievance is that the court erred in not holding that the board abused its discretion by not proceeding in the manner required by section 11517 (a) of the Government Code. The contention is without merit. Section 11517(a) is not applicable to the proceedings in this case. That section reads: "If a contested case is heard before an agency itself the hearing officer who presided at the hearing shall be present during the consideration of the case and if requested, shall assist and advise the agency. Where a contested case is heard before an agency itself, no member thereof who did not hear the evidence shall vote on the decision." As is shown by its text it applies to cases in which the agency itself with the hearing officer presiding, § 11512(b), hears the case including the evidence. Here the case was originally heard by a hearing officer alone and the proceedings before the board were under section 11517(c) without taking of additional evidence or further reference to a hearing officer. The agency itself may then decide the case upon the record including the transcript after having afforded the parties opportunity to present argument. Under this proceeding of section 11517(c) there is no requirement, as advocated by appellants, that the hearing officer who prepared the proposed decision must be present during the consideration by the agency of the record and the transcript made before him.

[2-4] It is further claimed that the board violated section 11517 Government Code by permitting the board member Reilly to vote on the decision, although he was not familiar with the record. It has been said that before an agency may deviate from the proposed decision under section 11517(c) it must read the record. Hohreiter v. Garrison, 81 Cal.App.2d 384, 396, 184 P.2d 323. The rule can be based both on due process and on the statutory provision that the agency may decide the case "upon the record, including the transcript." It may be seriously doubted whether to fulfill this requirement each member taking part in such a decision of the agency must personally have read the record including the transcript and whether it is not sufficient that in any other manner the members obtain an adequate knowledge of its contents. In this case the attorney for the board at the meeting of May 28th gave an extensive oral statement of the case including the evidence, after which counsel for the licensees argued that, "Assuming the attorney for the board has stated a true and correct statement of the facts" still the charge was not proved. However, we need not decide the question mentioned because there is no evidence showing that the board member Reilly did not personally familiarize himself with the record. The only evidence on which appellants base their contention that he did not do so is that after the argument by the attorneys of the board and the licensees he said: "I would like to hear from the State Liquor Administrator on his viewpoint for my guidance. I wasn't present at the last meeting of the board." The fact that he had not been at the prior meeting of the board is no proof that he was not familiar with the record. He may well have wished only some comment on the penalty, as is indicated by the fact that next he asked for the recommendation also of Mr. Treadwell, the acting Chief of the San Francisco office. Such evidence does not overcome as a matter of law the presumption that official duty has been regularly performed, Code Civ.Proc. § 1963(15), a presumption also applicable to consideration of the evidence by an administrative board. Cooper v. State Board of Public Health, 102 Cal.App.2d 926, 931, 229 P.2d 27.

[5, 6] Appellants complain under this point also of the board's asking staff assistants connected with the prosecution of the case for recommendation and assistance. Although some division between the prosecuting and adjudicating functions and personnel of administrative boards may well be desirable, no definite rules in this respect, except as to the use of hearing officers, are contained in the provisions of the Government Code relating to administrative adjudication or imposed by any decisions in this state cited by appellants or known to us. English v. City of Long Beach, 35 Cal.2d 155, 217 P.2d 22, 18 A.L.R. 2d 547, the only California authority cited by appellants in this respect, condemns the use against a party of evidence of which he is not apprised, a matter not involved in this case in which all action complained of took place in the presence of the attorneys of the licensees who did not in any way object. In general, the fact that an administrative agency is both accuser and judge is not considered to deprive the accused of due process of law. Hohreiter v. Garrison, supra, 81 Cal.App.2d at page 392, 184 P.2d 323. We see no good reason why, this being so, the same trained personnel cannot legally advise and assist the agency in both functions if such assistance does not violate any statutory provisions and if the agency itself makes the actual decision.

[7, 8] Appellants' next contention, that the evidence before the board was insufficient to sustain the finding of violation of section 303, Penal Code, is also without merit. As the State Board of Equalization has specifically been given quasi judicial or adjudicating power by section 22 of article XX of the California Constitution as to revocation in its discretion of liquor licenses for good cause, a reviewing court will sustain the board's decision in such respect in the absence of error of law, if the evidence before the board, though conflicting, contains substantial evidence supporting its findings and it will not reweigh said evi-

dence. Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545. In this case, the inference that the licensees employed girls on the licensed premises for the purpose of procuring or encouraging purchase or sale of alcoholic beverage can reasonably be drawn from the following testimony of two liquor control officers:

When on two occasions they visited the premises incognito the girls who acted there as cocktail waitresses asked them repeatedly to buy drinks for them and sometimes for the licensee George Dragovich, who acted as bartender, and encouraged the officers themselves to drink more and quicker; this happened at the bar sometimes within hearing of the bartender Dragovich, who on such occasions served the drinks even before the officers had consented to buy them. The drinks of the girls were always Seven-Up with a dash of gin, for which $1.00 per drink was charged to the officers, whereas the drinks of the officers themselves did not cost more than $.50. When the Officer McDonald protested that a "double" the waitress wanted was too expensive for him, she answered in the presence of bartender Dragovich: "Well, I have to keep busy." To identify the drinks bought by the officers and other male visitors for themselves the Roman numeral II was rung up on the cash register with the amount paid, whereas drinks bought for a girl were rung up separately with another Roman numeral to identify the girl; this distinction was substantially so explained by Dragovich himself. When officer McDonald in arresting him said: "George, I'm placing you under arrest, and the girl too, for section 303 of the Penal Code which is the B girl section", Dragovich did not deny that he had "B girls" on the premises and in further conversation about the numerals used on the cash register tape, he said: "I just have the one girl working." The denials of Dragovich and two of the waitresses as witnesses before the hearing officer could only cause a conflict with the above circumstantial evidence, which conflict was resolved by the board against the appellants. Said factual decision is binding on the reviewing courts.

[9, 10] Appellants finally contend that in increasing the penalty to immediate revocation of the license the board abused its discretion and acted arbitrarily on matters outside the record, because the board, influenced by publicity as to the "B girl" problem, was engaged in a series of raids by its own officers on licensed premises, one of which raids resulted in these proceedings, and in connection with this activity the board used this case as a warning to others, as was shown by language of the board member Reilly in moving to concur in the revocation. The contention is devoid of all merit.

As mentioned before, section 22 of article XX of our Constitution expressly gives the board power in its discretion to revoke any specific liquor license if it shall determine for good cause that the continuance of such a license would be contrary to public welfare and morals. It is not denied and can not be denied that the charged violation of section 303, Penal Code, if proved, would constitute good cause for holding that the continuance of the license would be contrary to public welfare and morals. We have held that the charge was sufficiently proved. Public interest in and official action as to the problem involved in the prosecution can evidently have no influence on the validity of the decision without a showing of definite facts which prevented the accused from having a fair trial. No showing whatever of such facts is made. That the board may have taken into consideration the effect of its decision on others in similar situations is a normal part of its function. To deter other persons from committing similar breaches of the law is considered one of the purposes of punishment. 24 C.J.S., Criminal Law, § 1974, p. 1180.

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

PEOPLE v. GOULD.

Cr. 2961.

District Court of Appeal, First District, Division 2, California.

May 24, 1954.

Rehearing Denied June 7, 1954.

Hearing Denied June 23, 1954.

Defendant was convicted of grand theft in a case tried on theory that money was obtained by false pretenses. The Superior Court, City and County of San Francisco, John B. Molinari, J., entered judgment, and defendant appealed. The District Court of Appeal, Dooling, J., held that evidence was insufficient to sustain conviction.

Judgment reversed and case remanded for new trial.

1. Embezzlement ⚿44(1)
False Pretenses ⚿49(1)
Larceny ⚿65

In case tried on theory that money was obtained by defendant by false pretenses, evidence was insufficient to sustain conviction for grand theft, nor was the evidence such as might support the conviction on theory of embezzlement or larceny by trick and device.

2. Embezzlement ⚿1
Larceny ⚿14(1)

Both embezzlement and larceny by trick and device require that the victim not part with title to his money or property.

3. Criminal Law ⚿238

Where, at preliminary hearing of charges that defendant obtained money from complaining witness under false pretense of using it to purchase machinery to operate a mine, complaining witness testified positively, without objection, that defendant purchased no machinery for the mine, elements of crime were sufficiently proved before the committing magistrate, notwithstanding it subsequently developed that such testimony was hearsay and inadmissible upon the trial.

Arthur D. Klang, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Clayton R. Janssen, Jr., Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellant was convicted by the court sitting without a jury, a jury trial having been waived, of the crime of grand theft. He appeals from the judgment and order denying his motion for new trial.

[1] It appears that appellant had an option to purchase from one Fred N. Pigeon the gold bearing gravel in a mine known as the Pigeon Mine. He met the complaining witness, one Cholia, an elderly man, in the tailor shop of one Selix. Appellant sold to Cholia a 10% interest in "the net gold production of the Pigeon Mine" for $1,250 and gave him a joint venture agreement in writing evidencing this sale which recites: "said option covers the mineral rights only." This was dated December 20, 1949. As to the initial transaction Cholia got just what he paid for.

Subsequently appellant caused to be incorporated in Nevada a corporation "Dixie-Cal Cooperative Syndicate" with a capital stock of $25,000 divided into 25,000 shares and he gave Cholia a certificate for 2,500 shares of this corporation on February 1, 1950, without further payment by Cholia, which appellant signed as secretary and Cholia, at appellant's suggestion, signed as president. Appellant had no permit from the Corporation Commissioner of California to sell this stock but he was not charged with a violation of the Blue Sky Law, Corporations Code, § 25000 et seq.

Cholia gave appellant other sums of money from time to time for which he received promissory notes signed by appellant. He testified that appellant represented that these sums were needed to buy machinery for the mine and to work the mine. Altogether Cholia testified that he gave appellant $10,115 although the information charges $4,985.

The case was tried on the theory that the money was obtained by false pretences. There is no substantial proof that the representations testified to by Cholia, that the money was needed for the purchase of machinery and to work the mine, were false or that the money was not used for those purposes by appellant. A witness for the people, Clift, testified that he was employed by appellant in 1949 from the spring to the fall in cleaning out and retimbering the mine and, over objection on the ground that this antedated the first transaction with Cholia, that up to the time he left in the fall of 1949 no new machinery was purchased for the mine. This evidence had no probative value as to what occurred after Cholia gave his money to appellant, although the trial judge from a remark made from the bench when he was summing up the evidence apparently gave it such construction. The only other evidence on the subject came from a witness for defendant, Waldner, a mining engineer who testified generally that in his opinion the Pigeon Mine showed good prospects of being made into a profitable mine. He visited the mine in 1933, 1948 and 1949, and "a couple of months" before he testified on March 27, 1953. He testified:

> "Q. Was there more equipment when you saw it a couple of months ago than when you saw it in 1948 and '49? A. Not so much, no."

This one answer is the only evidence relied upon by the people to establish that appellant falsely represented to Cholia that he intended to use his money for the purchase of machinery for the mine. It is too uncertain in character to rise to the dignity of substantial evidence. The transaction between Cholia and appellant occurred between December 20, 1949 and May, 1950. The fact that "not so much" more equipment was in the mine in 1953, three years later, would not establish what was there in 1950, and "not so much" is so vague in itself that it has little probative value. No man should stand convicted of a felony on such tenuous evidence.

[2] The people argue in the alternative that the evidence might support a conviction on the theory of embezzlement or larceny by trick and device. Both require that the victim not part with title to his money or property. Embezzlement: People v. Goodrich, 138 Cal. 472, 71 P. 509; People v. Holder, 53 Cal.App. 45, 199 P. 832; People v. Petrin, 122 Cal.App.2d 578, 265 P.2d 149; Larceny by trick: People v. Edwards, 72 Cal.App. 102, 113, 236 P. 944; People v. Shearer, 83 Cal.App. 321, 331, 256 P. 611. Here it is clear from the evidence that Cholia parted with title to his money: the first $1,250 to purchase an interest in the mine, the other amounts as loans evidenced by promissory notes. Furthermore the evidence on either theory is no more substantial than on the theory of false pretences.

There are suspicious circumstances connected with the dealings between Cholia and appellant which indicate that evidence might have been produced by the prosecution to support a conviction. The prosecution, to say the least, treated the case cavalierly. But suspicion cannot take the place of proof, and on the evidence presented no case was proved.

[3] Appellant argues that since the information is not supported by the evidence at the preliminary hearing his motion to dismiss the information on that ground should have been granted. At the preliminary hearing Cholia testified positively without objection that appellant purchased no machinery for the mine. On the trial it developed that this was hearsay and Cholia was not permitted to give such testimony. On the evidence before the committing magistrate the elements of the crime were sufficiently proved.

The judgment is reversed and the case remanded for a new trial.

NOURSE, P. J., and KAUFMAN, J., concur.

125 Cal.App.2d 378

POOTEL
v.
CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 15772.

District Court of Appeal, First District, Division 2, California.

May 20, 1954.

Action by retired police officer to recover compensation for extra duty performed, and for writ of mandamus requiring approval of time rolls and authorization of compensation for overtime. The Superior Court, City and County of San Francisco, Wm. T. Sweigert, J., entered judgment for plaintiff and ordered peremptory writ of mandate to issue, and defendants appealed. The District Court of Appeal, Gibson, J. pro tem., held that under provisions of city charter and rules and regulations of police department enacted pursuant thereto, police officer who had not taken compensating time off for extra duty performed could not claim compensation therefor.

Judgment reversed.

1. Municipal Corporations 🔑186(5)

Where salaries of police officers were provided for by city charter, police commission did not have authority, under its power to adopt rules for conduct and performance of its affairs, officers and employees, to fix or increase such salaries and any attempt by such commission to increase such salaries would be an act inconsistent with such charter provisions and void.

2. Municipal Corporations 🔑220(2)

Fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give municipal employee right to payment for overtime and, in absence of either valid contract or statute, there is no basis for recovery of compensation for overtime.

3. Municipal Corporations 🔑186(5)

Where annual salary of police officer was provided for by city charter which contained no provision for payment of compensation for overtime, police officer's annual salary was payment in full for all of his services without regard to number of hours which he worked.

4. Municipal Corporations 🔑186(5)

Where rules and regulations of police department enacted pursuant to city charter provided that, unless otherwise ordered by commanding officer, all extra duty should be taken by members of his command during calendar year in which such extra duty was performed, police officer who had not taken his extra hours of duty during calendar year in which it had been performed, and commanding officer had not otherwise ordered, could not thereafter claim credit therefor.

5. Municipal Corporations 🔑186(5)

Rules and regulations of police department providing that all extra duty should be taken by members during calendar year in which such extra duty was performed, unless otherwise ordered by commanding officer, did not require commanding officer to do anything and mere fact that complete record of officer's overtime was kept did not give rise to presumption that commanding officer made any order waiving time limit provided for in such rules and regulations.

Dion R. Holm, City Atty., Bernard J. Ward, Deputy City Atty., San Francisco, for appellants.

Molly H. Minudri, Manuel L. Furtado, San Francisco, for respondent.

GIBSON, Justice pro tem.

We are satisfied the judgment in this case may not be upheld.

The respondent was a member of the San Francisco Police Department from June 19, 1914 until his retirement on June 30, 1950. During this time he served in the capacity of patrolman, sergeant, lieutenant, captain of traffic and director of traffic, and in the course of his said employment worked several hours overtime. Prior to February 13, 1937 no records of overtime were kept in the central files of the police department, but in that year, in accordance with an order of the chief of police, all records of overtime were sent to the chief's office, and thereafter all such overtime records were kept there. At the time of this change, in 1937, a time card was set up for Mr. Pootel which showed 32 hours of strike duty and 295 hours of other overtime accrued up to that date, and the whole record up to June 30, 1950 showed there were 633 hours of overtime credited to him, 570 of which were credited prior to July 1, 1944 and 63 hours since that date. This was the only record kept anywhere of respondent's time; the time rolls showed no record of overtime earned.

Prior to 1944 the Charter of the City contained no provision for the payment of compensation for overtime worked in the police department, the only compensation to which such a member was entitled being the annual salary provided for therein (Section 35 of the Charter from 1937 to January 11, 1943 and Section 35.5 thereof from January 12, 1943 to July 1, 1944). In 1944 a Charter amendment was adopted (Proposition No. 6, Section 35.5½), which, for the first time, provided that members of the police department might be paid for overtime, in addition to their regular salaries, and the machinery therefor was at once enacted by the proper City authorities.

The respondent had given information to the police department when he first entered the service, showing he would become 65 years old on June 30, 1950, and all the records of the department and City Retirement Board at all times so showed, and this the respondent always knew, until January 25, 1950, when the Retirement Board corrected his birth date to be June 17, 1887, instead of June 17, 1885, and he was notified to that effect. On June 28, 1950, however, the Retirement Board re-established his birth as of June 17, 1885, which required his retirement on June 30, 1950. On July 6, 1950 respondent, in a letter to the Board of Police Commissioners, requested he be paid for 633 hours claimed to have been worked by him in excess of his basic work week, and for which he had received no extra compensation. Upon the failure of the City to pay him as requested, he brought this action for a money judgment in an unnamed sum, and for a writ of mandamus requiring appellants "to approve the necessary time rolls" and authorize "compensation for the 633 hours of time worked in excess of the basic work week for members of the police department, and which remains to the credit of petitioner according to the records of said police department, and as provided by Section 35.5½ of the aforesaid Charter."

The judgment of the lower court ordered a peremptory writ of mandate to issue as prayed for and provided further ,"that after the computation of the amount due petitioner by reason of the aforesaid, respondents, and each of them, to pay the amount found due and pay said sum to petitioner."

The appellants consistently contended in the court below, and contend here, that this is not a case for the extraordinary remedy provided by writ of mandamus, since the respondent had a plain, speedy and adequate remedy at law, to wit, an action at law for the recovery of the money claimed to be due against the City.

We deem it unnecessary to decide this question here, it being our view that the merits of the case alone dictate a reversal of the judgment.

If we were to assume this to be within the class of cases wherein a writ of mandate would ordinarily be proper, who could be ordered to do what under the facts here presented?

[1] The Court could, in no event, we are convinced, order any one to certify the respondent had 633 hours of overtime for which he could be paid or that any one should pay him therefor in money. While, prior to 1944, there were rules and regulations of the department whereby one working overtime could be compensated therefor by taking time off thereafter in addition to his regular time off, no provision has been called to our attention, and we can find none, which permitted payment *in money* for overtime. As above indicated, such was not provided for until the addition of Section 35.5½ to the Charter, and which was put into operation as of July 1, 1944, and

this was the first authority the City had to make such payments. Respondent's position in this regard is, "There is no section of the Charter * * * which forbids the payment of cash overtime for extra duty performed." Of course, the real question is, Is there anything in the Charter or other law which *permitted* such payment? In this respect he contends that the Police Commission had the authority to authorize cash payment for overtime under its power to adopt rules "for the conduct of its affairs, for the distribution and performance of its business, for the conduct and government of its officers and employees * * *" We think this provision does not give the Commission authority to fix salaries of police officers or increase their salaries which have theretofore been specifically fixed by Charter. Such was done, so far as the respondent is concerned in Section 35 of the Charter. Any attempt of the Commission to increase this would be an act inconsistent with such Charter provision and therefore void. Bruce v. Civil Service Board, 6 Cal.App.2d 633, 637, 45 P.2d 419; Viner v. Civil Service Comm., 59 Cal.App.2d 458, 465, 139 P.2d 88.

[2, 3] The rule is well established that, "The fact that normal hours of work are established and compensating time off is provided for work beyond those hours does not, of itself, give the employee a right to payment for overtime." Martin v. Henderson, 40 Cal.2d 583, 590, 255 P.2d 416, 420. And in the absence of either a valid contract or statute, there is no basis for a recovery by respondent. His annual salary was payment in full for all of his services, without regard to the number of hours which he worked. Treu v. Kirkwood, 42 Cal.2d 602, 268 P.2d 482. And in addition to there being no statute or contract authorizing recovery of overtime, there was, indeed, no order or rule of the Police Department which purported to do so.

[4] We also find no escape from the conclusion that, since respondent did not take his extra hours of duty during the calendar year in which it was performed, he could not thereafter claim credit therefor. Section 402 of Police Rules and Regulations, enacted pursuant to Charter authority, at all times read as follows:

> "402. Unless otherwise ordered by the commanding officer, all extra duty shall be taken by members of his command during the calendar year in which said extra duty has been performed."

[5] There is no evidence, and it is so conceded, that respondent's commanding officer at any time "otherwise ordered", except that respondent attempts to take advantage of the presumption that "official duty has been regularly performed". The difficulty with this claim is Section 402, supra, does not require the commanding officer to do anything and therefore there is no official duty to assume he performed in regard thereto. We know of no authority which would justify a holding that the mere fact the complete record of respondent's overtime was kept, gives rise to a presumption that the commanding officer made any order waiving the time limit provided for in the section. Keeping complete records of overtime, and using such overtime credit, constitutes two separate and distinct things.

There is nothing in the record to show that if respondent had used up his overtime each year no further records would have been kept thereof and such would have been "wiped out" as appellants express it. Not having used his overtime when he should have, under the evidence submitted it must be held he waived it. No overtime accrued for the last calendar year worked.

We think it only fair to state that this case was decided by the lower court largely upon the authority of certain cases then existing which had been decided by the District Courts of Appeal, but which since have been reversed and disapproved by the Supreme Court. See Martin v. Henderson, supra, 40 Cal.2d 583, 587, 255 P.2d 416; Jarvis v. Henderson, 40 Cal.2d 600, 604, 255 P.2d 426.

The foregoing is sufficient to show the judgment must be reversed, and it is so ordered.

NOURSE, P. J., and DOOLING, J., concur.

125 Cal.App.2d 310

DANIELS et al. v. WILLIAMS et al.

Civ. 15919.

District Court of Appeal, First District, Division 1, California.

May 19, 1954.

Action to annul a promissory note and deed of trust, allegedly procured by fraud. The Superior Court, Alameda County, Chris B. Fox, J., issued preliminary injunction restraining assignee of the note and deed from disposing of them or from causing the sale of the real estate covered by the deed, and assignee appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence supported finding that foreclosure during the litigation would produce great or irreparable injury to plaintiffs, and, therefore, issuance of injunction was not abuse of discretion.

Order affirmed.

1. Injunction ⚿147
Mortgages ⚿338

In action to annul promissory note and deed of trust which were then in hands of assignee, evidence supported finding that foreclosure during litigation would produce great or irreparable injury to plaintiffs, and, therefore, issuance of preliminary injunction restraining assignee from disposing of note and deed or from foreclosing was not abuse of discretion. Code Civ. Proc. § 526.

2. Appeal and Error ⚿954(1, 2, 4)
Injunction ⚿135, 161

The granting, denying, dissolving or refusing to dissolve a preliminary or temporary injunction is not a matter of right but rests in the sound discretion of the trial court, upon a consideration of all the circumstances, and such discretion will not be reviewed on appeal absent a showing of abuse, even though there be substantial conflict in evidence, but trial court's discretion should be exercised in favor of the party most likely to be injured.

3. Mortgages ⚿270

In action to annul a promissory note and deed of trust which were then in hands of assignee, where it appeared that the note had been obtained by fraud, which infected the title of payee, assignee's immediate predecessor, assignee had burden of showing that he acquired the note under circumstances which made him a holder in due course. Civ.Code, § 3140.

4. Injunction ⚿144
Mortgages ⚿338

Where, in action to annul promissory note and deed of trust which were then in hands of assignee, assignee filed no answer until after issuance of injunction against disposing of note and deed or from foreclosing, and where assignee's testimony did not contradict allegations that note was infected with fraud, preliminary injunction was not subject to claimed infirmity of being based upon mere allegations which were fully and specifically controverted.

◆

Thiel, Sassone & Howard, Oakland, for appellant.

John A. Grennan and Burt S. Hofmann, Oakland, for respondents.

FRED B. WOOD, Justice.

Plaintiffs brought this action to annul a promissory note and deed of trust which they had executed, claiming fraud in the procurement thereof.

As defendants, they joined Ben Melmet, the payee of the note, James A. Williams allegedly active in procuring the note, Milton N. Owens, allegedly engaged by Melmet to sell the note, and Walter E. McMannis, the present holder of the note.

Upon application of the plaintiffs, a preliminary injunction was issued restraining McMannis, during the pendency of the action, from disposing of the note or the deed of trust or from causing the sale of the real property covered by the deed of trust, conditioned upon the filing of a $3,000 corporate surety bond by the plaintiffs.

McMannis has appealed from the order for this injunction. He contends it was an abuse of discretion, a reversible error, to make the order because, according to his view of the evidence and the law, (1) there was no evidence to support the order and (2) the order was based upon the mere allegations of the complaint which were fully and specifically controverted by verified answer and sworn testimony.

(1) *Our examination of the record convinces us that the evidence adequately supports the order.*

The evidence consists of the verified complaint and the testimony of McMannis and one Rudy Washburn. McMannis did not file an answer until after the injunction had been granted.

McMannis claims he is a holder in due course but has adduced no evidence tending to prove that any prior holder had a good title to the note. He testified that prior to purchasing the note he had no knowledge at all of any of the dealings between any of the other parties to the action in connection with this transaction.

Accordingly, the following facts stated in the complaint are uncontradicted: Plaintiffs own certain real property subject to a secured indebtedness of $4,187.15. Plaintiffs requested defendant Williams to procure a purchaser. He later informed them he had a purchaser but represented that, to consummate the sale, it would be necessary to extinguish the existing loan and for that purpose execute and sell a new note and deed of trust for $4,000. Relying upon his representations, they executed the note and deed of trust in suit, which Williams without plaintiffs' knowledge or consent sold to Melmet, taking the proceeds for his own use and not extinguishing the original indebtedness of $4,187.15. Melmet was at all times aware of Williams' plan to defraud plaintiffs and convert the proceeds to his own use, and purchased the note with knowledge of Williams' defective title. Melmet employed Owens to sell the note and Owens knew or had sufficient cause for knowing that Melmet's title was defective.

The verified complaint further states that McMannis knew or had good cause for knowing that Melmet's title was defective, and, upon information and belief, that McMannis paid $2,500 for the note.

McMannis testified that he first learned of this note and deed of trust from a newspaper advertisement which stated: "Second trust deed $4,000.00, payable $40. a month, 7 percent interest, sell for $2800. Templebar 6–1110." He called the phone number and talked to one Dancy, an employee of defendant Owens, and was given the street address of the property. He inspected the property; phoned Dancy that $2,800 was too high; they agreed on $2,500. He deposited the money in escrow, his instructions being that upon Melmet's endorsing the note the sale would be complete. The transaction was completed and he received the note and deed of trust. He did not know the plaintiffs when he bought the note, nor did he know the payee, nor had he any prior dealings with Owens or Dancy. He did not know and did not inquire who was the maker of the note which supposedly was secured by the first deed of trust. He is a real estate broker and has purchased a number of second deeds of trust while in the real estate business.

Rudy Washburn testified on behalf of McMannis that in his opinion the second deed of trust when McMannis bought it was worth about $2,400 and that the property is worth between $9,500 and $10,500. When valuing the deed of trust in suit, Washburn viewed the premises but did not inquire as to the amount of rent being paid and did not know the amount of the first deed of trust. He admitted that the amount of the first would make a difference in his evaluation of the second if the first were real small.

Asked if it is his intention to go ahead and foreclose, McMannis said "Well, I think I am entitled to my payments, my monthly payments. I purchased that. I paid my money out for it. I think I am entitled to it."

[1] It is clear that it appeared to the trial judge that foreclosure of the deed of trust or sale of the note "during the litigation would produce * * * great or irreparable injury, to a party to the action". § 526, Code Civ.Proc. The evidence amply supports his implied finding to that effect. Accordingly, it was no abuse of discretion for him to grant the injunction, especially in view of the $3,000 bond which it would appear is well calculated to cover any and

all losses McMannis conceivably may sustain.

[2] In such a case as this the following statement seems particularly apt: "It is a rule, universally followed and often stated, that the granting, denying, dissolving or refusing to dissolve a preliminary or temporary injunction is not a matter of right but rests in the sound discretion of the trial court, upon a consideration of all the circumstances of each case, and that such discretion will not be reviewed on appeal in the absence of a showing of abuse. It is only necessary in the review of the action of the court in granting or denying a preliminary injunction that the appellate court shall find in the evidence sufficient basis to support the discretion which the trial court exercised. Even where there is a substantial conflict in the evidence the order will not be overthrown merely because there may be considerable or even preponderating evidence which, if believed, would have led to a contrary conclusion. The discretion, however, should be exercised in favor of the party most likely to be injured." 14 Cal.Jur. 180–183, Injunction, § 7.

[3] In this case there is no conflict in the evidence that the note was obtained by fraud, a fraud which infected the title of the payee, McMannis' immediate predecessor. McMannis, therefore, has the burden of showing that he acquired the note under circumstances which made him a holder in due course: "Every holder [of a negotiable instrument] is deemed prima facie to be a holder in due course; *but when* it is shown that *the title of any person who has negotiated the instrument was defective,* the *burden is on the holder to prove that he* or some person under whom he claims *acquired the title as holder in due course.*" Civ.Code, § 3140; emphasis added. The nature and extent of McMannis' inquiries prior to purchase and the considerable discount at which he purchased, lend emphasis to the view that equity should maintain the status quo until, at the trial on the merits, McMannis meets and carries or fails to carry that burden.

[4] (2) *The allegations of the complaint were not "fully and specifically controverted by verified Answer and Sworn Testimony" as asserted by McMannis in his opening brief.*

The record upon this appeal contains no answer. It is totally silent on the question whether an answer was presented or filed. Plaintiffs in their brief state that McMannis "did not file an answer to respondents' complaint until after the preliminary injunction had been granted. Therefore, the answer was not before the [trial] Court when it rendered its decision * * *." McMannis has not denied this statement.[1]

The testimony, as we have seen, controverted but a few of the allegations of the verified complaint: only those which pertained to McMannis' acquisition of the note, none of those which tended to prove fraud in the making of the note and defective title while in the hands of his predecessor.

Accordingly, this is not a case in which the principle enunciated in Gagliardo v. Crippen, 22 Cal. 362, applies. In that case the allegations of the complaint were "fully and specifically controverted by the affidavit." Therefore, said the court, "as the equities, whatever they may be, are denied, it is unnecessary to pass upon the objections to the complaint." 22 Cal. at page 362. In our case, as we have seen, the defendant's oral testimony (equally effective, of course, as an affidavit would be) controverted but a few of the allegations of the complaint, manifestly a different type of case from the Gagliardo case.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

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[1] He filed no reply brief and, pursuant to stipulation and request of the parties, the case was submitted upon the briefs on file, without oral argument.

125 Cal.App.2d 450

FOWLER v. BROWN et al.

Civ. 19763.

District Court of Appeal, Second District, Division 1, California.

May 24, 1954.

Action to rescind an exchange of real property or for damages, on ground of fraud and mistake of law. The Superior Court of Los Angeles County, Frank C. Charvat, J., pro tempore, entered judgment from which plaintiff appealed. The District Court of Appeal, Drapeau, J., held that evidence sustained findings that there was no mistake of law or fraud practiced upon plaintiff.

Judgment affirmed.

1. Appeal and Error ⚷931(1), 1010(1)

The trial court's findings are conclusive on appeal if there is substantial evidence to support them, and in considering the evidence, court will view it in light most favorable to respondent, will not weigh it and will indulge all intendments and reasonable inferences which favor sustaining the findings of the trier of fact.

2. Fraud ⚷3, 7, 64(1)

Misstatement or suppression of facts is not fraudulent unless motivated by an intent to deceive or induce another to enter into a contract, or unless it amounts to a breach of duty, and the question of actual fraud is always one of fact. Civ.Code, §§ 1572, 1573, 1574.

3. Exchange of Property ⚷8(4)
Fraud ⚷58(2)

In action to rescind an exchange of real property or for damages, on ground of fraud or mistake of law, wherein it was contended that defendants had misrepresented that the building received by plaintiff was free from rent control, evidence warranted findings to effect that at time of exchange a bona fide dispute existed between defendant owner and the Office of Price Administration and that plaintiff was aware of it, and that all parties understood the provisions of the rent control laws, and that there was no fraud or misrepresentation practiced upon plaintiff.

Desmond & Desmond, Long Beach, for appellant.

Demler & Eckert and Charles E. Samuel, Long Beach, for respondents.

DRAPEAU, Justice.

Plaintiff and the defendant Gladys M. Brown were owners of real property in Long Beach. On May 3, 1949, they entered into an escrow agreement by the terms of which it was agreed that defendant Brown would exchange her 10 unit apartment building having a value of $59,500, subject to an encumbrance of $32,500, for two parcels of property of plaintiff: (1) a duplex worth $10,000; and (2) a single family dwelling valued at $10,000 subject to an encumbrance of $2,000; plaintiff to execute a promissory note for $9,000 to equalize the values of the properties.

Defendant Burcaw, a licensed real estate broker, represented both parties to the transaction.

Plaintiff's parcel 1 was subject to rent control; parcel 2 was not. Defendants Burcaw and Mrs. Brown told plaintiff that the apartment building was free from rent control and that it produced a net income of $220 per month.

The complaint alleges that these representations were false, were known to defendants to be false and were made with the intent that plaintiff should rely upon them; that he did so rely and entered into the instant transaction with no knowledge of their falsity all to his damage. An amended complaint was filed which alleges as a second cause of action that such representations were made "under a misapprehension of the rent control laws by plaintiff and the said defendants."

In the meanwhile, the exchange of properties was completed, plaintiff paid certain fees and expenses and early in December of 1949, he discovered that with the exception of one apartment (owner occupied) the apartment building was subject to rent control, and had a maximum total net income of $103.50 per month.

Subsequently, plaintiff was compelled to refund to tenants certain amounts as overcharges made during the period from the close of escrow on July 22, to December 6, 1949.

On January 9, 1950, plaintiff gave notice of rescission, tendering to defendants the return of the apartment building and demanding return of his two parcels of land and the cancellation of the $9,000 promissory note.

As above noted, the instant action in rescission, or in the alternative for damages, is grounded on fraud and mistake of law.

From an adverse judgment, plaintiff prosecutes this appeal.

It is here contended that there is no substantial evidence in the record to support the trial court's findings:

(1) that there was no fraud on the part of respondent, and

(2) that there was no mistake of law in the transaction between the parties.

The record herein discloses that when Mrs. Brown listed her apartment building with him in January of 1949, respondent Burcaw checked with the O.P.A. and was told that the place was not registered. He therefore assumed it was not controlled, and the escrow for the exchange was opened with that understanding. Apartment 5 was owner-occupied prior to the exchange and was free of control.

On May 11 of that year, Mrs. Brown at the request of the rental authorities conferred with Mr. Elmore Wilcox of O.P.A. He told her that the property should have been registered and gave her forms to fill out. Upon learning that Apartment 6 had been rented in January of 1947, he told Mrs. Brown that it was subject to rent control. Mr. Wilcox testified that Mrs. Brown then told him that all accommodations, except Apartment 6, were rented after February 1, 1947. She executed and filed registration statements that all the other apartments were rented for the first time on February 9, 1947.

However, Mrs. Brown testified that she did not rent all of these eight apartments: 1, 2, 3, 4, 7, 8, 9, 10, on the same day; that "Maybe one would be one day before or after. Some people took the apartment and didn't move in for a month." Mrs. Brown further testified, that she did not believe the building was completed before February 1st because "We had the statements from the workmen that they worked in there after February the first. There were affidavits signed by the workmen and we didn't feel that it was (completed)."

At this point, O.P.A. terminated its inquiry for the time being.

It was stipulated between the parties hereto that "the rent laws and regulations then in effect provided that construction which was completed after February 1, 1947 was not subject to rent control."

After the May 11 conference, Mrs. Brown told Mr. Burcaw that Apartment 6 had been frozen by O.P.A. Mr. Burcaw called plaintiff's friend, Mr. Gibbon, a real estate agent who was associated in the exchange, and told him "he had better come over as I thought the deal was gone." He then met plaintiff and Mr. Gibbon and discussed the threat of control over the other apartments. Next Mr. Burcaw went to the Long Beach office of O.P.A. where he was told by assistant director Jolly that the whole matter hinged on the date of completion of the building. The notice of completion had been filed before February 1, 1947. Burcaw discussed this with Jolly. Neither was able to determine what constituted completion under O.P.A. regulations. As a result, Mr. Burcaw went to San Francisco on May 13 to see if he could find out. At that time, he did not know when the utilities were turned on or when the apartments other than 5 and 6 were first occupied. However, he informed the O.P.A. that affidavits could be obtained from contractors to the effect that certain work in the building had not been completed on February 1, 1947.

With this information at hand, the legal department of the O.P.A. in San Francisco gave Mr. Burcaw its oral opinion that the building was not controlled. He telephoned this information to Mrs. Brown, who in turn relayed it to plaintiff.

The escrow which was opened on May 3rd was not closed until July 22, 1949. Meanwhile, in June, 1949, Mrs. Brown was again called by Mr. Wilcox to his office for further discussion. Prior to this, she had submitted the affidavits of the contractors heretofore referred to. Because of conflicting statements received by his office as to the date of completion of the building, Mr. Wilcox had continued his investigation. As a result it was determined by O.P.A. that the building had been completed before February 1, 1947, and was therefore subject to rent control. At this conference in June, Mr. Wilcox so informed Mrs. Brown. He also recommended the institution of suit against her to recover treble damages for overcharges of rentals to tenants. At a much later date this suit was settled by consent judgment for the actual amount of rent overpaid.

In reply to the question of plaintiff's counsel, whether she had told Mr. Fowler, or Mr. Burcaw had told Mr. Fowler during pendency of the escrow regarding determination of O.P.A. that all of the apartments were controlled except Apartment 5, Mrs. Brown stated:

"No, I never told Mr. Fowler. I was with Mr. Burcaw in his place of business and we discussed it. Mr. Burcaw discussed the O.P.A. trial, or the trouble, with Mr. Fowler, and Mr. Fowler said, 'Well, you go right down and fight them, I am right behind you.' He said, 'I beat them once.' * * * Mr. Desmond: Do you remember if this was before the escrow closed, or after? A. Long before."

Mr. Burcaw went to San Francisco on May 13, 1949. Both Mrs. Brown and Mr. Fowler knew about this trip and what it was for. With respect to this, Mr. Fowler testified:

"Yes, I knew at the time Mr. Burcaw went to San Francisco that the O.P.A. was claiming there was control on this whole building. I am speaking of 1929 Magnolia Avenue, the property of Mrs. Brown. That is what the O.P.A. wanted to make out and then the affidavits were to overcome that. * * * The O.P.A. wanted to claim they were all frozen and the affidavits were to overcome that.

"Q. You knew of all that? A. I knew that.

"Q. You further knew, that being the case, the O.P.A. claimed that the place was under control and that Mr. Burcaw went to San Francisco to try to overcome that claim, you knew that didn't you? A. Yes.

"Q. Did you ever go down to the O.P.A., Mr. Fowler, and ask them what the facts were on the case? A. No, I never went to the O.P.A. because Mr. Burcaw said, 'Now, we have put the affidavits in and everything is in the clear.' * * * As I recall it, it was a question of whether or not the one apartment being frozen would automatically freeze all of them, that was the point that I know was discussed with Mr. Burcaw and myself. * * *

"Q. And in taking the trip to San Francisco, he was to see if the affidavits would keep the rest of them from being controlled? A. Yes. * * *

"Q. Did you make any effort to find out what the O.P.A. claimed? A. No, I took Mr. Burcaw's word for it."

On July 7, 1949, the parties discussed the possibility of the O.P.A. coming in at some future time and imposing rent control, or decreasing the rent by some form of governmental action. On that day the following instrument was executed and made a part of the escrow agreement:

"It is understood between the parties hereto that one of the apartments at 1929 Magnolia Avenue, Long Beach, California, is O.P.A. controlled and that all other apartments are at this time decontrolled. It is agreed that should at any time the O.P.A. step in and lower the rentals, thereby decreasing the present income of the property, the seller, Gladys May Brown, shall be relieved of any and all responsibility therewith. However, should these decreased rents be retroactive, the seller of said property herein agrees to make all rebates up to the close of escrow."

On July 22, the day the escrow was closed, another escrow supplement provided that Mrs. Brown should pay Mr. Fowler $15 per month until July 30, 1950, or at the end of rent control, to make up for the loss of rent on Apartment 6, which was then controlled.

On December 5, 1949, Mr. Fowler discovered that the entire property was controlled, and on December 7th he made a refund of all charges over the rent ceilings during his period of ownership, to-wit: the sum of $384.50.

It was stipulated at the trial that, "As a result of a rent ceiling being established on the premises up to the end of rent control, Mr. Fowler sustained a loss of $212"; this being the difference between what he was charging and what he was thereafter permitted to charge.

Appellant's position is that respondent Brown was under obligation to avoid an act of fraudulent concealment by a full disclosure to him of the factual developments of her conferences with Mr. Wilcox of the O.P.A. In support of this, appellant cites Dyke v. Zaiser, 80 Cal.App.2d 639, 653, 182 P.2d 344, 353, where it is said:

> "Many cases have been cited where it has been held that a man is not necessarily required to state everything he knows about the property involved. The present tendency, however, is to class concealment as actual fraud in those cases where the seller knows the facts which materially affect the desirability of the property which he knows are unknown to the buyer."

Based upon the evidence, of which the above is a brief resume, the trial court made the following findings which appellant urges are unsupported by the evidence:

> "It is not true that defendants falsely or fraudulently represented to plaintiff that Parcel 3 was free from control under the Federal Housing or Rent Acts; that instead it is true (1) that at all times during the negotiations between the parties defendants earnestly were of the belief that said parcel was free from such control (2) that such belief * * * was reasonably founded, and (3) that when the dispute arose between the defendants and the officials of the Office of Price Administration defendants fully disclosed to plaintiff the nature and all aspects of such dispute and plaintiff was thereby as fully apprised of such dispute and of the reasons for the view of said officials as were the defendants. * * *.
>
> "It is true that plaintiff and defendants understood the provisions of said rent control laws applicable to said parcel and were aware of the provision that said laws applied to apartment houses completed prior to February 1, 1947, but they were mistaken as to some of the incidents which the officials of the O.P.A. might take into account when determining whether an apartment house was or was not completed prior to February 1, 1947. It is true (1) that at the time said properties were exchanged and the escrow closed the officials of the O.P.A. had not ruled that said apartment house was subject to control and defendants were then earnestly and reasonably of the belief that said apartment house was free from control; (2) that after the said exchange of properties and the close of said escrow the officials of O.P.A. obtained additional information and thereupon rule that said apartment house was subject to control; and (3) that defendants in all their discussions with the officials of O.P.A. fully and truthfully answered all queries of said officials and in addition thereto fully and truthfully disclosed to said officials such further and additional information as defendants earnestly and reasonably believed might be pertinent to the consideration as to whether said apartment was or was not subject to control."

As recently stated by this court in Morand v. Seaside Memorial Hospital, 121 Cal.App.2d 745, 264 P.2d 96, 97:

[1] "The trial court's findings are conclusive on appeal if there is substantial evidence to support them. An appellate court will view the evidence in the light most favorable to the respondent; will not weigh the evidence, and will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact."

While it is true that respondent Brown, when interrogated during the trial was unable to remember many details of the exchange transaction, that in and of itself is insufficient to charge her with bad faith.

[2] "Misstatement or suppression of facts is not fraudulent unless motivated by an intent to deceive or to induce another to enter into a contract, Civ.Code, sec. 1572, or unless it amounts to a breach of duty, sec. 1573. The question of actual fraud is

always one of fact. Civ.Code, sec. 1574." Mesmer v. White, 121 Cal.App.2d 665, 264 P.2d 60, 64.

[3] It is clearly shown by the record that a bona fide dispute existed between respondent and the O.P.A., and that appellant was well aware of it. The trial court found that both parties "understood the provisions of said rent control laws." The dispute involved a factual issue, i. e., whether the law applied to a certain set of facts.

This court is of the opinion that the evidence amply supports the findings complained of.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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125 Cal.App.2d 243

LEITER et al. v. HANDELSMAN et al.

Civ. 20112.

District Court of Appeal, Second District, Division 1, California.

May 17, 1954.

Rehearing Denied June 7, 1954.

Vendors' action against purchasers for breach of contract. The Superior Court, Los Angeles County, Kenneth C. Newell, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Mosk, J. pro tem., held that even though land to be conveyed pursuant to agreement requiring delivery of clear title, with evidence thereof to be in form of a policy of title insurance, was registered under Land Title Law, and no easement had been recorded under Land Title Law, easement reported by title insurance company as cloud upon title constituted an encumbrance excusing purchasers' failure to perform.

Affirmed.

1. Records 🔑9(13)

A certificate of ownership issued by registrar of titles under Land Title Law is conclusive evidence of title as therein stated. Gen.Laws, Act 8589, §§ 1 et seq., 34, 42.

2. Vendor and Purchaser 🔑135(1)

Even though land to be conveyed pursuant to agreement requiring delivery of clear title, with evidence thereof to be in form of a policy of title insurance, was registered under Land Title Law, and no easement had been recorded under Land Title Law, easement reported by title insurance company as cloud upon title constituted an encumbrance excusing purchasers' failure to perform. Gen.Laws, Act 8589, §§ 1 et seq., 34, 42.

3. Estoppel 🔑119

Whether there has been a waiver is ordinarily a question of fact to be considered under all the evidence.

4. Vendor and Purchaser 🔑50

Where terms of executory agreement for sale of real property are clarified by provisions of signed escrow instructions, both instruments are to be considered together in determining understanding of parties and in ascertaining their rights and obligations.

5. Contracts 🔑211

As general rule, time is not of essence unless it has been made so by express terms of contract or is necessarily so from very nature of contract, and in order to render time thus essential it must be shown in clear, unequivocal and unmistakable language.

6. Contracts 🔑143

Neither trial nor appellate court has power to rewrite contract.

7. Contracts 🔑176(10), 212(1)

Where time is not of essence of an instrument, compliance within reasonable time after specified due date constitutes compliance therewith; and what constitutes reasonable time is always a question of fact.

8. Vendor and Purchaser 🔑329

In vendors' action for breach of contract, evidence would not sustain vendors' contention that there had been a waiver by purchasers of time limit fixed in escrow instructions for performance.

◆

Elwood Bowles and Fred L. Brown, Jr., by: Fred L. Brown, Jr., Los Angeles, for appellants.

Morris C. Schrager, Los Angeles, for respondents.

MOSK, Justice pro tem.

Appellants L. A. Leiter and Ralph Cogan owned lot 215, tract 13796, County of Los Angeles, and appellants Daniel D. Aberle and Virginia R. Aberle owned lot 216 in the same tract. Both parcels were registered under the Land Title Law (Torrens Title).

On February 24, 1950, the four owners executed an agreement to sell their respective lots to the four respondents, William J. Handelsman, Lillian M. Handelsman, Al Kahan and Essie L. Kahan, for the sum of $33,000. On February 28, 1950, an escrow was opened at the Florence White Escrow Company, instructions being signed by all parties.

The sum of $1,000 was deposited in the escrow the day it was opened by A. Lee Elkins, the broker handling the transaction, and the sum of $5,000 was deposited on March 6, 1950, by respondent Handelsman. Properly executed deeds were deposited in the escrow by the appellants on February 28, 1950.

The original purchase agreement provided that the "Purchase price to be paid in cash in escrow on delivery of deed free and clear title, there is no bonds—if deal is not accepted money will be refunded—no bonds—no assessments—no easement. Evidence of title was to be in form of a policy of title insurance issued by a responsible title company and to be furnished and paid for by the sellers."

The escrow instructions provided that it was to be completed "on or before 30 days" from February 28, 1950.

On March 13, 1950, the escrow company informed the purchasers that a preliminary title report had been received. A day or so later respondent Handelsman read the report in the escrow company offices and advised the escrow holder and broker Elkins that he and his associates would not accept the property with the reported easement thereon. The title company report showed an easement running 30 feet into the property in favor of the Southern California Edison Company and the Pacific Telephone and Telegraph Company. In addition there were guy wires physically located on the land.

The appellant Leiter and broker Elkins both admitted in their testimony they were informed during negotiations that respondents desired the property for the purpose of constructing a market building and they realized it would be impossible to construct a building if the wires and the easement were retained.

On or about March 30, the escrow company notified appellants that the respondents objected to the easement indicated in the preliminary title report. The following day the appellants employed an attorney for the purpose of assisting in clearing title so that the transaction might be completed.

Appellants' counsel proceeded expeditiously to persuade the utility companies to remove the wires and the easement, but the processing of the proposed quitclaim deed was not accomplished immediately.

Meanwhile, the respondents contacted the escrow company "every two or three days to see if the easement was removed". When it was not removed by April 17, 1950, respondents, through their counsel, sent a notice to the escrow company cancelling the escrow and demanding return of the $6,000 on deposit. The escrow holder immediately notified appellants by letter, stating therein that it would retain all funds and documents on hand for another five days.

On April 18, appellants' counsel called respondents' attorney and advised him that the guy wires had then been removed and that a quitclaim deed would be forthcoming. On April 26, the quitclaim deed was executed by the Southern California Edison Company and recorded May 9th. Pursuant to the demand of respondents the escrow was promptly closed and the deposited money and documents returned to the respective parties.

The easement in question purportedly was running in favor of the Southern California Edison Company and the Pacific Telephone and Telegraph Company. The quitclaim deed of April 26, 1950, was apparently that of the Edison Company only. There is nothing in the record before us to indicate how, or whether, the easement of the Telephone Company was extinguished. However, since neither party raises any issue on that subject, we will assume the Telephone Company rights and those of the Edison Company arose and expired simultaneously.

[1, 2] Appellants contend that the easement was not an encumbrance on the real property and therefore respondents lacked valid excuse for failure to perform. They have therefore brought this action seeking damages for breach of the contract to purchase. From an adverse determination in the trial court they have pursued this appeal.

The two lots were registered under the Land Title Law of California. Act 8589, Stats. of 1915, page 1932.

Section 42 of the Act provides in part as follows: "The register of any land, and duly certified copies thereof, shall, except as herein otherwise provided, be received in law and in equity as evidence of the facts therein stated, and as conclusive evidence that the person named therein as owner is entitled to the land for the estate or interests therein specified."

Section 34 of the Act provides in part as follows: "The registered owner of any estate or interest in land brought under this act shall, except in case of fraud to which he is a party, or of the person through whom he claims without valuable consideration paid in good faith, hold the same subject only to such estates, mortgages, liens, charges, and interests as may be noted in the last certificate of title in the registrar's office, and free from all others, except: * * *. 3. Any subsisting right of way or other easement, created within one year before issue of the certificate upon, over, or in respect of the land."

Lots 215 and 216, involved herein, were first registered under the Act on April 1, 1924. The grant of easement was dated October 24, 1947, and recorded on January 30, 1948. The foregoing sections of the Act fortify appellants' assertion that this purported easement should not be an objectionable encumbrance upon the property. As stated in Estate of Allan, 28 Cal.App.2d 181, 184, 82 P.2d 190, 192, a "certificate of ownership issued by the registrar of titles is conclusive evidence of the title as therein stated."

Testimony of the Chief of Land Registration of the County of Los Angeles established there was no record of easements on either lot.

Nevertheless the existence of the easement was reported by the Title Insurance Company as a cloud upon the title. Any such cloud would clearly affect the merchantability of the property. The parties herein contemplated in the purchase memorandum that there were to be "no bonds—no assessments—no easement", not merely easements recorded under the Torrens Title Law.

Further they did not contemplate validity of title to be ascertained only by the Land Title Law but "evidence of title was to be in form of a policy of title insurance issued by a responsible title company." This is not an unusual requirement, as indicated by King v. Stanley, 32 Cal 2d 584, 590, 197 P.2d 321, 325, in which the court said that title insurance "is a reasonable method by which a vendee may determine the merchantability of the vendor's title * * *."

In Ward v. Downey, 95 Cal.App.2d 680, 213 P.2d 523, there is a remarkable factual similarity. The instruments there were a purchase agreement calling for marketable title, and escrow instructions providing that if performance had not been completed within the specified time, the escrow was to continue open unless written demand to close had been made. The cloud on the title was no recorded instrument, but merely the title company's conclusion that there was a possibility of an inheritance tax and federal estate tax becoming due. This possibility alone convinced the court there was, 95 Cal.App.2d at page 685, 213 P.2d at page 526, "a defect in the title * * * which made it unmarketable within the meaning of the terms of the offer to purchase. If there was any reasonable doubt relative to litigation regarding the title, then the property was not 'marketable'."

In Culligan v. Leider, 65 Cal.App.2d 51, 149 P.2d 894, 898, it was held that if there was "any reasonable doubt" of the title, then the property was not marketable and the purchaser was entitled to return of his deposit. To the same general effect are Muller v. Palmer, 144 Cal. 305, 77 P. 954; Allen v. Globe Grain & Milling Co., 156 Cal. 286, 104 P. 305; Gwin v. Calegaris, 139 Cal. 384, 73 P. 851.

The evidence discloses that appellants themselves considered the easement to be a reflection upon their title. This is indicated first by the efforts they made to remove it. And secondly, after the escrow was closed, appellants filed suit against the Southern California Edison Company and the Pacific Telephone and Telegraph Company for slander of title and in their verified complaint in that lawsuit alleged that the prospective purchasers "withdrew from said escrow and refused to complete the transaction because of the said cloud on the title to said real property". That lawsuit was ultimately settled when the utility companies compromised and paid to appellants the sum of $3,000.

Appellants next urge that there was a waiver by respondents of the time limit fixed in the escrow instructions for performance, and that after this waiver a "notice terminating the waiver" and allowing a reasonable time for performance by appellants was necessary.

[3] Whether there has been a waiver is ordinarily a question of fact to be considered under all of the evidence. Lyons v. Brunswick-Balke, etc., Co., 20 Cal.2d 579, 583, 127 P.2d 924, 141 A.L.R. 1173; Jolin v. Spira, 94 Cal.App.2d 356, 360, 210 P.2d 704; Boyd v. A. E. J. Chivers Co., 134 Cal.App. 566, 569, 25 P.2d 878; Black v. Arnold Best Co., 124 Cal.App.2d 378, 268 P.2d 513.

The cases cited by appellants all involved factual situations justifying findings that there were waivers of the "time is of the essence" condition. None of them categorically assert this to be a question of law.

In Chin Ott Wong v. Title Ins. & Trust Co., 89 Cal.App.2d 183, 200 P.2d 541, decided by this court, performance of a real property sale agreement was to be completed by May 29, 1946. The plaintiff's own complaint alleged that on July 15 certain supplemental agreements were entered into. This court therefore found that the complaint affirmatively revealed the transaction to be pending long after the date to which the time-essence condition was to apply. Clearly this constituted a waiver.

Chin Ott Wong was retried and thereafter went to the Supreme Court, to be known as Chan v. Title Ins. & Trust Co., 39 Cal.2d 253, 246 P.2d 632. Here again the court found that the transaction was still pending long after the time limit set in the escrow instructions, and that under those facts the time clause must be deemed to have been waived.

Lifton v. Harshman, 80 Cal.App.2d 422, 182 P.2d 222, was somewhat comparable, although the court there noted that time was not declared to be of the essence of the contract. 80 Cal.App.2d at page 433, 182 P.2d 222. The escrow was to be completed within 30 days. Three days after expiration of the 30-day period, the seller deposited money in the escrow to be used toward eliminating encumbrances; thereafter she attempted to declare the purchaser's default. The court found her action to constitute a waiver of strict compliance with the date of completion.

In Tuffin v. Warfield, 72 Cal.App. 282, 237 P. 64, the purchasers actually took possession prior to the time-essence date specified in the contract. After the date had passed without full performance of the sellers' agreed obligations, the purchasers not only remained in possession of the land, but they cultivated it, made improvements thereon, and subsequently wrote a letter admitting the continued existence of their obligation to pay. Surely, said the court, these acts constituted a waiver.

The element of waiver is discussed in an entirely different context in Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935, 939, although parenthetically it may be noted there is disapproval of holding specified conduct to be a waiver as a matter of law "without regard to the circumstances under which it is made."

[4] There are two instruments involved here, the agreement of purchase, and the escrow instructions. Where the terms of an executory agreement for the sale of real property are clarified by the provisions of signed escrow instructions, both instruments are to be considered together in determining the understanding of the parties and in ascertaining their rights and obligations. Katemis v. Westerlind, 120 Cal.App.2d 537, 261 P.2d 553; Keelan v. Belmont Co., 73 Cal.App.2d 6, 12, 165 P.2d 930. Escrow instructions are customary and expected directions to carry into effect an executory agreement. King v. Stanley, supra.

The agreement of purchase provided that "time is of the essence of this contract, but the time for any act required to be done may be extended not longer than thirty days by the undersigned agent". The escrow instructions contained the following: "In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest date possible thereafter, unless we or either of us shall have made written demand upon you for the return of the money or instruments deposited by either of us; in which case you are instructed to return all instruments and/or cash to the respective parties hereto. * * *"

[5] The general rule is that time is not of the essence unless it has been made so by the express terms of a contract or is necessarily so from the very nature of the contract. Katemis v. Westerlind, supra. In order to render time thus essential, it must be shown in clear, unequivocal and unmistakable language. Miller v. Cox, 96 Cal. 339, 31 P. 161.

Katemis held a purchase agreement clause, comparable to the one in the instant case, to indicate performance on the specified date was not of crucial significance to the vendee. This was deduced from the permissive power of a mere agent to extend performance of any act for 30 days without notice.

It should be appreciated, however, that factually Katemis was an exaggerated case. There the instrument provided for performance on March 1, 1952. A check in full was mailed February 29, and because of an intervening weekend, did not arrive until March 3rd. On March 5th, cancellation of the escrow was demanded for failure to have completed the transaction by the 1st.

In this case we have no such marginal miscalculation. The escrow was to have been completed 30 days after February 28, 1950. Not until after that period had expired were efforts made to eliminate the easement and the guy wires. On April 17, respondents demanded their money be returned. On the following day, April 18, counsel for appellants informed respondents' counsel the wire had been removed, but not until April 26 was a quitclaim deed for the easement delivered to the title company.

Assuming nevertheless, but not necessarily deciding, that Katemis is controlling and that time was not of the essence here, we come next to the escrow instructions. They provided for performance within 30 days, but if not completed then, the period was extended to "the earliest date possible thereafter".

That "earliest date" conceivably could be prolonged to many years distant were it not for the further protective qualification: "unless we or either of us shall have made written demand" for return of the money or instruments.

[6] The right to make written demand for return of the money or instruments was an integral, clear and unequivocal clause in the instructions. Even if time was not of the essence, and even if it could be found that there had been a waiver of the precise time of performance, nowhere has it been suggested in the evidence or in argument that respondents waived their right to

make written demand for return of their money after the 30-day escrow period concluded. Were they to be denied that right, the court in effect would be altering the express terms of the contract. Neither a trial nor appellate court has the power to rewrite a contract.

[7] Where time is not of the essence of an instrument, compliance within a reasonable time after the specified due date constitutes compliance therewith. Walsh v. Walsh, 42 Cal.App.2d 287, 292, 108 P.2d 765. Milton Realty Co. v. Butterfield, 87 Cal.App. 772, 776, 262 P. 419.

What constitutes reasonable time is always a question of fact. In this instance it is limited to that time after the 30-day escrow period and before written demand upon the escrow company pursuant to terms of the instructions.

There is language in some cases, notably Chan v. Title Ins. & Trust Co., supra, suggesting that after a waiver, or when the date originally provided for performance has passed without decisive action, a definite notice demanding performance by another reasonable and specific date is required.

This question was decided in Weaver v. Casad, 86 Cal.App.2d 593, 195 P.2d 81, 82. The escrow instructions there required all acts to be performed in 90 days and "that if not so done the escrow could be cancelled on written notice to the escrow holder at any time thereafter". The acts were incomplete at the end of 90 days and written notice to cancel was given to the escrow holder. Said the court, 86 Cal.App.2d at page 595, 195 P.2d at page 82: "No further notice was required as the escrow instructions were controlling in this regard."

Though not required by any instrument to do so in this case, the escrow holder did send a 5-day notice to the sellers. While the notice was not in the form of a demand for performance, it did unequivocally advise that the purchasers had exhausted their patience and had demanded close of the escrow. At the expiration of the five days the Edison Company quitclaim still had not been executed.

[8] While the evidence does not reflect that the sellers were dilatory in any respect, all of the events indicate with equal perspicuity that the purchasers acted in good faith, and not arbitrarily. They proposed to purchase clear title to real property. Within a reasonable time after the specified date clear title was not offered to them. The trial court properly determined those circumstances did not create liability.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

TIDE WATER ASSOCIATED OIL CO.
v.
SUPERIOR COURT IN & FOR COUNTY OF LOS ANGELES.*

PACIFIC LIGHTING GAS SUPPLY CO.
v.
SUPERIOR COURT IN & FOR COUNTY OF LOS ANGELES.

BEAL et al.
v.
SUPERIOR COURT IN & FOR COUNTY OF LOS ANGELES.

Civ. A. Nos. 20248–20250.

District Court of Appeal, Second District, Division 2, California.

May 17, 1954.

Hearing Granted July 14, 1954.

Proceedings on application for peremptory writ restraining Superior Court of Los Angeles County, from taking any further steps based upon allegations of cross complaint filed in special proceeding by attorney general to enjoin wastage of natural gas. The District Court of Appeal, Moore, J., held that special proceeding by attorney general to enjoin wastage of natural gas is not open for pleadings by private parties against one another, to settle their personal grievances, and that proceedings on cross complaint would be prohibited.

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* Subsequent opinion 279 P.2d 35.

Peremptory writ issued.

McComb, J., dissented.

1. Mines and Minerals 🔑92.63

A proceeding brought by the attorney general pursuant to statutory authorization, and in exercise of police powers, to regulate the recovery of a natural resource is not a proceeding in which private parties, such as operators in an oil field, may plead and publish their personal grievances against one another, but it is a special proceeding which differs from an ordinary action whereby one party prosecutes another for the enforcement of protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Const. art. 6, § 5; Public Resources Code, §§ 3300 to 3305, 3310, 3312, 3313; Code Civ.Proc. §§ 22, 23.

2. Courts 🔑125

The jurisdiction of special proceedings conferred upon the Superior Court by the Constitution does not authorize that court to exceed the power conferred it by Legislature in the statutes authorizing the special proceeding. Const. art. 6, § 5; Public Resources Code, §§ 3300 to 3305, 3310, 3312, 3313; Code Civ.Proc. §§ 22, 23.

3. Pleading 🔑1

The Superior Court has no power in a special proceeding to entertain a pleading that does not strictly follow the procedure prescribed for such special proceeding. Const. art. 6, § 5.

4. Mines and Minerals 🔑92.63

In view of fact that Public Resources Code first prescribes a special procedure for special proceedings by attorney general pursuant to order of Director of Natural Resources to enjoin unreasonable waste of gas and then authorizes the application of part of Code of Civil Procedure relating generally to civil actions, intent is manifested that no step may be taken in such a proceeding that is not authorized by Public Resources Code with exception that if those sections should not make express provision for injunctive process with respect to any feature, resort may be had to chapter on injunction. Code Civ.Proc. §§ 1107, 1108, 1178, 1201.1, 1256; Public Resources Code, §§ 3310 to 3313; Probate Code, § 1233.

5. Mines and Minerals 🔑92.63

Provisions of Natural Resources Code relative to special proceeding by attorney general to enjoin the wastage of natural gas, indicate a legislative intent to limit the scope of the inquiry to the issue whether there has been unreasonable wastage of natural gas, and to provide for a proceeding summary and as expeditious as can be done consistently with the constitutional rights of private owners. Public Resources Code, §§ 3302 to 3313.

6. Mines and Minerals 🔑92.63

Provisions of Public Resources Code pertaining to unreasonable waste of gas, and authorizing special proceeding by attorney general to enjoin such wastage, do not authorize the filing of cross-complaint or counterclaims by defendant, since the act is of a regulatory character designed to be of service to the state and not to provide a leverage for private litigants to square accounts with one another. Public Resources Code, § 3300 et seq.

7. Mines and Minerals 🔑92.63

Operators in gas field, who had not filed a petition with the director of natural resources complaining of wastage of gas by other operators, as they might have done under statutes were not entitled, even if authorized to file a cross-complaint against other operators in special proceeding by attorney general to enjoin wastage, to ask judicial relief, since they had not, in any event, exhausted their administrative remedies. Public Resources Code, § 3302.

8. Administrative Law and Procedure 🔑229

In the event that an administrative remedy is provided by statute, relief must be sought from the administrative agency and such remedy must be exhausted before the courts will act, and the rule is not one to be varied according to the discretion of a court, but is a fundamental rule of procedure that applies to all courts.

9. Mines and Minerals 🔑92.63
Prohibition 🔑5(3)

State, upon institution of special proceeding through attorney general to enjoin wastage of natural gas, was entitled to a trial upon its complaint with reasonable celerity, without impediment by private controversies among the offending defendants, and thus further proceedings on cross-complaint of such character filed in special proceeding would be prohibited on application of an interested party. Public Resources Code, § 3312.

10. Prohibition 🔑3(2)

Where litigant by reason of vicissitudes of an unnecessary trial will be subjected to an unnecessary delay and expense in obtaining the relief he seeks, an appeal is not an adequate remedy.

◆

William F. Kiessig and Herbert W. Clark, San Francisco, for Tide Water Associated Oil Co.

Oscar C. Sattinger, Los Angeles, for Pacific Lighting Gas Supply Co.

Twitchell & Rice, Santa Maria, and Overton, Lyman, Prince & Vermille, Los Angeles, for Carlton Beal and others.

Harold W. Kennedy, County Counsel, John B. Anson, Deputy County Counsel, Los Angeles, for respondent Court.

Everett S. Layman, San Francisco, for real parties in interest. Kenneth S. Carey, Menlo Park, Lawrence W. Jordan, Jr., James M. Dennis, San Francisco, Everett S. Layman, Jr., Menlo Park, of counsel.

MOORE, Presiding Judge.

Petitioners demand a peremptory writ restraining the Superior Court of Los Angeles County from taking any further steps based upon the allegations of a cross-complaint filed by Porter Sesnon and others in proceeding number 617733 now pending in respondent court, other than to dismiss such pleading.

Proceeding number 617733 was filed by the Attorney General pursuant to the order of the Director of Natural Resources to enjoin the unreasonable waste of gas from the Sesnon Zone of the Aliso Canyon Oil Field in Los Angeles County. The Director's order followed a hearing on the complaint of certain operators in the oil field. He determined that there was probable cause for such complaint and ordered the Supervisor (State Oil and Gas) to hold a hearing. At a time fixed by him, the Honorable R. D. Bush, Supervisor of Oil and Gas, Department of Natural Resources, determined that there existed an unreasonable waste of gas in the Sesnon Pool of the Aliso Canyon Field; that 3,450,000 cubic feet of gas was excessively and wastefully produced from specified wells between July 1951 and April 1953; that production of gas from any well in the Sesnon Zone at a rate in excess of 4500 cubic feet to each barrel of oil is unreasonable, and while such gas is used for the generation of light, heat and power, there is other natural gas in sufficient quantities available for those uses. Thereupon, the Supervisor ordered all operators of wells producing gas from the Sesnon Zone at a rate in excess of 4500 cubic feet to each barrel of oil, to cease such excessive production. On appeal of the Supervisor's order, the District Oil and Gas Commissioners also found the production of gas from the Sesnon Zone to exceed 4500 cubic feet for each barrel of oil and that such production is clearly an unreasonable waste, and adopted the findings and order of the Supervisor as a final order with slight modifications.

On discovering noncompliance with such order, the Director of Natural Resources caused proceeding number 617733 to be instituted and a preliminary injunction was issued based upon count 1 of the complaint which is predicated upon section 3312, Public Resources Code.* It alleged that certain operators were "producing gas in quantities grossly in excess of the pool average gas-oil ratio and in quantities unreasonably wasteful." That such excessive production creates a rapid depletion of reservoir pressure which allows the gas held in solution in the oil to escape, thereby reducing mobility, increasing viscosity, requiring increased amounts of energy to recover the oil; causing a rapid depletion of gas available for moving the oil, with the result that large quantities of oil remain in the oil sands to be forever economically unrecoverable. It alleged that by reason of the wanton, excessive and unreasonable production of gas, approximately 5,000,000 barrels of oil have been lost to date and if such production continues, in excess of 12,000,000 barrels of oil otherwise recoverable will be lost.

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* Section 3312: "Whenever it appears to the director that the owners, lessors, lessees, or operators of any well or wells producing oil and gas or oil or gas are causing or permitting an unreasonable waste of gas, he may institute, or have proceedings instituted, in the name of the people of the State of California, to enjoin the unreasonable waste of gas regardless of whether proceedings have or have not been instituted under sections 3302 to 3305, and regardless of whether

All the operators in the Sesnon Zone were served with process and all answered. But the Sesnon group included a cross-complaint by which it alleged much statistical data with reference to the Aliso Canyon Oil Field, complaint to and action by the Supervisor of Oil and Gas, and the various steps until the filing of the complaint by the Attorney General. It alleged abuses of the Sesnon Pool by certain defendants in that the latter disregarded the order of the Supervisor and damaged the Sesnon group in the sum of $5,000,000 by producing from the waster wells at gas-oil ratios exceeding those specified in the Supervisor's order, and that such wasteful production will cause in excess of 15,000,000 barrels of oil, worth $37,500,000, to remain in the reservoir. It alleged that the operation of such waster wells, if not enjoined, will be an "obstruction to the free use of property of the people of the State and every owner and operator of a portion of the Sesnon Pool and every well therein which is not a waster." It prayed for a permanent injunction against every defendant, except the Sesnon group, from producing gas in unreasonably wasteful quantities or at gas-oil ratios in excess of 4500 cubic feet of gas for each barrel of oil produced from the same well at the same time and demanded $5,000,000 damages against every cross-defendant other than Standard and Tide Water, and $15,000,000 against Tide Water.

The cross-defendants demurred and moved to strike the cross-complaint on the ground that the proceeding 617733 was commenced pursuant to sections 3302 and 3310 of the Public Resources Code. The demurrer was overruled and the motion was denied.

The Law

There is no authority for filing a cross-complaint in such proceeding. Article 5 of Division 3, Chapter 1, of the Public Resources Code, sections 3300–3313, relates to "Unreasonable Waste of Gas". While section 3300 denounces the unreasonable waste of gas as unlawful, sections 3302 et seq., set forth the procedure for its enforcement. Upon the complaint of any operator in an oil field to the Director of Natural Resources of an unreasonable waste of gas, that official is authorized to make an investigation and if he finds probable cause for such complaint, he must order the Supervisor of Oil and Gas to hold a hearing at a time and place fixed by the Supervisor. Section 3302. At the hearing, all persons interested may be heard and a transcript of all proceedings shall be made by a stenographic reporter. Section 3305. The order of the Supervisor, when he finds the complaint justified, is filed with the Director and if not complied with may be appealed within five days to the board of district commissioners, otherwise the Director must enforce it. Section 3310. If it is appealed, it shall be heard *de novo* by the commissioners, section 3351, and their decision shall be filed with the Supervisor. Section 3353. Such decision as modified may be reviewed by the su-

an order has or has not been made therein.

"Such proceedings shall be instituted in the superior court of the county in which is situated the well or wells, or any thereof, from which the unreasonable waste of gas is occurring. The owners, lessors, lessees, or operators causing or permitting an unreasonable waste of gas in the same oil or gas field may be made parties to the action, although their properties and interests may be separately owned and their unreasonable waste separate and distinct."

perior court on the record from the commissioners. Section 3354. The sections on review are not pertinent here except to show that the regulatory provisions of Article 5, sections 3300 et seq., were designed to enable the administrative agencies to inquire into and correct abuses in the oil industry.

When the order of the district commissioners is not complied with by the operators of an oil field, it is the duty of the Director to cause the institution of proceedings in the name of the people of the State of California to enjoin the unreasonable waste of gas. Section 3310. In such suits a restraining order shall not be issued *ex parte* and an injunction shall not be refused or stayed pending appeal, but otherwise, the procedure on appeal shall conform with the provisions of Chapter III of Title VII of Part 2 of the Code of Civil Procedure. Section 3311. But section 3312 authorizes the director to institute proceedings in the superior court in the name of the people of the State to enjoin unreasonable waste of gas regardless of whether proceedings have been instituted under sections 3302 to 3305.

[1] Now, proceeding No. 617733 is brought pursuant to such statutory provisions in the exercise of the police power to regulate the recovery of a natural resource. It is not a proceeding in which the private parties may plead and publish their personal grievances against one another. It is therefore a special proceeding. It differs from an ordinary action whereby one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. Code Civ.Proc. §§ 22, 23; Carpenter v. Pacific Mutual Life Ins. Co., 10 Cal.2d 307, 327, 74 P.2d 761.

[2, 3] While jurisdiction of special proceedings is conferred upon the superior court, Constitution, Art. VI, § 5, such jurisdiction does not authorize that court to exceed the power conferred upon it by the legislature in the statutes that gave birth to the special proceeding. The occasion for the exercise of the jurisdiction is prescribed by the statute, sections 3310 and 3312; the limitations upon the issuance or dissolution of an injunction and upon the stay pending appeal are likewise provided by the statutes authorizing the special proceeding. Sections 3312, 3313. A number of decisions have emphasized that the superior court has no power in a special proceeding to entertain a pleading that does not strictly follow the procedure prescribed for such special proceeding. City of Pasadena v. Porter, proceeding in condemnation, 201 Cal. 381, 388, 257 P. 526, 53 A.L.R. 679; Estate of Davis, 136 Cal. 590, 597, 69 P. 412; Guardianship of Breslin, on an asserted claim against a guardian, no statute authorizing it, 135 Cal. 21, 22, 66 P. 962; Smith v. Westerfield, 88 Cal. 374, 378, 26 P. 206; Fisher v. Superior Court, petition to revoke probate of a will, 23 Cal.App.2d 528, 531, 73 P.2d 892. In Carpenter v. Pacific Mutual Life Insurance Company, supra, the court held that findings are not required in a special proceeding where the statute authorizing the proceeding has not incorporated the provisions of Part 2 of the Code of Civil Procedure, which demands findings in civil actions. The court said in effect in 10 Cal.2d at page 328, 74 P.2d 761, while findings are necessary in probate proceedings by virtue of section 1230 of the Probate Code, yet when the statute providing for a particular special proceeding is silent as to the necessity for findings, none is required. Such reasoning clearly demonstrates that unless the legislature in creating a special proceeding incorporates the provisions of Part II of the Code of Civil Procedure by reference into the creative statute, the procedure for such special proceeding will be exactly that which is prescribed in the act authorizing the special proceeding.

[4, 5] In the enactment of the Public Resources Code, no mention of Part II of the Code of Civil Procedure is to be found prior to section 3311 which provides for specific limitation upon the issuance of injunctions in such proceedings, "but *otherwise* the procedure, including the procedure on appeal, shall be conformable with the provisions of Chapter III of Title VII of Part 2 of the Code of Civil Procedure",

sections 525–534, relating to "Injunctions." Had the legislature intended the general provisions as to civil actions to govern courts in special proceeding for injunction against wanton waste in the recovery of oil, it would have merely adopted the rules of practice for civil "actions." But it did not do so. On the contrary, it authorized resort to Part 2 of the Code of Civil Procedure for guidance when the provisions of the Public Resources Code have been exhausted. The lawmakers followed the same pattern in their statute authorizing writs of review, mandate and prohibition. C.C.P. §§ 1107, 1108. Applications for such writs are special proceedings and the procedure is fully prescribed in the statute. In providing the Rules of Practice in the enforcement of liens, after a volume was completed on the subject of General Procedural Provisions, section 1183 et seq., they finally declare in section 1201.1: "Except as *otherwise* provided in this chapter, the provisions of Part 2 of this code are applicable to * * * the proceedings mentioned in this chapter." Similar resort to Part II is prescribed in Probate proceedings, Probate Code, § 1233; in Eminent Domain, C.C.P. § 1256; in Forcible Entry and Detainer, C.C.P. § 1178. Such uniform thoughtfulness on the part of the legislature in first prescribing a special procedure for special proceedings and then authorizing the application of Part 2 of the Code of Civil Procedure to any situation not mentioned in the statutes which authorize the special proceeding, is persuasive that no step may be taken in such a proceeding as No. 617733 that is not authorized by sections 3310 to 3313, Public Resources Code, with the exception that if those sections should not make express provision for the injunctive process with respect to any feature, resort may be had to the chapter in Injunction. Code Civ.Proc. § 526 et seq.; See Carpenter v. Pacific Mutual Life Ins. Company, supra, 10 Cal.2d at page 311, 74 P.2d 761. And the fact that consultation of Part 2 is confined by sections 3311 and 3313 to Chapter III, indicates the legislative intent to limit the scope of inquiry to the issue relevant to the enforcement of section 3300 requiring action to abate the plundering of a public resource, namely the unreasonable wastage of natural gas. That the proceeding was intended to be summary and as expeditious as is consistent with the constitutional rights of private owners and at the same time to prevent waste is indicated by the sections of Article 5, Chapter 1, Division 3; "Unreasonable Waste of Gas". It is unlawful, section 3300; the director, on receipt of the petition of any operator in the oil field requesting an inquiry into alleged unreasonable waste of gas, must order the supervisor to hold a hearing, section 3302; procedure preparatory to a hearing, sections 3303–3308; effect of the supervisor's order, section 3309; enforcement of the order by judicial proceeding, sections 3310–3313. The chapter goes so far as to forbid a stay of the injunction pending appeal and to make the findings of the supervisor prima facie evidence of an unreasonable wastage of gas, section 3311. Finally, any writ of review must be made returnable not later than ten days after its issuance and on the return day must be heard, unless continued for good cause, and in no event longer than thirty days.

[6] Is it reasonable to believe that the Legislature could have intended that such a procedure designed to effect a speedy investigation of charges of waste and a cessation thereof should become entangled in the mazes of private feuds and controversies of the numerous persons and corporations interested in an oil field? That the entire Act for preventing the waste of natural gas (secs. 3300 et seq.) could have contemplated the filing of cross complaints or counterclaims by the defendants is utterly abhorrent to the idea that the Act is of a regulatory character, designed to be of service to the State and not to provide a leverage for private litigants to square accounts with one another.

[7, 8] But even though a fair construction of the natural gas wastage act did not preclude the filing of a cross complaint in a special proceeding like No. 617733, the defendants had no right to do so. The sole remedy any of them had was to complain to the Director of Natural Resources by filing a petition. Section 3302. Prior

to the filing of its cross complaint, the Sesnon group filed no such petition. Neither did they cause any order to be made by the Supervisor or Director. Therefore, they are in no position to ask judicial relief. In the event that an administrative remedy is provided by statute, relief must be sought from the administrative agency and such remedy must be exhausted before the courts will act. Such rule is not to be varied according to the "discretion" of a court. It is a fundamental rule of procedure that applies to all courts. Abelleira v. District Court of Appeal, 17 Cal.2d 280, 292, 293, 109 P.2d 942, 132 A.L.R. 715. Where a city filed a condemnation suit to obtain land for the extension of a street and the superior court by *ex parte* order directed the city to take immediate possession of the land and to remove therefrom all spur tracks of the petitioner, the Supreme Court issued a writ of review and restrained further proceedings. After hearing, it annulled the ex parte order for the reason that the constitution vests in the Public Utilities Commission the exclusive power to abolish a railroad's street crossing. The city's complaint had not alleged the Commission's approval of the proposed relocation of a crossing over railroad tracks. "An order of the superior court taking from a public utility property being used by it for the service of the public, in the absence of any showing of prior approval by the commission, is one which is in excess of jurisdiction as that term is used in determining the right of a litigant to a writ of prohibition or review." Northwestern Pacific Railroad Company v. Superior Court, 34 Cal.2d 454, 458, 211 P.2d 571, 574.

Sesnon's Authorities

On behalf of the cross complaint, counsel for the Sesnon group submit Ambassador Petroleum Company v. Superior Court, 208 Cal. 667, 284 P. 445; Rescue Army v. Municipal Court, 28 Cal.2d 460, 171 P.2d 8; People v. Associated Oil Company, 212 Cal. 76, 297 P. 536; In re Sutter-Butte, 190 Cal. 532, 213 P. 974. No light is shed by any of them. The Ambassador Petroleum case quotes section 389 of the Code of Civil Procedure to the effect that "'when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in'" and quotes the "'general rule is, that the court will not order new parties defendant to be brought in against the will of the plaintiff, unless the presence of such new parties is necessary to the determination of the action.'" 20 Cal. at page 671, 284 P. 447. The pleadings in the instant proceeding disclose no reason why an adjudication of the issues raised by the answers cannot effect a "complete determination of the controversy." The State by its complaint seeks no more than to curb the excessive waste of gas. No new parties are proposed by the cross complaint in order to make the decree more far reaching. It merely proclaims new controversies with which the State has no concern.

People v. Associated Oil Company, supra [212 Cal. 76, 297 P. 536], involves the single issue of the validity of the "Oil and Gas Conservation Act", Stats.1915, p. 1404, whose provisions are now included in the Public Resources Code. The word cross complaint is not mentioned. In Rescue Army v. Municipal Court, supra, the question of filing a cross complaint is not raised. In re Sutter-Butte, supra, was a motion to dismiss an appeal. Nothing is said with reference to a cross complaint. It does furnish an intelligent definition of "special proceeding."

No Adequate Legal Remedy

[9] The assertion that petitioners have a plain, speedy and adequate remedy at law by appeal is a chimerical concept. How could an appeal be adequate to the State's needs? By the circuitous course provided by statute through the Director of Natural Resources, the Supervisor of Oil and Gas, the District Oil and Gas Commissioners, the State finally concluded that its facts justified calling upon the Attorney General to seek judicial enforcement of the Supervisor's order. If prohibition should be denied, the court would evidently be for an indefinite time engaged in a trial of the issues between the cross complainant

and the cross defendants. If a jury should be empaneled to try the legal issues, Pacific Western Oil Co. v. Bern Oil Co., 13 Cal.2d 60, 66, 87 P.2d 1045, a realization of the purposes of the original action would be further delayed and incalculable damage to the people would be done by the delay in enforcing the order of the Supervisor, if the court should determine that such findings are justified. In an action by the State to protect the public resources, it is entitled to a trial upon its complaint with reasonable celerity and not to have it impeded with private controversies among the offending defendants. Courts of appropriate jurisdiction are always open to litigants desirous of either legal or equitable relief against those whose acts are detrimental. It is therefore without reason that the State should be encumbered in its effort to serve the common good by sharing its forum with warring, hostile factions on matters that have no relation to the State's injunction against despoilers of public resources.

[10] An appeal is not adequate; neither is it plain nor speedy. It is not available until after a final judgment shall have been entered. It will therefore not suffice to do justice in a matter where the final order in an action is unduly delayed. Providence Baptist Church of San Francisco v. Superior Court, 40 Cal.2d 55, 60, 251 P.2d 10. Where a litigant by reason of the vicissitudes of an unnecessary trial will be subjected to an unnecessary delay and expense in obtaining the relief he seeks, an appeal is not an adequate remedy. Hampton v. Superior Court, 38 Cal.2d 652, 657, 242 P.2d 1.

It follows that the filing by Sesnon and others of the cross complaint in proceeding number 617733 pending in respondent court is not authorized by law and is an interference with the orderly procedure of a trial of the issues raised by the complaint and answers.

It is ordered that in each case the alternative writ issued herein is discharged and that a peremptory writ issue directing respondent court to strike the cross complaint of Porter Sesnon, Barbara Sesnon Cartan, William T. Sesnon, Jr., and B. F. Porter Estate, a corporation, from the files of such proceeding, and respondent court is prohibited from taking any steps under such pleading.

FOX, J., concurs.

McCOMB, Justice (dissenting).

I regret that I am unable to agree with the opinion of the majority of this court for the following reasons:

First: A writ of prohibition is not available to control issues and procedure in a pending cause or to test the correctness of rulings on motions to strike the whole or any part of a pleading in a cause over which the trial court has jurisdiction. If the trial court's ruling was erroneous, petitioners have an adequate remedy by appeal. In Lichtenstein v. Superior Court, 85 Cal.App.2d 486, at page 489 [2], 193 P.2d 508, 510, Mr. Justice Goodell accurately states the rule thus:

"The petitioner cites several cases decided *on appeal,* holding that cross-complaints in those cases were improper, but no case is cited where any court has held that by a writ of prohibition such pleadings can be controlled or ruled out in a piece of litigation then under way in a trial court. We have discovered no such case. On the contrary the law seems to be settled (21 Cal.Jur. p. 603) that 'The writ cannot be used for the purpose of regulating the issues in a pending cause and confining them to a particular scope, or to test the correctness of rulings on motions to strike out the whole or any part of a pleading filed in a cause over which a court has complete jurisdiction.'

"In 21 Cal.Jur., p. 583 it is said, 'Jurisdiction is power or "authority to hear and determine a cause." It does not depend upon the regularity of the exercise of that power or upon the rightfulness of the decisions there made, and the writ of prohibition is not, as a consequence, available to restrain or correct error,—to regulate or control procedure * * *'.

"In Abelleira v. District Court of Appeal, 17 Cal.2d 280, 287, 109 P.2d 942, 946, 132 A.L.R. 715, the court restates the familiar rule that 'If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition.'

"In County of Sutter v. Superior Court, 188 Cal. 292, 295, 296, 204 P. 849, 850, the Court expressed doubt whether the trial court 'did not manifestly err' in its action, but then went on to say that 'we do not think these questions can be raised by a proceeding in prohibition. * * * Even if an order made as an incident in the progress of a case involves the question of jurisdiction, prohibition cannot be invoked to annul the order or stop proceedings under it.'

"In the recent case of Rescue Army v. Municipal Court, 28 Cal.2d 460, 466, 171 P.2d 8, 12, the court said: 'A remedy is not inadequate merely because more time would be consumed by pursuing it through the ordinary course of law than would be required in the use of the extraordinary writ of prohibition. (Citations.) Experience has shown that most of the meritorious defenses are sustained and most of the unsubstantial constitutional or other objections are weeded out at the proper time on the proper showing during the trial or on appeal. These remedies are therefore considered adequate in the usual situations. If this were not so, then whenever jurisdiction is challenged prohibition would lie and the trial of the case would be interrupted until the reviewing court passed upon the intermediate question and appellate courts in many cases would be converted into *nisi prius* courts. (Agassiz v. Superior Court, 90 Cal. 101, 103, 27 P. 49.)' "

The rule is likewise succinctly stated by Mr. Chief Justice Gibson, speaking for the Supreme Court of California, in Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 287 [1], 109 P.2d 942, 946, 132 A.L.R. 715, as follows:

" 'Second is the nature of a writ of prohibition, which never issues to restrain a lower tribunal from committing mere error in deciding a question properly before it. If the lower court has power to make a correct determination of a particular issue, it clearly has power to make an incorrect decision, subject only to appellate review and not to restraint by prohibition. Hence, in examining the authorities, we must conclude that in those situations in which a writ of prohibition was issued, the particular action restrained was one beyond the jurisdiction of the court to take.' "

Second: Prohibition ordinarily issues to prevent future judicial acts rather than to undo acts already performed. Speaking for the Supreme Court of California, Mr. Justice Schauer, in Melancon v. Superior Court, 42 Cal.2d 698, 268 P.2d 1050, 1054, thus states the rule:

"In the first place, the rule is that prohibition ordinarily issues only to prevent future judicial acts rather than to undo acts already performed. (See State Board of Equalization v. Superior Court (1937), 9 Cal.2d 252, 254, 70 P.2d 482; 21 Cal.Jur. 581–582, and cases there cited.)"

In the instant case petitioners are attempting, by a writ of prohibition, not to prevent future judicial acts of the trial court, but, in fact, to undo acts already performed upon the theory they are erroneous.

Third: The expense of an appeal is not a sufficient reason to justify the issuance of a writ of prohibition. Mr. Justice Schauer, speaking for a unanimous Supreme Court, in Jollie v. Superior Court, 38 Cal.2d 52, 56 [1], 237 P.2d 641, 643, thus states the rule:

"In support of the petition for the writ, petitioner Jollie contends that his remedy of appeal from the proposed judgment in action 561185 would be inadequate in that it would entail a large expenditure of time and money. As declared in Mitchell v. Superior Court (1950), 98 Cal.App.2d 304, 305, 219 P.2d 861, 'This is insufficient.' "

Fourth: The trial court impliedly found that the matters set forth in the cross-complaint arose out of the transaction or happening set forth in the complaint. This finding, supported as it was by substantial evidence, is binding upon an appellate court. In Lumas Film Corp. v. Superior Court, 89 Cal.App. 384, at page 386, 264 P. 792, the court in passing upon an application for a writ of prohibition, says:

"On the other hand, the law is thoroughly settled that, on appeal, findings of fact made by the trial court on substantial evidence in support thereof are conclusive so far as the appellate tribunals are concerned. This court is advised of no reason why a similar rule should not obtain in a proceeding of the nature of that here involved. To hold otherwise, and to reach a conclusion different in any respect from that reached by the trial court, would amount to nothing less than a new trial by this court on the facts, and a substitution of the conclusion by this court thereon for the conclusion with reference to such facts as found by the trial court."

Again, in 89 Cal.App. on page 389, 264 P. on page 794, it is stated: "In denying the writ, the Supreme Court declared that it was neither necessary nor proper for it to determine whether the action in the superior court was one in which summons might be legally served by publication, and added the following:

"'* * * That court has jurisdiction of the subject-matter of the action, and whether it has obtained jurisdiction over the persons of petitioners is a question which (it) must determine for itself before entering judgment in the action, and which it has the same authority to pass upon as any other question of law or fact which may arise during its progress; and if, in the decision, error shall be committed to the prejudice of petitioners, the law affords them a plain, speedy, and adequate remedy by an appeal from any judgment which may be entered against them. (Agassiz v. Superior Court, 90 Cal. 101 (27 P. 49), and cases cited.)'"

For the foregoing reasons I would deny the applications for writs of prohibition and would discharge the alternative writs heretofore issued.

125 Cal.App.2d 458

OHLIGSCHLAGER v. OHLIGSCHLAGER.

Civ. 19854.

District Court of Appeal, Second District, Division 3, California.

May 24, 1954.

Divorce action. The Superior Court, Ventura County, Charles F. Blackstock, J., entered decree granting divorce to wife and husband appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained award of divorce to wife on ground of mental cruelty.

Judgment affirmed.

1. Divorce ⚷130

Evidence sustained award of divorce to wife on ground of mental cruelty.

2. Divorce ⚷34

It is not the policy of the law that a man and his wife should be required to live together, or be held in a marital relationship, when they have come to regard each other as mere strangers, even though one of them objects to termination of the marriage.

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Loughman & Fay, Ventura, for appellant.

Hammons, Willard & Todd, Ventura, for respondent.

SHINN, Presiding Justice.

Defendant James K. Ohligschlager appeals from a decree granting a divorce to plaintiff Barbara Jean Ohligschlager on grounds of mental cruelty. Custody of the parties' child was awarded to plaintiff, with rights of visitation to the husband. The community property of the parties was divided approximately equally. The court ordered defendant to pay plaintiff $250 per month alimony and support money until a final decree should be entered, whereafter defendant is to pay $75 per month for support of the child. The parties were married on December 28, 1946, at Ventura, California. At that time defendant was a first lieutenant in the Army Air Force. They separated in July 1950.

The court found that: "That during the said marriage of the parties hereto, the defendant treated the plaintiff in a cruel manner and in particular as follows:

"(a) That on numerous and various occasions during the course of the marriage, and so numerous as to constitute a continuous course of conduct, the defendant wilfully failed and refused to discuss with the plaintiff sundry mutual problems of the parties hereto; in particular, these problems related to place of residence of the parties, care of the parties' child, family finances, and the sex life of the parties hereto.

"(b) That on numerous occasions, and so repeatedly as to constitute a continuous course of conduct on his part, the defendant wholly failed to assume or exercise the ordinary and normal responsibilities of a husband in connection with the social obligations of the parties hereto, in that when the guests were in the home of the parties, the defendant would assume a passive attitude, would fail to take any active part in the conversation, would exercise no init[i]ative in extending hospitalities to such guests or in their entertainment, and would be moody and uncommunicative with the plaintiff and with such guests.

"That all of said conduct on the part of the defendant was wilful and wrongful and without cause or provocation on the part of the plaintiff; that said conduct caused the plaintiff great and extreme mental suffering and anguish, caused her embarrassment and humiliation and so affected her health and happiness that it was necessary for her to, and she did, consult physicians and psychiatrists as a result thereof; that the acts and course of conduct on the part of the defendant destroyed the legitimate objects of matrimony and there is no lik[e]lihood that the marriage can be saved; that a continuation of the marriage would cause a serious hazard to the health of this plaintiff.

"That the marriage relationship has so far deteriorated that the parties hereto cannot even live together as friends—that their relationship to each other is that of strangers."

[1] Defendant in his briefs argues the weight of the evidence and contends that the court should have found that he had not been guilty of extreme cruelty. We have read the record and are satisfied that the findings are supported by evidence that warranted the granting of a divorce. It is with reluctance that we summarize the evidence relative to the unhappy conditions under which these young people lived, which, as the court found were such "That the marriage relationship has so far deteriorated that the parties hereto cannot even live together as friends—that their relationship to each other is that of strangers."

From time to time defendant was transferred to different fields. Plaintiff accompanied him and encountered many difficulties in finding suitable abodes. During this time it was plaintiff's desire not to have children. She believed it would be unwise, not only because of the travelling made necessary by the transfers of defendant, but also because the marriage was an unhappy one. Upon the subject of having children there was sharp disagreement. Defendant had not only desires but strong scruples on the subject, of religious origin and belief, which were in conflict with plaintiff's desire to use measures which would prevent conception. Plaintiff, against her better judgment, gave in; although not planned, a child was born while the parties were living in Tacoma, in August 1948. For the greater part of their married life the couple have never been happy together, and plaintiff believed it would be wrong to bring any more children into the family. All sexual relations were terminated in September 1949. In July 1950 plaintiff returned to her former home in Ventura, leaving defendant in Tacoma. She returned to Tacoma and again went to Ventura. In July 1951 defendant spent three weeks in Ventura, living under the same roof with plaintiff. He was sent to Labrador and returned in August 1952. Soon after, plaintiff instituted this action. There was evidence that defendant was habitually taciturn, uncommunicative, unwilling to discuss family affairs and problems, secretive with respect to his finances, reluctant to give plaintiff money which she needed, indifferent toward the forthcoming birth of the child, unsociable toward guests and unwilling to make an effort to make the marriage a successful one. All this was testified to by plaintiff and her mother. The latter visited the couple in Tacoma for six weeks and testified that they treated each other as strangers. After plaintiff had spent two months in Ventura, following the birth of the baby, she returned to Tacoma in order to make another effort to save the marriage. Fearing that she might be the one at fault she consulted a psychiatrist, seeking an answer to her problem. She urged defendant to do the same, but upon the advice of his chaplain he declined to do so. Shortly before the trial he consulted with someone in the American Institute of Family Relations. Whatever advice the parties received failed to help the situation.

[2] The law provides a method of escape from marital relationships that have become intolerable to one or both of the parties. This was such a marriage. There were mutual desires to solve the marital problems and avoid a divorce, but the sincere efforts of plaintiff had failed and it appeared clearly from the evidence that further efforts would have been futile. It is not the policy of the law that a man and his wife should be required to live together, or be held in a marital relationship, when they have come to regard each other as mere strangers, even though one of them objects to its termination. And when it appears that honest and repeated efforts have been made by the complaining party to overcome the causes of the failure of the marriage, and that they cannot be overcome, it would be an act of injustice to withhold the relief which the law provides. Defendant had his day in court before an understanding and patient judge, and he has been found at fault. In his testimony he stoutly defended his own conduct and placed the blame for failure of the marriage upon his wife. The finding of cruelty, wrongfully inflicted, means only that it was within defendant's power to change his ways, which were the principal cause of dissention, and that his failure to do so was wrongful. It is not given to a reviewing court to place itself in the position of the trial judge, even if that were possible. And it is particularly true that in a contested suit for divorce an opportunity to observe the demeanor of the parties, to weigh their motives and judge of their characters, is indispensable to an intelligent and just decision with respect to the responsibility for disruption of the marriage.

Defendant earns $550, net, per month as a Captain in the Air Corps. While he remains married his subsistence allowances amount to about $130 per month. Plaintiff is willing to obtain employment and become self-supporting. The court has found that continuation of the marriage would cause a serious hazard to the health of plaintiff. This finding has support in the evidence. The court denied defendant's motion for a new trial, upon which motion defendant no doubt advanced all the arguments that are made on the appeal. We are satisfied that the court reached an eminently wise and just decision and that the appeal is without merit.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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125 Cal.App.2d 291

KILFOY et al. v. FRITZ.

Civ. 20011.

District Court of Appeal, Second District,
Division 2, California.
May 18, 1954.

Action by administrators of decedent's estate against decedent's niece, to recover for estate money and securities which came into defendant's possession during last months of decedent's lifetime and which defendant claimed to be a gift to her. The Superior Court, Los Angeles County, William J. Palmer, J., rendered judgment against defendant for a portion of the cash and property which had come into her possession, which judgment represented sum which had been on deposit in bank account at time of decedent's death, and certain bonds and currency. Defendant appealed. The District Court of Appeal, McComb, J., held that where there was no fraud or undue influence in relationship between decedent and defendant, a conclusive statutory presumption arose that money deposited in joint bank account of defendant and decedent was done so with intent of vesting title to such deposit and any additions thereto in survivor of the parties who had established the account, but that evidence sustained findings with respect to the bonds and the currency.

Judgment as to joint bank account reversed with directions; judgment in other respects affirmed.

1. Gifts ⚷49(2)

In action by administrators of decedent's estate against decedent's niece to recover for estate money and securities which came into defendant's possession during last months of decedent's lifetime and which defendant claimed to be a gift to her, evidence sustained finding that there was no fraud or undue influence in the relationship between defendant and decedent.

2. Joint Tenancy ⚷3

Where there was no fraud or undue influence in relationship between decedent and his niece, a conclusive statutory presumption arose that money deposited in joint bank account of decedent and his niece was done with intent of vesting title to such deposits and any additions thereto in survivor of the parties who had established the account. Gen.Laws, Act 652, § 15a.

3. Contracts ⚷168

That which is implied by law becomes as much a part of the written contract as that which is therein expressed.

4. Joint Tenancy ⚷8

Bank Act provision relating to joint deposits, which provision was in effect at time joint bank account was entered into, became a part of the joint tenancy contract. Gen.Laws, Act 652, § 15a.

5. Contracts ⚷167

Decisions of the reviewing courts of the state interpreting statutes applicable to a contract are part of such contract.

6. Joint Tenancy ⚷6

The death of one joint tenant causes the previous concurrent interest of the survivor to ripen without anything more, and his sole ownership of the whole is not by descent but by the fact of survivorship.

7. Gifts ⚷49(1)
Trusts ⚷372(3)

In action by administrators of decedent's estate to recover for estate money and securities which came into defendant's possession during last months of decedent's lifetime, and which defendant claimed to be a gift to her, evidence sustained findings that a portion of the bonds and money was intended as a gift to defendant, but that decedent intended the remaining portion to be distributed by defendant to undesignated charities, and that, upon decedent's death before any of such funds were so distributed, the portion earmarked for charities became property of decedent's heirs.

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Louis J. Euler, Los Angeles, and George W. Rochester, Beverly Hills, for appellant.

Freston & Files, John B. Petermann, Los Angeles, and Meredith L. Campbell, National City, for respondents.

McCOMB, Justice.

This action was instituted for the purpose of recovering for the estate of John Fritz a large sum of money and securities which came into the possession of appellant during the last months of decedent's lifetime and which appellant claims to be a gift to her.

Facts: John H. Fritz died on the morning of October 1, 1949, at the age of 85 years. He had been failing for some time and had been seriously ill for a considerable period. In February of 1946, appellant, his niece, came to live with him. She was paid $25 per week for her services plus her room and board. She remained as his nurse, companion and housekeeper from that time until the date of his death.

During the period prior to decedent's death and immediately thereafter she came into possession of large sums of currency and government bonds, which, with a balance in a bank account, amounted to in excess of $55,000.

The trial court rendered judgment against appellant for the aggregate sum of $19,046.46, which was a portion of the cash and property which had come into appellant's possession. The judgment represented three different items: (1) the sum of $9,889.89, which had been on deposit in a bank account at the time of decedent's death; (2) bonds of the value of $6,750; and (3) currency aggregating $2,406.25.

Questions: First: *Did the trial court err in receiving evidence to show (1) the ownership of money, and (2) the intent with which it was deposited in the joint bank account of decedent and appellant?*

Yes. On October 11, 1947, appellant and decedent opened a joint bank account with the Security-First National Bank of Los Angeles. The contract provided that upon the death of either the survivor should have vested title to all monies remaining in the joint account.

At the time this bank account was opened section 15a of the Bank Act (1 Deering's Gen.Laws, 1937, Act 652) read in part as follows:

> "Joint deposits. When a deposit shall be made in any bank by any person or persons whether minor or adult in the names of such depositor or depositors and another person or persons, and in form to be paid to any of them or the survivor or survivors of them, such deposit and any additions thereto made by any such persons after the making thereof, shall become the property of such persons as joint tenants, and the deposit together with all dividends or interest thereon, shall be held for the exclusive use of such persons and may be paid to any of them during their lifetime or to the survivor or survivors after the death of one or more of them, and such payment and the receipt or acquittance of the person or persons to whom such payment is made shall be valid and sufficient release and discharge to such bank for all payments made on account of such deposit prior to the receipt by such bank of notice in writing not to pay such deposit in accordance with the terms thereof. The making of the deposit in such form shall, in the absence of fraud or undue influence, *be conclusive evidence*, in any action or proceeding to which either such bank or the surviving depositor or depositors may be a party, of the intention of such depositors to vest title to such deposit and the additions thereto in such survivor or survivors."

[1, 2] The trial court correctly found, supported by substantial evidence, that there was no fraud or undue influence in the relationship between appellant and decedent. Therefore section 15a of the Bank Act was applicable to the joint bank account which the parties had created, and there was a conclusive presumption that the money deposited in such account was done so with the intent of vesting title to such deposit and any additions thereto in the survivor of the parties who had established the account. (Paterson v. Comastri, 39 Cal.2d 66, 73[9] et seq., 244 P.2d 902.)

[3, 4] Respondents contention is not sound that section 15a of the Bank Act, supra, was repealed so far as the facts of this case are concerned by section 852 of the Banking Code, which was in effect at the time of the death of decedent, and which did not contain the former provisions of section 15a of the Bank Act establishing a conclusive presumption as to the right and interest of the surviving party to a joint bank account. Though it is true that section 852 of the Banking Code became effective at midnight on October 1, 1949, and that decedent did not die until 2:00 a. m. on October 1, 1949, it is the law that that which is implied by law becomes as much a part of a written contract as that which is therein expressed. (Southern Pacific Milling Co. v. Billiwhack, etc., Farm, 50 Cal.App.2d 79, 83[2], 122 P.2d 650.) Thus section 15a of the Bank Act became a part of the joint tenancy contract entered into by appellant and decedent on October 11,

1947. (Paterson v. Comastri, supra, 39 Cal.2d 72[6], 244 P.2d 905, 906; Wallace v. Riley, 23 Cal.App.2d 654, 666[6], 74 P.2d 807.)

[5, 6] Moreover the decisions of the appellate courts of this state interpreting statutes applicable to a contract are part of such contract (Blair v. Williams, 86 Cal. App. 676, 681[4], 261 P. 539); also the death of one joint tenant causes the previous concurrent interest of the survivor to ripen without anything more, and his sole ownership of the whole is *not by descent* but by the fact of survivorship. (Wallace v. Riley, supra, 23 Cal.App.2d 662, 74 P.2d 811, 812.)

Applying the foregoing rules to the case at bar it is clear that section 15a of the Bank Act having become an integral part of the contract creating the joint tenancy, there was a conclusive presumption that the funds therein belonged to the survivor in the absence of a finding of fraud or undue influence, and that appellant took such sum as a survivor free of any claim of decedent, his heirs or executors, and that appellant did not take such fund by way of descent. Thus, rules applicable to property taken by descent are not here in point.

The result is that the trial court erred in admitting parol evidence to show the funds in the bank account were placed there in trust and for the benefit of decedent, and finding No. IV* of the trial court is thus not supported by the evidence and the judgment as to such sum is contrary to the law. The trial court should have awarded the entire bank account in the sum of $9,889.98 to appellant.

[7] Second: *Were the following findings supported by the evidence?*

"Finding No. VI. That on or about June 1, 1946, the decedent, John H. Fritz, placed in the possession of defendant a package containing United States Treasury Bonds having a face value of $27,000 that said decedent, at the time of delivering said bonds to defendant, was competent to dispose of his property; that at the time of said delivery decedent instructed defendant that 75% of said bonds were for her, and that 25% were 'for charity for the poor and education.' That at the time of so delivering said bonds, the decedent intended to make a gift of 75% thereof to the defendant, a gift which she accepted, and he intended that she be his agent in giving away to others, as charitable gifts for the poor and for education, bonds or proceeds of bonds, amounting in value to 25% of said sum of $27,000, that is, to the sum of $6,750.

"Finding No. VII. That thereafter defendant cashed $13,000 of said bonds, for her own use and purpose, and at the time of trial, had the remainder, of $14,000, in her apartment at 338 South Alvarado Street, Los Angeles, California * * * During the life of decedent, no part of said $27,000 in bonds, or of the interest or proceeds from the sale of any of them, was delivered to any charity or used for any charitable purpose or otherwise given away for the poor or for education. The decedent did not at any time designate any specific charity or donee for or to which or for or to whom said bonds or any thereof or their proceeds or any thereof were or was to be distributed. It was at all times the intention of decedent that defendant have no property or other interest in the 25% part of said bonds which, by his specific direction, was to go to charity.

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* Finding No. IV reads:

"During his lifetime decedent established a checking account at the Security-First National Bank of Los Angeles, Fifth and Spring Branch, in the name of 'John H. Fritz or Catherine Fritz.' All the funds deposited in said account were the funds of John H. Fritz, and nothing was ever contributed to said account by Catherine Fritz. During the lifetime of decedent Catherine Fritz drew checks on said account solely for the use and benefit of John H. Fritz. The sole purpose of establishing said bank account in the two names as aforesaid, was to make it possible to take care of the living expenses and other current obligations of John H. Fritz at times when it might be inconvenient or physically impossible for him to do so personally. It was agreed between John H. Fritz and Catherine Fritz at the time said account was established, and it was the understanding and intention of both of them at all times thereafter, that said account and the placing of the same in both names were solely for the benefit and convenience of John H. Fritz, and that Catherine Fritz had no interest therein and would have no survivorship right therein. At the death of John H. Fritz there was a balance of $9,889.89, in said account. The sum of $7,889.89 was withdrawn from said account by defendant and was converted by her to her own use, and $2,000 remains in said account."

"Upon the death of said John H. Fritz, bonds or funds in the possession of defendant and representing, being or derived from said one-fourth part of said bonds in the total value of $27,000, the value of said one-fourth part being $6,750, were the property of the heirs of said John H. Fritz, who were entitled to have such bonds or funds in the value of $6,750 delivered to their representative or representatives in the administration of said estate. That defendant had refused to make such delivery, and in so refusing she has converted said property to her own use, and this she has done in spite of the fact that after the death of John H. Fritz she did pay out for charitable and benevolent purposes substantial sums received into her possession from property previously belonging to said decedent."

Yes. These findings were supported by the evidence. It should be noted at the outset that the trial court did not find as asserted by appellant that the whole of the property was a gift to her. What the court found was that the entire property was placed in the possession of appellant, not that there was a gift of the whole. Appellant testified that her uncle had told her about the money in the valise, some of which was marked with slips of paper and part of which was to go to charity. She testified, "He said, 'It is marked on the slips of paper just how I want you to do it, and if at all possible I would like to have you carry out my intention.' Of course, I couldn't carry it all out after his death because I spent some for litigation, and my expenses were very, very great, so I couldn't carry it out like I should have." In response to a question by the court as to whether the things she was to give to other people or to charity were to be so given before or after decedent's death, appellant testified it was to be afterward.

Appellant contends that since upon a certain note which accompanied bonds given into the possession of appellant which read, "25% of these bonds for charity, for the poor and education," and a later note on the same slip, "These her own property in this package, bonds," that the trial court should have found that the bonds in the package were the sole property of appellant. This construction does not necessarily follow. The construction placed thereon by the trial court is a reasonable one, that is, the bonds with the exception of 25% thereof were to be the property of appellant.

The foregoing evidence clearly sustains the trial court's findings.

Third: *Was there substantial evidence to sustain this finding?*:———

"Finding No. VIII. On or about June 1, 1946, decedent placed in the possession of defendant various packages containing United States currency. All said currency was intended by decedent to be *inter vivos* gifts to defendant excepting the sum of $2,406.25, which sum decedent placed in defendant's possession for delivery by her as his agent to unnamed and unspecified charities. It was at all times the intention of decedent that defendant have no property or other interest in said sums of currency totaling $2,406.25. It was at all times decedent's intention that defendant act as his agent for the distribution of said $2,406.25 to charity. Defendant did not during the lifetime of decedent distribute or pay over any part of said $2,406.25 to any charity or use it for any charitable purpose; and upon the death of John H. Fritz, said sum of $2,406.25 became the property of his heirs, who were entitled to have said sum delivered to their representative or representatives in the administration of said estate. Defendant has failed and refused to pay over to plaintiffs, as administrators, any part of said $2,406.25."

Yes. The evidence discloses that one of the bundles of cash handed to appellant amounted to $3,700. Accompanying the bundle was a slip of paper indicating one half the sum was to go to charity. Another bundle contained the sum of $2,225 and was accompanied by a slip of paper indicating that 25% was to go to charity. It is obvious that one half of $3,700 and 25% of $2,225 equal $2,406.25, the amount which the court found decedent told appellant to devote to charity. Therefore the trial court's finding is sustained by the evidence.

The judgment is reversed with directions to make appropriate findings with respect to the joint bank account in accordance with the views herein and then to enter judgment accordingly. The judgment in other respects is affirmed.

MOORE, P. J., and FOX, J., concur.

PACIFIC MUT. LIFE INS. CO. OF CALIFORNIA et al.*

v.

MALONEY et al.

Civ. 15977.

District Court of Appeal, First District, Division 2, California.

May 14, 1954.

As Amended on Denial of Rehearing June 11, 1954.

Hearing Granted July 13, 1954.

Proceeding for a peremptory writ of mandate to rescind an order of the Insurance Commissioner approving a plan to mutualize a life insurance corporation. From a judgment of the Superior Court, County of Los Angeles, Paul Nourse, J., denying a peremptory writ and discharging an alternative writ staying execution of the plan, petitioners appealed. The District Court of Appeals, Gibson, J. pro tem., held that the evidence justified the Commissioner's conclusion that the plan was fair and equitable to, and protected the rights and interests of, all interested parties.

Judgment affirmed.

1. Mandamus 🔑168(4)

Evidence justified Insurance Commissioner's conclusion that plan for mutualization of life insurance corporation was fair and equitable to, and protected rights and interests of, all interested parties, including a stockholder in whose right petitioners for peremptory writ of mandate to rescind Commissioner's order approving plan sued. Code Civ.Proc. § 1094.5; Insurance Code, §§ 11526(c), 11527.

2. Mandamus 🔑168(4)

Detailed facts need not be spread on record in proceeding for peremptory writ of mandate to rescind Insurance Commissioner's order approving plan to mutualize life insurance corporation, but statute requires only that commissioner's approval be supported by substantial evidence in light of whole record, in which case Superior Court and District Court of Appeal are bound thereby. Code Civ.Proc. § 1094.5; Insurance Code, §§ 11526(c), 11527.

3. Courts 🔑91(1)

Supreme Court decisions upholding legality and propriety of plan for rehabilitation of insolvent life insurance corporation's business by organizing new solvent life insurance corporation foreclosed District Court of Appeal from considering claim of old corporation and its stockholders that Superior Court judge's order approving rehabilitation agreement was not res judicata in claimants' proceeding for peremptory writ of mandate to rescind Insurance Commissioner's order approving plan to mutualize new corporation. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1037(d), 1043, 11526(c), 11527.

4. Judgment 🔑744

An adjudication of validity of agreement is res judicata in subsequent proceeding, though a litigant therein urges some reason not urged in prior proceeding for alleged invalidity of agreement.

5. Judgment 🔑677, 678(1)

An adjudication of validity of plan for rehabilitation of insolvent insurance corporation's business by organizing new solvent life insurance corporation was res judicata, in subsequent proceedings for court's approval of plan, as to all parties represented therein, persons in privity with such parties and parties represented by them through class representation, though a series of orders was contemplated. Insurance Code, §§ 1037(d), 1043.

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* Opinion vacated 285 P.2d 636.

6. Judgment 🔑564(2)

One of a series of orders in a proceeding becomes res judicata, if such order is appealable and not appealed from or is affirmed on appeal therefrom.

7. Judgment 🔑720

A Superior Court judge's order, approving agreement for rehabilitation of insolvent life insurance corporation's business by organizing new solvent life insurance corporation after full litigation of issue in adversary proceeding, was res judicata as to such agreement and plan for mutualization of new corporation in subsequent proceeding by old corporation and its stockholders for peremptory writ of mandate to rescind Insurance Commissioner's order approving mutualization plan. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1037(d), 1043, 11526(c), 11527.

8. Insurance 🔑32

The Insurance Commissioner was not bound to determine going concern value of new solvent life insurance corporation, organized pursuant to agreement for reorganization of old insolvent life insurance corporation, by ascertaining new corporation's earning capacity and capitalizing it at appropriate rate on basis of economic surveys and special studies of relevant criteria before approving plan for mutualization of new corporation, as new corporation's stock could be evaluated either on basis of its market value, corporation's going concern and investment value, or usual method of evaluating all stock of insurance company. Insurance Code, §§ 1043, 11526(c), 11527.

9. Insurance 🔑46

A price determination committee, appointed pursuant to agreement for rehabilitation of insolvent life insurance corporation by organizing new solvent life insurance corporation, properly determined investment or going concern value of new corporation's stock on basis of capitalization of its earnings applicable to stockholders' equity after fixing pattern of corporation's future earnings on sufficient evidence. Insurance Code, § 1043.

10. Insurance 🔑32

The Insurance Commissioner's order, approving plan for mutualization of solvent life insurance corporation organized pursuant to agreement for rehabilitation of old insolvent life insurance corporation's business, was not invalid as due to mistake of law, arbitrary and constructively fraudulent because Commissioner failed to determine investment value of new corporation's stock, where a committee, in which power and duty to determine value and price of such stock was lodged by agreement, made reasonable determination of value thereof after considering several conventional and approved methods of valuation. Insurance Code, §§ 1043, 11526(c), 11527.

11. Judgment 🔑566

A reservation of jurisdiction to make further orders in premises by paragraph of Superior Court judge's order approving agreement for rehabilitation of insolvent life insurance corporation's business by organizing new solvent life insurance corporation did not show that such order was not res judicata as to rehabilitation agreement in subsequent mandamus proceeding to rescind Insurance Commissioner's order approving plan to mutualize new corporation, as such reservation did not stultify previous order, but was intended to permit court to make whatever orders it deemed proper to carry such order to fruition. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1037(d), 1043, 11526(c), 11527.

12. Judgment 🔑720

A Superior Court judge's order, approving agreement for rehabilitation of insolvent life insurance corporation's business by organizing new solvent life insurance corporation, was res judicata as to right or option, given new corporation's participating life policyholders by provision of such agreement, to mutualize such corporation, in subsequent mandamus proceeding to rescind Insurance Commissioner's order approving mutualization plan. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1037(d), 1043, 11526(c), 11527.

13. Judgment 🔑720

The Superior Court's approval of agreement for rehabilitation of insolvent life insurance corporation's business by organizing new solvent life insurance corporation rendered question of applicability of sections of Insurance Code concerning mutualization of solvent life insurance corporations to mutualization of new corporation, as provided in such agreement, instead of sections providing for mutualization of insolvent life insurance corporations by Commissioner as conservator or liquidator thereof, res judicata in mandamus proceeding to rescind Commissioner's order approving plan to mutualize new corporation. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1043–1052, 11525–11533.

14. Insurance 🔑32

The sections of Insurance Code providing for mutualization of solvent life insurance corporations, rather than sections providing for mutualization of insolvent life insurance corporations by insurance commissioner as conservator or liquidator thereof, apply to mutualization of solvent life insurance corporation organized pursuant to agreement for rehabilitation of insolvent life insurance corporation's business. Insurance Code, §§ 1043–1052, 11525–11533.

15. Insurance 🔑32

In mandamus proceeding to rescind Insurance Commissioner's order approving plan to mutualize new solvent life insurance corporation organized pursuant to agreement for rehabilitation of old insolvent life insurance corporation's business, court is not required to disregard new corporation's corporate entity and treat it as though it were old corporation. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1043–1052, 11525–11533.

16. Corporations 🔑1

The entity of corporation cannot be disregarded, in absence of allegation and proof that organization thereof was fraudulent or prompted by dishonesty, that injustice would be done if corporate entity were not disregarded, and that individuality and separateness of corporation and its stockholders have ceased.

17. Insurance 🔑32

The validity of life insurance corporation's directors' adoption of plan for mutualization of corporation by majority vote, as required by statute, cannot be attacked on ground that directors were insufficiently informed of data on which plan was based. Insurance Code, §§ 11525, 11526.

18. Insurance 🔑32

A solvent life insurance corporation's directors' approval of plan to mutualize corporation by majority vote, as required by statute, was not invalid on ground that directors were not adequately informed of data on which plan was based, where each director had received copies of stock price determination committee's report and mutualization plan and board received reports and heard informed witnesses' testimony that plan could be practically accomplished with due regard to interests of all interested persons, that it was based on sound principles and fair, just, equitable and financially feasible, and that price of and terms of payment for corporation's stock were reasonable and fair. Insurance Code, §§ 11525, 11526.

19. Insurance 🔑32

An insolvent life insurance corporation and its stockholders were not entitled to rescission of Insurance Commissioner's order approving plan to mutualize new solvent life insurance corporation, organized pursuant to court approved rehabilitation agreement wherein Commissioner, as conservator of insolvent corporation and shareholder of new corporation, consented to any mutualization plan promulgated by price determination committee, on ground that new corporation's stockholders never validly approved mutualization plan, that such consent of conservator did not constitute valid approval thereof, and that he could not delegate his power to committee. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1043, 11525–11533.

20. Contracts 🔑284(1)

Agreements in which obligations depend on fact determinations to be made thereafter by third persons are valid.

21. Insurance 🔑32

The Insurance Commissioner, as conservator or liquidator of insolvent life insurance corporation, was not precluded from giving his approval, as trustee for corporation's shareholders, to plan for mutualization of new solvent life insurance corporation organized pursuant to agreement for rehabilitation of insolvent corporation's business, before adoption of such plan by vote of majority of new corporation's board of directors, in absence of statutory provision that steps required to mutualize solvent insurance corporation must be taken in order enumerated in statute. Insurance Code, §§ 1043, 11526.

22. Insurance 🔑32

The Insurance Commissioner, agreeing, as conservator or liquidator of insolvent life insurance corporation, to consent to any plan promulgated by stock price determination committee for mutualization of new solvent life insurance corporation organized pursuant to agreement for rehabilitation of insolvent corporation's business, will be deemed to have consented to such plan at proper time, though after adoption thereof by new corporation's board of directors, as equity will regard as done that which should have been done and substance should prevail over mere form. Civ.Code, § 3529; Insurance Code, §§ 1043, 11526.

23. Insurance 🔑32

A claim that some persons testifying before Insurance Commissioner in proceeding for his approval of plan to mutualize life insurance corporation were interested witnesses goes only to weight of their testimony, not its admissibility. Insurance Code, §§ 11526(c), 11527.

24. Mandamus 🔑168(4)

In mandamus proceeding to rescind Insurance Commissioner's order approving plan to mutualize life insurance corporation, a claim that some persons who testified before Commissioner were interested witnesses cannot be upheld, in absence of showing that any evidence received by Commissioner was not trustworthy or that any stock price determination committeeman, valuer or witness was guilty of partiality, bad faith or misconduct in their appraisals or testimony. Code Civ.Proc. § 1094.5; Insurance Code, §§ 11526(c), 11527.

25. Constitutional Law 🔑278(1)

The Insurance Commissioner's approval of plan for mutualization of new life insurance corporation, acquiring assets and assuming liabilities of old insolvent life insurance corporation pursuant to rehabilitation and reinsurance agreement, did not have effect of taking property of old corporation and its stockholders in violation of due process clause of Constitution, as such approval was merely a permit and did not compel new corporation or life policyholders thereof to approve plan, nor Commissioner, as old corporation's stockholder, to dispose of such corporation's stock as provided in plan. Insurance Code, §§ 1043, 11525–11533.

26. Constitutional Law 🔑278(1)

An insolvent life insurance corporation and its stockholders were not deprived of substantive due process by Insurance Commissioner's approval of plan for mutualization of new solvent life insurance corporation, organized pursuant to agreement for rehabilitation of old corporation's business, because new corporation's stock was valued as of present, time of payment therefor was fixed long in future, payment was conditional, there was no provision for reasonable interest, and price paid was grossly inadequate, in view of evidence warranting conclusion, adopted by Commissioner and upheld by Superior Court, that mutualization plan was fair and equitable. Insurance Code, §§ 1043, 11525–11533.

27. Mandamus 🔑73(1)

Where insolvent life insurance corporation and its stockholders, seeking writ of mandate to rescind Insurance Commissioner's order approving plan to mutualize new solvent life insurance corporation organized pursuant to agreement for rehabilitation of insolvent corporation's business were parties to proceeding in which rehabilitation agreement was proposed and their representatives participated in seeking commissioner's approval of mutualization plan, they could not complain of terms thereof. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1043, 11526(c), 11527.

28. Mandamus ⚿187(9)

On appeal from Superior Court's judgment denying peremptory writ of mandate to rescind Insurance Commissioner's order approving plan to mutualize life insurance corporation organized pursuant to agreement for rehabilitation of old insolvent life insurance corporation's business, District Court of Appeal cannot consider purported agreement by certain person to pay specified amount for stock in old corporation, subject to important contingencies. Code Civ.Proc. 1094.5; Insurance Code, §§ 1043, 11525–11533.

29. Mandamus ⚿187(9)

On appeal from judgment denying peremptory writ of mandate to rescind Insurance Commissioner's order approving plan to mutualize life insurance corporation organized pursuant to agreement for rehabilitation of old insolvent life insurance corporation's business, District Court of Appeal cannot hold that Commissioner erred in his conclusions, even if court gives full consideration to purported agreement by certain person to pay specified sum for stock in old corporation, as such offer would be merely cumulative evidence and not so conclusive as to compel direction of judgment for appellant. Code Civ.Proc. § 1094.5; Insurance Code, §§ 1043, 11525–11533.

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Joseph L. Lewinson, Henry W. Low, Los Angeles, for appellants.

C. Ray Robinson, William B. Boone, Merced, amici curiae for appellants.

O'Melveny & Myers, Paul Fussell, Homer I. Mitchell, James E. Cross, Los Angeles, George B. Gose, Frank P. Doherty, Los Angeles, of counsel, for respondent Pacific Mut. Life Ins. Co.

Guy Knupp, Peery Price, Los Angeles, for Insurance Commissioner.

Lloyd W. Dinkelspiel, Heller, Ehrman, White & McAuliffe, San Francisco, amici curiae for respondents.

GIBSON, Justice pro tem.

This is an appeal from a judgment of the Superior Court, which denied a peremptory writ of mandate, and discharged an alternative writ previously issued.

The peremptory writ was sought under the provisions of section 1094.5 of the Code of Civil Procedure to rescind an order of the Insurance Commissioner approving a plan to mutualize Pacific Mutual Life Insurance Company, a California corporation (referred to hereinafter as "New Company").

The alternative writ discharged by the judgment included an order staying the execution of the Plan of Mutualization. By stipulation a stay order was made by the District Court of Appeal, Second Appellant District, Division Three, prior to the expiration of the stay order made by the Superior Court. The stay order made by such appellate court is now in force.

The Plan of Mutualization was submitted to Honorable Wallace K. Downey as Insurance Commissioner in his character as an administrative officer, purportedly in pursuance to the provisions of subdivision (c) of section 11526 of the Insurance Code (relating to the mutualization of non-delinquent stock companies), which provides that such a Plan of Mutualization must be approved by the board of directors of a company and its stockholders, and the Insurance Commissioner.

Order approving the plan was made after a hearing under section 11527 of the Insurance Code, which provides:

"The commissioner shall examine the plans submitted to him under the provisions of subdivision (c) of section 11526. He shall not approve such plan unless in his opinion the rights and interests of the insurer, its policyholders and shareholders are protected nor unless he is satisfied that the plan will be fair and equitable in its operation."

After the conclusion of the hearing Mr. Downey, as commissioner, made affirmative findings in accordance with the provisions of the section, and approved the Plan of Mutualization.

The petition for mandate alleges that the order of the Insurance Commissioner was made without jurisdiction and was not justified by the evidence.

Appellants, who were petitioners below (sometimes referred to herein as petitioners), are The Pacific Mutual Life Insurance Company of California, a California corporation, (referred to hereinafter as "Old Company"), and Samuel K. Rindge, and others, who are stockholders in the Old Company, and the members of Pacific Mutual Shareholders Protective Committee.

In the receivership proceedings Honorable Samuel L. Carpenter, Jr., Insurance Commissioner of the State of California, first acted as conservator and then as liquidator of the Old Company, and several successors as Insurance Commissioners, including Honorable John R. Maloney, have acted as liquidator and Mr. Maloney now acts as liquidator.

Respondents below and here are the New Company and Mr. Maloney, as Insurance Commissioner of the State of California and as liquidator of the Old Company.

The order approving the Plan of Mutualization was made by Mr. Downey on September 22, 1950, at the time he was Insurance Commissioner of California and liquidator of the Old Company. He was named in the petition for mandate as a respondent, both in his character as Insurance Commissioner and as liquidator; but during the pendency of the proceeding in mandate, Mr. Downey was succeeded in both capacities by Mr. Maloney, and Mr. Maloney was accordingly substituted for Mr. Downey and the cause proceeded against Mr. Maloney in both capacities.

In 1936 The Pacific Mutual Life Insurance Company of California was in the possession of the Insurance Commissioner as conservator by reason of its insolvency. On December 4, 1936, by order of the court in the proceedings for the conservatorship of Old Company, title to all of the outstanding capital stock of New Company was vested in the Insurance Commissioner, as conservator of Old Company, subject to an option in favor of the participating life policyholders of New Company, giving them the right, after the expiration of approximately 10 years, to institute mutualization proceedings, that is, proceedings to cause New Company to purchase its capital stock for the purpose of converting the company from a stock company to a mutual company. Such option was contained in the rehabilitation and reinsurance agreement under the terms of which the business of Old Company was rehabilitated by organizing a new and solvent company, which acquired most of the assets and assumed most of the liabilities of Old Company. The rehabilitation and reinsurance agreement is the source and basis of appellants' claim to the equitable interest in the proceeds of any sale of New Company stock that might be made by the Insurance Commissioner as liquidator (formerly conservator) of Old Company.

The rehabilitation and reinsurance agreement is also the source and basis of the right of the participating life policyholders of New Company to cause the company to acquire its stock (and thus accomplish its mutualization) at such price and upon such terms as might be fixed by a price determination committee, to be selected by the President of Stanford University, the Provost of the University of California at Los Angeles, and the President of the Association of Life Insurance Presidents (the name of which was later changed to Life Insurance Association of America). That agreement, including the option in favor of the participating life policyholders of New Company, was, with the approval of Judge Henry M. Willis, after a hearing in the proceedings for the conservatorship of Old Company, executed by the conservator and by New Company. Judge Willis's order of approval, dated December 4, 1936, adjudged that the rehabilitation and reinsurance agreement was valid. Appeals were taken and the judgment was affirmed. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761; Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182.

In 1946, upon request of the requisite number of life policyholders, a price determination committee was appointed, and thereafter such committee determined that mutualization was practicable of accomplishment, promulgated a Plan of Mutualization, and fixed the price and terms of payment at which the life policyholders of New Company should have the right to acquire the stock of New Company from the liquidator (who had by that time become successor of the conservator) of Old Company.

On September 22, 1950, the Insurance Commissioner, after a lengthy hearing, found that the Plan of Mutualization was fair and equitable to the stockholder, as well as to all other interested parties, and approved the plan.

In response to the petition for a writ of mandamus filed by appellants for the purpose of inquiring into the validity of the Insurance Commissioner's approval of the Plan of Mutualization there were presented to the Superior Court the questions of whether the Insurance Commissioner proceeded without or in excess of his jurisdiction, and whether the commissioner accorded a fair trial to those opposing the plan, and whether the commissioner committed any prejudicial abuse of discretion, particularly whether the commissioner proceeded in the manner required by law, and whether his approval of the plan was supported by substantial evidence in the light of the whole record. After a hearing, the judge of said court filed a carefully prepared opinion, in which he held that the Insurance Commissioner had not acted without or in excess of his jurisdiction, had accorded a fair trial to those opposing the plan, and had not abused his discretion in approving the plan.

Since appellants raise questions as to whether the rehabilitation and reinsurance agreement dated December 4, 1936, is valid in respect of the option to mutualize granted to the participating life policyholders; whether the validity of such agreement is res judicata; whether New Company, which has been carrying on a nationwide insurance business since 1936, should now be treated as insolvent for the purposes of mutualization; whether the requisite statutory steps were taken for mutualization of New Company, and whether the price determination committee acted in good faith in fixing the price and terms of payment for the stock of New Company, it is essential to present in some detail what preceded the Insurance Commissioner's hearing as well as what took place at the hearing.

Old Company was engaged in the business of writing both participating and nonparticipating life insurance and accident and health insurance. The report of the regular Triennial Convention examination of Old Company made as of December 31, 1935, showed that Old Company was insolvent. The insolvency arose out of the fact that the premium rates charged by Old Company to the holders of noncancellable accident and health policies (hereinafter referred to as "non-can policies") were inadequate. The result was that the reserves for non-can policies were inadequate and Old Company was insolvent by at least $17,000,000. Said report was filed with the Insurance Commissioner on July 21, 1936. On July 22, 1936, pursuant to the provisions of section 1011 of the Insurance Code, the Insurance Commissioner filed with the Superior Court in Los Angeles an application for an order appointing him conservator of Old Company and vesting in him title to all of the assets of that company. We shall hereafter refer to such proceeding as "conservatorship proceeding."

Said application was presented to Judge Douglas L. Edmonds, then presiding judge of said court, and Judge Edmonds on July 22, 1936, signed the order applied for. Pursuant to said order and pursuant to section 1013 of the Insurance Code, which authorized seizure without notice or court order, the Insurance Commissioner took possession of all of the assets of Old Company. Carpenter v. Pacific Mut. Life Ins. Co., supra, 10 Cal.2d 307, 314–317, 74 P.2d 761.

On July 22, 1936, Judge Edmonds also signed "Order Permitting, Approving and Authorizing Rehabilitation Sale and Transfer of Assets and Reinsurance Plan and Agreement of The Pacific Mutual Life Insurance Company of California" pursuant to the provisions of section 1043 of the Insurance Code. Said order, among other things, authorized the organization of New Company with a capital and surplus of $3,000,000, to be provided from the funds of the participating life division of the life department of Old Company. In addition thereto, the participating life division of the life department of Old Company was to furnish to New Company the sum of $1,792,118.97 as a reserve for the non-can policies which were to be partially assumed by New Company under the rehabilitation agreement approved by Judge Edmonds. Said rehabilitation agreement further provided that the stock of New Company should be held by the Insurance Commissioner as conservator, subject to the right of New Company to become mutualized "as soon as legally possible."

In accordance with Judge Edmonds' order, the Insurance Commissioner organized New Company and the participating life policyholders contributed to New Company the total sum of $4,792,118.97, $3,000,000 of which constituted the capital and surplus of New Company, and $1,792,118.97 of which constituted a reserve for non-can policies which were to be partially assumed by New Company.

Said sum contributed by the participating life policyholders constituted all but $423,136.26 of the surplus of the participating life division of the life department of Old Company. Said sum had been earmarked for and was owned by the participating life policyholders of Old Company, because Old Company had conducted its participating life division as if it were a separate mutual life insurance company. A separate set of books had been maintained for the participating life division; specific expenses had been charged to said division, separate surplus had been maintained for said division; separate annual statements had been prepared for said division, and the so-called "dividends" or returns of premium made to participating life policyholders had been charged against the funds of said division.

After the organization of New Company the commissioner, as conservator, in accordance with Judge Edmonds' order, transferred to New Company substantially all of the assets of Old Company. As consideration for such assets, New Company delivered to the conservator all of the capital stock of New Company, which he was to hold, subject to the provisions of the rehabilitation agreement approved by Judge Edmonds. On July 23, 1936, New Company intervened and became a party to the conservatorship proceeding. Shortly thereafter it was found that Justice Edmonds was the owner of a policy of life insurance issued by Old Company, and that he was, therefore, disqualified. It was ultimately held that his orders were void, Carpenter v. Pacific Mut. Life Ins. Co., supra, 10 Cal.2d 307, 323, 74 P.2d 761.

Upon discovery of Judge Edmonds' disqualification, the application of the Insurance Commissioner for appointment as conservator of Old Company was assigned to and heard by Judge Henry M. Willis, and on August 11, 1936, Judge Willis made a new order appointing the Insurance Commissioner as conservator and ratifying an appointment theretofore made by Judge Edmonds. It was held that notwithstanding the invalidity of Judge Edmonds' orders, the conservator's seizure of the assets of Old Company was lawful, Carpenter v. Pacific Mutual, supra, 10 Cal.2d 324, 74 P.2d 772. However, Judge Willis did not, on August 11, 1936, make any order with respect to the rehabilitation agreement theretofore approved by Judge Edmonds or with respect to the transfer of Old Company's assets to New Company and the issuance of New Company's stock to the conservator. Nevertheless, New Company held the assets of Old Company and the conservator held all of the capital stock of New Company. In view of the fact that the rehabilitation of the business of an insolvent insurer and the transfer of assets of such an insurer can be made only with court approval, Insurance Code sections 1043 and 1037(d), the invalidity of Judge Edmonds' orders left the permanent status of the assets and the stock in suspense until Judge Willis's order of December 4, 1936, which will hereinafter be referred to.

During the period between July 22, 1936, and December 4, 1936, New Company acted as a corporate agent of the Insurance Commissioner to assist him in carrying on the business of the Old Company.

As was stated by the Supreme Court in the Carpenter case, supra: It was obvious that if the agency organization were to be preserved pending court approval of the rehabilitation plan, the business of the Old Company had to be continued. Faced with these facts, the commissioner determined to organize a New Company to continue the business pending the approval of a rehabilitation plan. And it was pending the approval of a rehabilitation plan that New Company acted as a corporate agent of the Insurance Commissioner. Carpenter v. Pacific Mut. Life Ins. Co., supra, 10 Cal.2d 307, 325, 74 P.2d 761.

On August 29, 1936, Judge Willis ordered all interested parties to show cause why they should not approve the rehabilitation agreement which Judge Edmonds had theretofore purported to approve. Numerous parties, including individual stockholders and the Pacific Mutual Stockholders Protective Committee, filed objections to such rehabilitation agreement. Carpenter v. Pacific Mut. Life Ins. Co., supra, 10 Cal. 2d 319, 74 P.2d 769.

On September 25, 1936, the Insurance Commissioner filed a "Petition for Approval of the Rehabilitation and Reinsurance Agreement", attached to which was the rehabilitation and reinsurance agreement which constitutes the basis of the rights of the conservator and his successors as owners of all of the stock of the company, and the basis of the rights of appellants herein, who claim an equitable interest in the stock of New Company, and the basis of the rights of the participating life policyholders under the option contained therein to cause New Company to be mutualized. Said petition prayed for an order ratifying, confirming and approving the acts of the commissioner as conservator and causing to be formed, forming and subscribing to and purchasing the capital stock of New Company, and ratifying, confirming and approving the transfer and conveyance therefore made of the assets of Old Company to New Company. Said petition further prayed that the rehabilitation and reinsurance agreement be approved and that the conservator be authorized and directed to execute said agreement and to carry out its provisions.

On the same date, the court issued an order requiring Old Company, New Company, and all persons interested or claiming to be interested, either as policyholders or stockholders of Old Company, or otherwise, to show cause why the court should not make orders in accordance with the conservator's petition.

After a protracted hearing pursuant to said order to show cause, in which Pacific Mutual Stockholders Protective Committee, numerous individual stockholders and others were heard, Judge Willis made his order of December 4, 1936, in which he ratified, confirmed and approved the acts of the conservator in organizing and subscribing to and acquiring the capital stock of New Company, and in transferring to New Company the sum of $3,000,000 out of the assets in his hands as a conservator, and ratifying, confirming and approving the transfer and conveyance theretofore made of the assets of Old Company to New Company.

Said order approved "each and all of the terms and conditions" of the rehabilitation and reinsurance agreement and authorized and directed the conservator to enter into said agreement, and authorized him "without further order of this court, fully and faithfully to perform, carry out, and discharge each and all of the obligations, terms, conditions, and covenants on his part required to be performed under the terms of said Rehabilitation and Reinsurance Agreement," and "forever barred and enjoined [all persons] from making hereafter any complaint in respect of the said Rehabilitation and Reinsurance Agreement, or any provision or provisions thereof, except as in said agreement specifically permitted or by appeal from this Order; the prosecution by any person, firm, or corporation of any proceeding or proceedings of whatever kind or nature, for the purpose of attacking this Order, or any conveyance or transfer made pursuant hereto, (other than as permitted by said Rehabilitation and Reinsurance Agreement or by appeal from this Order)."

The Rehabilitation and Reinsurance Agreement provided for the transfer to New Company of substantially all of the assets of Old Company and for the reinsurance and assumption by New Company, at the election of the respective policyholders, of all policies of insurance other than non-can policies, and on reduced rates of benefit, for reinsurance and assumption by New Company at the election of the policyholders of all non-can policies of insurance. It provided that New Company should establish a participating department, whose assets should be held and whose business should be carried on in the same manner as if it constituted a separate mutual life insurance company. It further provided that New Company should establish a separate department for its Non-Participating Life Insurance, and a separate department for its Accident and Health Insurance, and that any surplus existing in said departments might be used for general corporate purposes subject to limitations contained in Paragraph 14 of said agreement.

In Paragraph 14 it was provided that a special fund should be established from funds available for general corporate purposes for the purpose of completely restoring the non-can benefits which had been reinsured and assumed on reduced basis. It was further provided that there should be transferred to such fund such amounts as the Board of Directors should in its discretion determine to be not reasonably required for the reasonable, proper and profitable conduct of the operations of New Company as a going concern. It was further provided that at the time of any examination of New Company by the Insurance Commissioner, the commissioner might require the transfer of additional funds to such special fund, to the extent that such additional funds available for general corporate purposes were, in his opinion, available without interfering with the proper and profitable conduct of the business of New Company as a going concern.

These provisions with respect to restoration of non-can benefits were made "to the end that the benefits originally provided in said Non-Can Policies as written may eventually be fully paid, including eventual full payment of benefits becoming due prior to the time of such restoration, with interest on deferred restoration payments of such benefits at the rate of three and one-half percent (3½%) per annum."

The Rehabilitation Agreement provided for the transfer to New Company from the participating division of the life department of Old Company of the sum of $3,000,000 as capital and surplus and of the sum of $1,792,118.97 as a reserve for the Accident and Health Department, and further provided for the transfer to New Company, for its general corporate purposes, of not to exceed 10% of the net profits on participating policies reinsured pursuant to said agreement. Profits from participating policies thereafter written were not to be affected thereby and were to be held in the walled-off participating department of New Company.

Paragraph 20(a) of the Rehabilitation and Reinsurance Agreement created an *option* in favor of the participating life policyholders to cause the company to be mutualized under the conditions specified therein. Said right of the participating life policyholders was referred to in Paragraph 20 as "an option to mutualize." It was provided therein that after a period of approximately 10 years, 10% of the participating life policyholders could request the creation of an appointing committee to exercise duties in respect of a mutualization of New Company for the benefits of the departments of New Company designated by such policyholders; that the appointing committee should designate a price determination committee; that the price determination committee should determine whether, in its opinion, mutualization of New Company was then practicable and that, if it determined that mutualization was then practicable it should determine the proper price to be paid for the stock of New Company upon such mutualization and appropriate terms of payment. Said agreement provided further, in order that said option might be an effective option, binding upon the stockholder of New Company and all others claiming through such stockholder, that the conservator, as sole stockholder, for himself and for any successors in ownership of said stock, agreed to consent and consented to such Plan of Mutualization as might be promulgated by the price determination committee and to dispose of such stock at the price and upon the terms of payment provided for in such Plan of Mutualization.

Various provisions of the Rehabilitation and Reinsurance Agreement show that the agreement contemplated that the price determination committee could promulgate a Plan of Mutualization and fix the price and terms of payment for the stock prior to the full restoration of non-can benefits; and that in such case payment for the stock would be postponed until after restoration of non-can benefits had been completed. Inherent in the fact that the agreement contemplated such postponement of payment, is a further fact that the agreement contemplated that the Plan of Mutualization should not obligate New Company unconditionally to make the postponed payment.

Appeals were taken from Judge Willis's order of December 4, 1936, adjudicating the validity of the Rehabilitation and Reinsurance Agreement and the Supreme Court of California and the Supreme Court of the United States affirmed the order. Carpenter v. Pacific Mutual, etc., supra.

The result of Judge Willis's order of December 4, 1936, was that New Company acquired valid title to substantially all of the assets of Old Company and the conservator acquired valid title to all of the capital stock of New Company, subject, however, to an option to the participating life policyholders of New Company, through mutualization proceedings initiated after approximately 10 years, to cause New Company to acquire such stock at the price and upon the terms fixed by a duly appointed price determination committee, in the event that such committee should determine that in its opinion mutualization was practicable. The option required that the mutualization proceedings should be conducted in accordance with the laws of the State of California.

On February 2, 1937, the court, in the conservatorship proceedings, ordered the liquidation of Old Company and appointed the Insurance Commissioner to liquidate it. The validity of this order was upheld on appeal. Carpenter v. Pacific Mut. Life Ins. Co., 13 Cal.2d 306, 89 P.2d 637.

Thus, the liquidator succeeded the conservator, as the owner of the stock of New Company, subject to the option in favor of the participating policyholders to cause the company to be mutualized.

On April 4, 1938, the liquidator transferred title to the capital stock of the New Company to voting trustees. This was done pursuant to the provisions of section 1037(e) of the Insurance Code. The validity of this transfer under the voting trust was upheld upon appeal. Caminetti v. Pacific Mutual Life Ins. Co., 22 Cal.2d 344, 139 P.2d 908.

Under the provisions of the voting trust, the trustees were given full legal title to the stock in order that they might exercise the rights of stockholders in the control of the corporation, and they were expressly obligated to carry out all of the provisions of the Rehabilitation and Reinsurance Agreement, including the covenant of the conservator, for himself and his successors in the ownership of the stock, to consent to any Plan of Mutualization promulgated by a duly appointed price determination committee.

Thus, the voting trustees held the stock of New Company subject to the option to mutualize contained in the Rehabilitation and Reinsurance Agreement. The voting trust provided that it should terminate upon adoption of a Plan of Mutualization in accordance with the laws of the State of California.

In 1946, approximately 10 years after the organization of New Company, the requisite percentage of participating life policyholders requested the creation of an appointing committee to exercise the duties and functions provided for in the Rehabilitation and Reinsurance Agreement in respect of a proposed mutualization of New Company. The participating life policyholders, as permitted by the agreement, specified that the mutualization should be for the benefit of both participating and non-participating life policyholders. As of January 31, 1947, in accordance with the terms of said agreement, George Willard Smith, President of the Life Insurance Association of America (formerly the Association of Life Insurance Presidents), Doctor Donald B. Tresidder, President of Stanford University, and Doctor Clarence A. Dykstra, Provost of the University of California at Los Angeles, appointed a price determination committee consisting of Alva J. McAndless, Ray D. Murphy, Horace R. Bassford, and Albert J. Hettinger. Mr. McAndless was the President of Lincoln National Life Insurance Company of Fort Wayne, Indiana, a stock company, and the tenth largest life insurance company in the United States. He was a graduate of the University of Michigan and an actuary by profession. He was a past President of the American Institute of Actuaries (now called the Society of Actuaries) and a past President of the American Life Convention. He had been connected with Lincoln National Life Insurance Company since 1919 and had risen through the ranks, holding various positions and offices until he became President in 1939. He had had extensive experience in evaluating other life insurance companies through the acquisition of stock companies, either by way of acquiring their stock or their assets. Among the acquisitions with which he was familiar or in which he personally participated were acquisitions which Lincoln National Life Insurance Company made of Michigan State Life Insurance Company, Pioneer Life Insurance Company, Merchants Life Insurance Company, Globe Life Insurance, American Life Insurance Company, Reinsurance Life Insurance Company, Old Line Life Insurance Company, Northern States Life Insurance Company, and Royal Union Life Insurance Company. In addition thereto, he had handled negotiations for the purchase of Illinois Life Insurance Company and Missouri State Life Insurance Company, but in those instances Lincoln National Life Insurance Company did not become the purchaser.

Mr. Murphy was the Vice President and Chief Actuary of the Equitable Life Assurance Society of the United States, one of the five largest life insurance companies in the country. He is a graduate of Harvard University and an actuary by profession. He had been with Equitable Life since 1913. He was a past President of the Actuarial Society of America. Since 1936 he had been responsible at Equitable Life for all valuations of life and accident and health contingencies, including noncancellable accident and health contracts. He was responsible at Equitable Life for mortality and morbidity investigations and for analysis of all sources of profits and losses, and for distribution of surplus based upon such analyses. His duty caused him to be involved in many studies and estimates of projected future profits and losses and the effect of future contingencies upon the operations of Equitable Life.

Mr. Bassford was Vice President and Chief Actuary of Metropolitan Life Insurance Company, the largest life insurance company in the United States. He was a graduate of Trinity College and had been associated with Metropolitan Life since 1915. He was a Vice President of the Actuarial Society of America. He had participated in the acquisition by Metropolitan Life of several life insurance companies, including Pittsburg Life and Trust Company, Niagara Life Insurance Company, and Golden Seal Association, in connection with which it was necessary for him to evaluate said companies.

Mr. Hettinger was a partner in the investment banking firm of Lazard Freres & Company. He was a graduate of Stanford University and received the degree of Doctor of Philosophy in Business Economics at Harvard University, where he served for a number of years as Professor of Business Economics in the Harvard Graduate School of Business Administration. As a member of the Harvard Faculty he had supervised research work in the valuation of life insurance stocks, and during the same period acted as economist to the Governor of the Federal Reserve Bank of Boston. He became engaged in business in the investment field in 1926 and became a partner in Lazard Freres & Company in 1943. During his business life he had made a particular study of life insurance stocks and their values.

Following their appointment on January 31, 1947, the members of the price determination committee undertook to perform the duties and responsibilities entrusted to them. They employed as their actuary Joseph A. Christman, Associate Actuary of the Metropolitan Life Insurance Company of New York. He was a Fellow of the Actuarial Society of America and had served in the Actuarial Division of Metropolitan Life since 1926. In the performance of his duties for Metropolitan Life, approximately 600 employees worked under his supervision. Associated with him in the duties which he performed for the price determination committee were D. J. van Keuren and F. H. Byron, both employees of Metropolitan Life and Fellows of the Actuarial Society of America. Mr. Christman and his colleagues had the assistance of numerous trained supervisory and clerical employes borrowed from Metropolitan Life and Equitable Life.

Commencing in 1947, the members of the price determination committee, with the assistance of Mr. Christman and his associates, undertook a study of the past and anticipated future earnings of New Company, of the amount which would be required completely to restore non-can benefits, of the length of time which would be required to accomplish such restoration, and of the value of the stock of that company. Their study occupied a period of approximately three years and consumed approximately 10,000 hours of work. Mr. McAndless testified that the committee made "one of the most complete investigations of earning power that has ever been made for any life insurance company."

On April 4, 1950, the price determination committee rendered its report, stating that in its opinion mutualization of New Company was then practicable, determined the value of the stock as of December 31, 1948, and fixed the price to be paid for the stock of New Company at $3,000,000 plus interest on $3,000,000, from December 31, 1948, to date of payment, with certain provisions for its augmentation, and fixed the terms of payment.

The Plan of Mutualization provides for a special surplus fund to be accumulated from 5% of the net profits of the participating department on policies issued subsequent to July 22, 1936, and for a payment of the purchase price from this fund and from capital in general corporate surplus. The Plan of Mutualization filed by the committee as part of its report, provided that upon adoption of the plan, the Voting Trust Agreement of April 4, 1938, should terminate in accordance with the provisions of said voting trust and that the liquidator to whom the voting trustees were obligated to transfer the stock should immediately dispose of the stock of New Company by transferring it to trustees under a new voting trust, in accordance with the provisions of Insurance Code section 11529.5. It was expressly provided that nothing contained in the plan should affect the right of the non-can policyholders to have applied to restoration of non-can benefits all of the corporate earnings of the company not reasonably required for the reasonable, proper and profitable conduct of the operations of New Company as a going concern, as provided in Paragraph 14 of the Rehabilitation and Reinsurance Agreement.

The plan further provided that in accordance with such agreement New Company should submit the plan to the policyholders entitled to vote thereon and that if 10% of such policyholders should so request New Company should submit the plan for approval in accordance with the laws of the State of California.

The plan was submitted to the life policyholders and the requisite percentage requested its submission for approval in accordance with the laws of the State of California. In accordance with section 11526 of the Insurance Code, New Company submitted the plan for the required approvals; on May 5, 1950, the Board of Directors of New Company adopted the Plan of Mutualization. Thereafter, a majority of the voting trustees under the Voting Trust Agreement of April 4, 1938, as owners and holders of the stock of New Company, and in accordance with the provisions of said Voting Trust Agreement, approved the Plan of Mutualization by executing their written consent thereto. Under the provisions of the Voting Trust Agreement the action of a majority of the trustees constituted action of all of the trustees.

On or about June 16, 1950, New Company submitted the Plan of Mutualization to the Insurance Commissioner and petitioned for the approval thereof. The Insurance Commissioner gave notice by publication and by mail that a hearing would be held on August 1, 1950, for the purpose of determining whether the Insurance Commissioner should approve the plan. Notice of the hearing was mailed, among others, to Old Company and to the Pacific Mutual Stockholders Protective Committee. On August 1, 1950, the hearing commenced, and continued from day to day until and including August 18, 1950. All persons desiring to be heard were heard, including the Pacific Mutual Stockholders Protective Committee. Old Company did not avail itself of the opportunity to be heard. Evidence both oral and documentary was received, and was incorporated in a reporter's transcript of over 500 pages.

On September 22, 1950, the Insurance Commissioner issued a 22 page decision, in which he found that the Plan of Mutualization protected the rights and interests of New Company, its policyholders and its shareholders, and that the plan would be fair and equitable in its operation, and in which he issued his approval, thus permitting the plan to become effective if it should be approved by a majority vote of the life policyholders and should thereafter be filed in the office of the Insurance Commissioner. Insurance Code section 11526.

The life policyholders of New Company thereafter approved the Plan of Mutualization in accordance with section 11526(d) of said Code.

On or about November 9, 1950, before the plan was filed in the office of the Insurance Commissioner, after having been adopted by a vote of the directors of New Company, and after having been approved by the written consent of the shareholders of New Company and by the Insurance Commissioner (but before its approval by the life policyholders of New Company) appellants filed their petition for writ of mandamus and obtained an order staying the operation of the Insurance Commissioner's approval of September 22, 1950, expressly permitting, however, a vote of the life policyholders in accordance with section 11526(d) of the Insurance Code.

In accordance with the provisions of the Code of Civil Procedure, section 1094.5, a hearing was held by the court below. All of the record of the proceedings before the Insurance Commissioner was filed with the court. Appellants, respondent Insurance Commissioner, and respondent New Company each filed lengthy briefs and lengthy arguments were made, which are reported in the Reporter's Transcript on Appeal. No evidence was received other than stipulations and the record before the Insurance Commissioner, consisting of the Reporter's Daily Transcript, the exhibits and the Insurance Commissioner's decision. On March 24, 1952, the Judge of the Court filed his Memorandum of Decision, and on June 2, 1952, he filed his Findings of Fact, Conclusions of Law and Judgment, which are the subject matter of the appeal herein.

We will now proceed to a consideration of the law of the case. As above indicated, the principal points raised by appellants are two:

(1) The order made by the Insurance Commissioner was not justified by the evidence; and

(2) The order was made without jurisdiction.

We think neither claim is tenable and that the judgment of the lower court must be affirmed.

[1] Point (1) may be rather quickly disposed of. After notice to all interested parties, a hearing, which took 13 days to complete, was had by the commissioner. Much evidence, both oral and documentary, was received by him. It is manifestly impossible to here set it forth at length. Suffice it to say we have examined it in detail, all of the volumes of the daily transcript

of the evidence and the exhibits introduced, and we are not prepared to say that such evidence then taken and received was insufficient to justify the commissioner's ultimate conclusion that the plan was fair and equitable to, and protected the rights and interests of, all interested parties, including the stockholder, in whose right the appellants sue.

On the contrary, much of the evidence was based upon thousands of hours of study and investigation by persons who appear to have been well qualified experts, and we are well satisfied the commissioner acted upon adequate evidence. Two members of the Price Determination Committee and one of the actuaries employed by the Price Determination Committee testified at length as to the manner in which, and the basis upon which, the committee arrived at the price to be paid by New Company for its stock when it consummated the proposed Plan of Mutualization. In substance they testified that they had, by long and exhaustive actuarial studies, determined the amount necessary to fully but gradually restore the benefits of the non-can policyholders; that they had then discounted these amounts at 3% interest to their present value, and found that the present value of the amounts necessary for restoration was $22,000,000; that by similar studies they had established the probable earnings of New Company for each year, commencing with the year 1949 and extending to the year 2000; that by discounting the earnings for the years 1949 to 1974, both inclusive, at 3% (only a portion of the earnings for the last year were so discounted), they determined that the company would be able to complete restoration of non-can benefits in the year 1974; that after the completion of restoration the stockholders of Old Company would be entitled to its earnings, and that the present value of these earnings from 1974 to perpetuity, discounted at 10%, was $2,614,000; that by reason of the terms of the rehabilitation agreement it was necessary to add $500,000 to this amount, but that if certain risk elements had been disregarded, they thought it proper to deduct the sum of approximately $100,000, giving a present value to the stock of $3,000,000; that the calculated earnings upon which their estimate of the time within which to complete restoration of non-can benefits could be made, and upon which they base the present value of future earnings, were net earnings, after provision for contingency reserves.

They also testified that in their opinion a buyer could be found who would be willing to presently pay $3,000,000 for the stock of New Company and await the right to participate in the earnings of New Company for 25 years; that the stock of large life insurance companies currently had sold at 4.3 to 7.8 times of their estimated earnings after the deduction of voluntary reserves; that if the estimated earnings of New Company from 1948 to perpetuity were discounted to their present value at 10%, that value would be less than the amounts necessary for full restoration, and there would be nothing left for the stockholders; that if the present value of the stock were fixed by giving a value to the non-participating life insurance in force at $20 per thousand, the value of the stock would be less than the amount necessary for restoration, and that, in their considered opinion, the price of $3,000,000 was a fair one to be paid to the stockholders.

They also testified that because the payment of the present value of the stock as determined by them was not to be made immediately, but was to be deferred, that they had provided for the payment of interest upon the $3,000,000, and instead of fixing a rate of interest had used the basis of the highest coupon rate paid on long term Government bonds, as they thought that would be equal to the amount New Company could earn upon the deferred payment from year to year; that they recognized that if restoration was completed sooner than they estimated, that is, prior to 1974, this would give an added value to the stock and that they believed $250,000 for each year by which the date of restoration preceded 1974, was a fair estimate of the increased value.

There was introduced into evidence the report of the actuaries who had made the studies upon which the cost of restoration of future earnings were based, and in which the method and the data used are set forth in detail; and much other direct and pertinent evidence.

[2] Some point is made of the fact that some evidence available was not spread upon the record. In view of the foregoing, such is of no consequence. And, in any event, there is nothing in section 1094.5, Code of Civil Procedure, or any other law we know of in proceedings such as this, which requires the spreading of detailed facts upon the record. Popcorn Equipment Co. v. Page, 92 Cal.App.2d 448, 451, 207 P.2d 647; In re Atlas Pipeline Corporation, D.C., 39 F.Supp. 846, 848. All that is required is that the commissioner's approval be supported by substantial evidence in the light of the whole record, and if such be the case, as we now hold it was, the court below and this court are bound thereby. Thompson v. City of Long Beach, 41 Cal.2d 235, 239–240, 259 P.2d 649; Rible v. Hughes, 24 Cal.2d 437, 445, 150 P.2d 455, 154 A.L.R. 137; Housman v. Board of Medical Examiners, 84 Cal.App.2d 308, 315, 190 P.2d 653, 192 P.2d 45; Republic Aviation Corp. v. N.L.R.B., 324 U.S. 793, 800, 65 S.Ct. 982, 89 L.Ed. 1372, 1377.

[3] Point (2). We shall now proceed to a consideration of the question of jurisdiction and related matters. We think it proper to first consider the issue of res judicata. In this respect the appellants contend that the order of December 4, 1936, approving the Rehabilitation and Reinsurance Agreement is not res judicata as to such agreement, nor is it res judicata as to the Plan of Mutualization.

As to the first contention, we are foreclosed from considering it for the Supreme Court has already decided the point contrary to appellants' claim. In Carpenter v. Pacific Mut. Life Ins. Co., 13 Cal.2d 306, 309, 89 P.2d 637, 639, the court said: "The legality of the seizure and the lawfulness and propriety of the plan of rehabilitation have already been upheld by this Court. Carpenter v. Pacific Mut. Life Ins. Co., 10 Cal.2d 307, 74 P.2d 761, affirmed with opinion, Neblett v. Carpenter, 305 U.S. 297, 59 S.Ct. 170, 83 L.Ed. 182."

[4] The California courts have quite uniformly held that when the validity of an agreement is adjudged in a prior proceeding, that issue is res judicata, even though a litigant in a later proceeding may urge some reason for its alleged invalidity which was not urged in the prior proceeding. Price v. Sixth District Agricultural Ass'n, 201 Cal. 502, 509, 258 P. 387; De Hart v. Allen, 26 Cal.2d 829, 831, 161 P.2d 453.

[5] In proceedings in which attacks have been made upon the validity of similar plans of rehabilitation after an adjudication of the validity of such plans, the courts have held the issue of validity to be res judicata as to all parties represented in the proceedings for the approval of such rehabilitation plan, as to persons in privity with such parties, and as to parties represented by them through class representation. Thrower v. Kistler, D.C., 14 F.Supp. 217, 219, 221; National Surety Corporation v. Nantz, 262 Ky. 413, 90 S.W.2d 385, 388.

[6] The fact that a series of orders were contemplated does not change the rule. One of a series of orders in a proceeding becomes res judicata if the order is appealable and not appealed from or if an appeal is taken and is affirmed on appeal. In re Estate of Nolan, 145 Cal. 559, 561, 79 P. 428; Baldwin v. Stewart, 218 Cal. 364, 367–368, 23 P.2d 283.

[7] The issue of the Rehabilitation and Reinsurance Agreement was fully litigated in an adversary proceeding, and not by default. We have examined the authorities cited by appellants in support of their contention in this regard and find that they are not, in our opinion, authority for that which we are now investigating.

[8] Appellants urge that before approving the Plan of Mutualization as fair and equitable the Insurance Commissioner was in duty bound to determine the value of the New Company as a going concern by ascertaining its earning capacity and capitalizing the same at an appropriate rate on the basis of economic surveys and special studies of the relevant criteria. In this case it was not necessary, as a mat-

ter of law, to employ any one method of determining the value of the stock. Such stock could be evaluated either on the basis of the market value, capitalization (so-called going concern and investment value), or on the basis of the usual method of evaluating all the stock of an insurance company. California Annual Conference of M. E. Church v. Seitz, 74 Cal. 287, 296, 15 P. 839; Rives-Strong Bldg., Inc., v. Bank of America, etc., 50 Cal.App.2d 810, 816, 123 P.2d 942; Bewick v. Mecham, 26 Cal.2d 92, 94–98, 156 P.2d 757, 157 A.L.R. 1277. At any rate, the Price Determination Committee did determine the investment value (or going concern value) of the stock, on the basis of a capitalization of corporate earnings applicable to the stockholders' equity.

[9] In estimating future earnings there appears to be no specific criteria to go by. As the U. S. Supreme Court has said: "The extent and method of inquiry necessary for a valuation based on earning capacity are necessarily dependent on the facts of each case." Consolidated Rock Products Co. v. Du Bois, 312 U.S. 510, 527, 61 S.Ct. 675, 685, 85 L.Ed. 982, 994. The pattern of future earnings of the New Company having been fixed by the committee, upon sufficient evidence, we can see no objection to the plan adopted for capitalization. Akron, Canton and Youngstown Ry. Co. v. Hagenbuch, 6 Cir., 128 F.2d 932, 939.

[10] The next point urged is that the Insurance Commissioner made no pretense of determining investment value in the manner required by law or otherwise; his order approving a Plan of Mutualization, therefore, was due to a mistake of law and must be reversed as arbitrary and constructively fraudulent. One answer to this is that the power and duty to determine the value and price of the stock was lodged in the Price Determination Committee and not in the Insurance Commissioner, by the Rehabilitation and Reinsurance Agreement, and this committee was thereby empowered to determine the price to be paid for the stock on any reasonable basis. The determination of value was made by the committee after considering several conventional and approved methods, and we are unable to hold, from the record, that the conclusion it arrived at was unreasonable.

Appellants complain that $3,000,000 was arbitrarily taken away from the stockholders by adding $3,000,000 to the estimated cost of restoration. We find this item to be fully explained in the Christman Report and in his testimony and we can find nothing arbitrary in his calculations. It is based on detailed study by actuaries.

In answer to appellants' contention to the contrary, we find it could well have been found, upon the evidence, that the Mutualization Plan did adequately protect the rights and interests of shareholders.

[11] Appellants next contend that by approving Paragraph 20(f) of the Rehabilitation and Reinsurance Agreement, the court thereby reserved the jurisdiction to determine, at a future time, whether the provisions as to mutualization in Paragraph 20 were contrary to law or illegal or void. We can see no merit in the contention. If the court had intended to reserve such power it would have said so. There is nothing in the order to that effect, and we should not and cannot read something into it that is not there. It is further urged that Paragraph 16 of Judge Willis's order of December 4, 1936, shows that the order is not res judicata as to the Rehabilitation and Reinsurance Agreement. The fact that the court therein reserved jurisdiction to make further orders in the premises, does not stultify, or set at naught, the order already made. This paragraph was obviously intended to permit the court to thereafter make whatever order it deemed proper, if any, to carry the order then being made along to fruition. Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 231 P.2d 6, 21 A.L.R.2d 1387.

[12] Passing now to the next contention of appellants, that the order of December 4, 1936, is not res judicata as to the Mutualization Plan proposed, we must, of course, agree, since the court could not then approve a plan which was not before it, nor, indeed, had it then been formulated; but what it did do was to approve the agreement in all of its details, and one of those details was to give the participating life

policyholders the *right or option* to mutualize thereafter. The decreeing of this *right* is, therefore, res judicata. We are satisfied that the order we have been discussing has become res judicata as to all the matters determined therein.

[13, 14] We now pass to another point urged by appellants, and that is that sections 1043–1052 of the Insurance Code, and not sections 11526–11533, are applicable to the mutualization of the New Company.

In the first place, the rehabilitation agreement above referred to unquestionably makes section 11525, etc., applicable to the mutualization of the New Company, and this agreement has been approved by the court, thus becoming res judicata. In the second place, these sections, 11526–11533, would have been applicable in any event, because the New Company is a solvent insurer and not one that has been seized by the commissioner. Paragraph 20 (a) of the agreement approved by the court, provides machinery for the formation of a "voluntary mutualization of the New Company, in accordance with the laws of the State of California." Under such law a voluntary mutualization can be accomplished only under the provisions of section 11525, etc., of the Insurance Code and not under the provisions of section 1043, etc., thereof. This being the case, it would seem unnecessary to consider the other points raised by counsel in this regard, since to do so would merely be reconsidering something that has already been decided by the Supreme Court.

[15] The contention is made that the court must disregard the corporate entity of the New Company and treat it as though it were the Old Company. This matter has already been decided contrary to such claim. Garrison v. Pacific Mutual Life Ins. Co., 83 Cal.App.2d 1, 9, 187 P.2d 893.

[16] There is nothing in the Carpenter case, 10 Cal.2d 307, 74 P.2d 761, supra, indicative of a thought that the two companies were one and the same, at least after December 4, 1936. The entity of a corporation cannot be disregarded unless it be alleged and proved that the organization thereof was fraudulent or prompted by dishonesty and that injustice would be done if the corporate entity were not disregarded, and that there has been a cessation of the individuality and separateness of the corporation and the owners of its stock. Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 262–263, 200 P.2d 836, and cases therein cited. Nothing of such a nature herein appears. The New Company was not an agency of the Insurance Commissioner subsequent to December 4, 1936, but even if it was, obviously such would not make the New Company the same as the Old Company.

[17, 18] Next we consider the claim of appellants that the directors of the New Company had no knowledge of the data on which the Plan of Mutualization was based, and in purporting to adopt the plan, acted as rubber stamps. Section 11525 of the Insurance Code provides that a Plan for Mutualization of a solvent insurance company may be carried out "by complying with the requirements of this chapter." One requirement is that the plan shall be "Adopted by a vote of a majority of the directors." Section 11526. It is conceded that this was done on May 5, 1950. No authority is cited for the proposition that directors' action, once taken, can be attacked on the ground of insufficient information, and there probably is none, for obvious reasons. In fact, the law is, no doubt, to the contrary. 6 Fletcher, Cyclopedia of Corporations, p. 296. Furthermore, there is no merit in the statement that the directors were not adequately informed. Prior to April 13, 1950, each director had received a copy of the report of the Price Determination Committee and of the Plan of Mutualization. Furthermore, at its meeting on May 5, the Board received reports, heard the testimony of informed witnesses, all to the effect that the plan could be practically accomplished, having due regard to the interests of all persons interested in the New Company, that it was based on sound principles, was fair, just, equitable, financially feasible, and that the price to be paid and the terms of payment were reasonable and fair; all of which

seems to be a complete answer to this point raised by appellants.

[19] We now take up the claim that no valid approval of the Plan of Mutualization has ever been given on behalf of the stockholders, the consent purportedly given by the conservator in the Rehabilitation Agreement did not constitute a valid approval of the present Plan of Mutualization, and the liquidator or conservator could not delegate his power to the Price Determination Committee. The facts of this case take it out of the general rules of law enunciated in the authorities cited by appellants. Here, the validity of the rehabilitation agreement, wherein the conservator, for himself and his successors in interest, as shareholder of the New Company, consented and agreed to consent to such Plan of Mutualization as might be promulgated by a duly appointed Price Determination Committee, is, as is all other parts of said agreement, res judicata.

Thus, the proposition is not where a trustee, having certain duties to perform, on his own initiative delegates his authority or duties to another; rather is it a case where he is bound, both by contract and decree, to consent to what another may do. He could not have refused to give his consent, had he wanted to, under the facts in this case.

[20] We in no way intend to detract from the force of the foregoing conclusion in adding that agreements in which obligations depend on fact determinations thereafter to be made by third persons are valid and not unusual. There are many cases so holding. Illustrative thereof are: Bewick v. Mecham, 26 Cal.2d 92, 97, 156 P. 2d 757, 157 A.L.R. 1277; American-Hawaiian Engineering, etc., Co. v. Butler, 165 Cal. 497, 513, 133 P. 280; Roberts v. Security Trust & Savings Bank, 196 Cal. 557, 568, 238 P. 673; Silva v. Mercier, 33 Cal. 2d 704, 708–709, 204 P.2d 609; Market Street Ry. Co. v. Hellman, 109 Cal. 571, 42 P. 225; 3 Williston on Contracts, p. 2247, section 800.

[21] Another contention of the appellants is that the conservator or liquidator could not give his approval as trustee for the shareholders until after the adoption of the Plan of Mutualization by a vote of a majority of the Board of Directors, they specifically saying that the steps required to mutualize a solvent or delinquent corporation must be taken in the order enumerated in section 11526. We cannot agree. The section could easily have so provided, but it does not, except in subdivision (e) thereof, and we are not permitted to judicially legislate.

[22] Also, if there could be any question about it, the fact that the language appearing in subdivision (e) is not made to apply to subdivisions (a), (b), (c), or (d) is strongly persuasive that the Legislature did not intend that such provisions should apply to these other subdivisions. Market Street Ry. Co. v. Hellman, 109 Cal. 571, 587, 42 P. 225; In re Estate of Bull, 153 Cal. 715, 717, 96 P. 366; In re Sekuguchi, 123 Cal.App. 537, 538, 11 P.2d 655; 23 Cal.Jur. 762. At any rate, if the liquidator was the stockholder whose consent was required, his consent will be deemed to have been given at the proper time, because being bound by the conservator's agreement to consent, equity will regard that as done which should have been done. Civil Code sec. 3529; Poultry Producers, etc., v. Nilsson, 197 Cal. 245, 254, 239 P. 1086. It is wholly proper that substance should prevail over mere form.

Appellants complain that the Insurance Commissioner, prior to approving the Plan of Mutualization did not conduct the type of hearing required by section 11527 of the Insurance Code. This is based principally upon the claim that the Insurance Commissioner did not have, or receive, proper evidence to justify his conclusion which approved the Mutualization Plan. The basic problem for the commissioner to determine was whether or not the price and terms of payment for the New Company stock were fixed in accordance with the rehabilitation agreement, for if they were, the Plan of Mutualization is fair and equitable because it gives the stockholder the price and terms he agreed to take.

[23, 24] The point is made that some of the witnesses who testified before the commissioner were interested witnesses.

Such claim could go only to the weight of the evidence and not its admissibility. It does not appear here, in any event, that any evidence received by him was not trustworthy, nor that any committeeman or valuer or any witness was guilty of partiality, bad faith, or misconduct in their appraisals or testimony. Therefore, the point cannot be upheld. Cecil v. Bank of America, etc., 107 Cal.App.2d 38, 236 P.2d 408; Riccomini v. Pierucci, 54 Cal.App. 606, 608, 202 P. 344.

[25, 26] Another point raised by the appellants is that they have been deprived of substantive due process because the stock of the New Company was valued as of the present, that the time of payment was fixed long in the future, payment was conditional, there was no provision for reasonable interest, and the price paid was grossly inadequate. On this question of due process we should never lose sight of the fact that the commissioner's approval of the Plan of Mutualization did not have the effect of taking appellants' property, since it was nothing more or less than a permit and did not compel the life policyholders to approve the plan, nor the stockholder to dispose of the stock as therein provided, or the New Company to adopt the plan. Even after the commissioner's approval the life policyholders could have rejected the plan, had they so desired. The stockholder could have rejected the plan but for the Rehabilitation and Reinsurance Agreement, which obligated the stockholder to dispose of the stock at the price and upon the terms fixed by the Price Determination Committee. The compulsion upon the stockholder flows from the obligations of the Rehabilitation and Reinsurance Agreement and not from the commissioner's approval of the plan. Even if this were not so, we do not believe the point raised is sound. As we read the evidence it does not necessarily lead to that conclusion; in fact, it could well lead to a contrary conclusion, the one that was adopted by the Insurance Commissioner and upheld by the lower court, to wit, that the plan was fair and equitable.

This already lengthy opinion must come to a conclusion. We have carefully read the briefs of all parties and each point raised by the appellants. Those not hereinabove discussed, we find to be without substantial merit.

[27] The record shows that the commissioner's order approving the Mutualization Plan was not improper, on the evidence submitted. As above indicated, the liquidator was bound by the rehabilitation agreement to dispose of the stock of the New Company on the terms fixed by the committee. Petitioners were parties to the proceeding in which the rehabilitation agreement was proposed, and their representatives participated in seeking that approval. They may not now complain of its terms.

The evidence before the commissioner was fully documented with respect to all factual data, the witnesses who testified appear to be outstanding in their fields, and their expert judgment on questions of valuation and valuation methods, interest rates and trends, and all other matters within the province of expert opinion, could not be disregarded on the basis of "mere unsupported suggestions and opinions as counsel." In that situation the commissioner could clearly have come to the conclusion that the plan should be approved.

We have studied this case diligently in an effort to ascertain if there was error committed in the court below. We can find none of any consequence.

[28] The oral argument of this case was regularly set for hearing by this court for February 10, 1954. On February 1, 1954, the parties hereto signed, and on February 8, 1954, filed herein a stipulation waiving oral argument and agreeing that the case "may be submitted for decision upon the briefs and record on file." On February 10, 1954, appellants appeared before the court and made an ex parte application to have the court consider a purported agreement between Old Company and one Clint W. Murchison, wherein the latter agreed, subject to a number of highly important contingencies, to pay $17,000,000 for stock in Old Company.

Various briefs have been filed herein, mostly by amici curiae, respectively approving and opposing such application. We have concluded we may not give consideration to such agreement. Redsted v. Weiss, 71 Cal.App.2d 660, 666, 163 P.2d 105; Bassett v. Johnson, 94 Cal.App.2d 807, 812, 211 P.2d 939.

[29] If we were to give full consideration to the offer, as made, we would be in no position to hold that the Insurance Commissioner erred in his conclusions, since such evidence could, at the most, be merely cumulative. Katenkamp v. Union Realty Co., 36 Cal.App.2d 602, 621–622, 98 P.2d 239.

And, in any event, such additional evidence obviously would not be "so conclusive that it compels the direction of a judgment in favor of appellant," nor would its effect upon this appeal be "decisive". Bassett v. Johnson, supra [94 Cal.App.2d 807, 211 P.2d 942].

While the last 18 years history of this company is no proof thereof, nevertheless, it is a well recognized principle that all litigation must some time come to an end.

The judgment of the lower court must be, and is, affirmed.

DOOLING and KAUFMAN, JJ., concur.

125 Cal.App.2d 222

VICTORY OIL CO.
v.
HANCOCK OIL CO. et al.
VICTORY OIL CO. et al.
v.
McKENZIE et al.

Civ. 19375.

District Court of Appeal, Second District,
Division 1, California.
May 17, 1954.

Rehearing Denied June 7, 1954.
Hearing Denied July 14, 1954.

Suit was brought to quiet title to realty and for declaratory relief, and cross complaints were filed. The Superior Court of Los Angeles County, Joseph M. Maltby, J., entered judgment quieting title, and certain of the parties appealed. The District Court of Appeal, Mosk, J. pro tem., held that where deed reserved to grantors and their successors in interest all oil, gas, hydrocarbons and other minerals and provided that if such minerals should not be found in paying quantities within five years, mineral rights of grantors should terminate, and that if minerals were found within five years, rights of grantors to minerals should continue for 20 years and so long thereafter as minerals should be produced in paying quantities, grantee's interest in minerals was not "vested" but was "contingent" because dependent on a dubious, uncertain future event and was therefore a contingent interest and void under rule against perpetuities.

Affirmed.

1. Courts 🔑91(2)

Where California Supreme Court rendered a decision stating that there was considerable uncertainty as to contention that rule against perpetuities is in force in California, and thereafter District Court of Appeal concluded that California always had the rule against perpetuities, and the Supreme Court of California denied a hearing, it was necessary to assume that the Supreme Court thereby approved the decision of the District Court of Appeal. Political Code, § 4468; Const. art. 20, § 9.

2. Perpetuities 🔑3

The enactment by the Legislature of statutes in 1951 making effective in California the American common-law rule against perpetuities and providing that such statute shall not invalidate any part of any will or any instrument executed prior to effective date of such statute and which would have been valid prior to effective date of such statute, did not compel a conclusion that there was no rule against perpetuities in California prior to 1951. Political Code, § 4468; Const. art. 20, § 9; Civ. Code, § 715.2; St.1951, p. 3443, § 8.

3. Contracts 🔑103

The validity of any instrument is determined by laws both written and unwritten. Code Civ.Proc. §§ 1896, 1899.

4. Common Law ⇨1

Judicial interpretation of the common law may be included in that body of the law known as the "unwritten law." Code Civ. Proc. § 1899.

See publication Words and Phrases, for other judicial constructions and definitions of "Unwritten Law".

5. Common Law ⇨12

In California, the common law, except so far as it is inapplicable to California conditions, or has been modified by statute, still remains in force. Political Code, § 4468.

6. Common Law ⇨14

The California code establishes the law respecting the subjects to which it relates, but where the code is silent, the common law governs. Political Code, § 4468

7. Courts ⇨90(4)

Decisions written on a subject prior to the enactment of a statutory provision thereon are not necessarily controlling. Political Code, § 4468.

8. Courts ⇨89

The doctrine of stare decisis is applicable in California.

9. Perpetuities ⇨3

The rule against perpetuities has always been in effect in California. Political Code, § 4468; Const. art. 20, § 9.

10. Perpetuities ⇨4(12)

A vested interest is not subject to the rule against perpetuities. Political Code, § 4468; Const. art. 20, § 9.

11. Estates ⇨1

The law favors the vesting of interests and will presume every interest to vest unless a contrary intention is clearly manifested.

12. Remainders ⇨4

Whenever preceding estate is limited, so as to determine only on an event which is uncertain and may never happen, or wherever remainder is limited to a person not in esse or not ascertained, or wherever it is limited so as to require concurrence of some dubious uncertain event, independent of determination of preceding estate and duration of estate limited in remainder, to give it a capacity of taking effect, then the remainder is a "contingent remainder." Civ.Code, §§ 694, 695.

See publication Words and Phrases, for other judicial constructions and definitions of "Contingent Remainder".

13. Perpetuities ⇨4(4)

Where deed reserved to grantors and their successors in interest all oil, gas, hydrocarbons and other minerals and provided that if such minerals should not be found in paying quantities within five years, mineral rights of grantors should terminate, and that if minerals were found within five years, rights of grantors to minerals should continue for 20 years and so long thereafter as minerals should be produced in paying quantities, grantee's interest in minerals was not "vested" but was "contingent" because dependent on a dubious, uncertain future event and was therefore a contingent interest and void under rule against perpetuities. Political Code, § 4468; Const. art. 20, § 9.

See publication Words and Phrases, for other judicial constructions and definitions of "Contingent" and "Vested".

14. Deeds ⇨141

A "reservation" creates some right or privilege for benefit of grantor in land described in deed and withhholds it from operation of the grant, and by a "reservation" the grantor reserves to himself something which did not exist as an independent right before the grant, but which is thereby newly created.

See publication Words and Phrases, for other judicial constructions and definitions of "Reservation".

15. Deeds ⇨137

An "exception" is a clause in a deed withdrawing from operation of deed some part of the estate granted.

See publication Words and Phrases, for other judicial constructions and definitions of "Exception".

16. Deeds ⇨138

The terms "reservation" and "exception" are often used interchangeably, and their distinction is technical, slight and shadowy.

17. Mines and Minerals ⚿55(4)

Provision in deed "excepting" therefrom and "reserving" to the grantors and their successors in interest all oil, gas, and hydrocarbons and other minerals was an "exception."

18. Larceny ⚿5

The severance of oil from the land of another with felonious intent is prohibited.

19. Larceny ⚿1

Generally, a theft, though prosecution therefor may be barred by statute of limitations, is no less a theft.

20. Mines and Minerals ⚿55(7)

Court, in determining whether duration clause of deed that rights of grantors to minerals shall continue so long thereafter as minerals shall be produced therefrom in paying quantities, was fulfilled, was required to place itself in position of parties at time of execution of deed.

21. Mines and Minerals ⚿55(7)

Where, at time of execution of deed excepting minerals, scientific methods were not sufficiently developed so that course and direction of oil well under ground could be determined, and, without knowledge of the parties, producing oil well drilled on realty in question was slant drilled so that its producing interval was beyond exterior boundary of the realty in question, duration clause in deed that rights of grantors to minerals shall continue so long as minerals shall be produced therefrom in paying quantities, would be deemed to have been complied with.

22. Estoppel ⚿92(3)

The acceptance of royalties from those carrying on drilling operations did not estop those accepting the royalties from asserting that drilling operations were illegal.

◆

Ball, Hunt & Hart and M. E. Lewis, Jr., Clark Heggeness, Long Beach, for appellants.

McCutchen, Black, Harnagel & Green, Harold A. Black, Philip K. Verleger, Los Angeles, for respondents Hancock Oil Co. and Milton H. Philleo.

Clock, Waestman & Clock, John G. Clock, Long Beach, for respondents Hoffman and Berry.

Eugene Tincher, Long Beach, for respondents Morrill.

John W. Doran, Long Beach, for respondent Ryan.

Desmond & Desmond, Long Beach, for respondent Page Oil Tools, Inc.

MOSK, Justice pro tem.

Certain cross-defendants and one cross-complainant appeal from an adverse judgment quieting title to real property and granting declaratory relief in this case tried on stipulated facts plus the testimony of two expert witnesses.

Hereford Berry and Minnie F. Berry deeded a parcel of real property to J. W. Tucker on March 18, 1922, "excepting therefrom and reserving to the grantors and their successors in interest all oil, gas, hydrocarbons and other minerals on or under the said described lands * * * provided however that the said grantees shall be entitled to one-half (½) of all net royalty, rental, or profits received by said grantors under any lease or contract which the said grantors may grant or enter into with any person, firm or corporation for the development of said lands * * *".

All of the parties to this law suit claim their rights through either the grantors or the grantee.

The deed further provided that "in the event that oil, gas, hydrocarbons or other minerals shall not be found in paying quantities in or upon said described land within five (5) years from date of this agreement, all rights of said grantors in said land shall cease and terminate and the grantee and his successors in interest shall thereupon become vested with absolute title * * *".

In the event oil, gas, hydrocarbons or other minerals were found within the five-year period from the date of execution of the deed then the instrument provided "the rights of said grantors in said lands as herein divided shall continue for a period of twenty (20) years, and so long thereafter as oil, gas or other minerals may or shall be produced therefrom in paying quantities".

On December 19, 1925, Hereford Berry, as lessor, entered into an oil and gas lease with the Hancock Refining Company, a corporation, and others, as lessees. Through a succession of assignments, not material here, the Hancock Oil Company, a corporation (hereinafter called Hancock), and the heirs and devisees of Louise E. Dabney, deceased, have succeeded to the entire leasehold interest of the original lessees under the Berry Lease.

The original lessor, Hereford Berry, died in 1946, leaving his interest in the lease to Frances M. Hoffman and Hereford Berry, Jr., an undivided two-thirds and one-third respectively.

Pursuant to the lease, three oil wells were drilled in the leasehold property and by December, 1926, were productive in paying quantities. This was within the five-year period. All three wells continued to be productive for nearly two decades but were ultimately abandoned on May 20, 1946.

On January 5, 1931, a fourth well, known as Berry No. 4, was completed and became productive in paying quantities. The surface location of this well was upon the leasehold property but unintentionally it was slant drilled so that its producing interval was approximately 100 feet beyond the exterior boundaries of the Berry leasehold. The producing interval is defined as that portion of an oil well through which oil is taken into the well, thereupon to be raised by mechanical means to the mouth of the well at the surface.

It was conceded in the stipulation of facts, and additionally testified to by both expert witnesses, John O. Richardson for the cross-complainants and A. A. Carrey for the cross-defendants, that in 1922 there was no known way of ascertaining the subsurface location of an oil well, and no way of controlling the subsurface direction of an oil well, that not until the last twenty years have there been in common use underground survey instruments and electric logs to ascertain underground strata. The trial court found, and there was no evidence to the contrary, that Berry No. 4 was not intentionally drilled outside of the exterior boundaries of the leasehold property as the boundaries are projected from the surface vertically downward.

Out of production of the four wells appropriate royalties were paid to the appellants herein, it being stipulated in open court, however, that none of them were informed or aware of the fact that the producing interval of Berry No. 4 was located off the property described in the Berry Lease. It was further stipulated that none of the parties tendered back any of the royalties previously received, although all sums have been impounded since August, 1951.

The Victory Oil Company originally brought this suit in simple quiet title form, alleging fee title to the real property involved herein. Thereafter, all of the parties involved in this appeal filed answers and cross-complaints, except appellant Marjory R. Clarke, who is a cross-complainant only. The Victory Oil Company later sought to dismiss its action, and although dismissal was denied for the reason that affirmative relief was sought in the various cross-complaints, it did not participate further in the proceedings.

At the trial John R. Richardson, a petroleum engineer for the Hancock Oil Company, testified that despite the location of the producing interval Berry No. 4 drains oil from the area beneath the Berry Lease. He expressed the opinion that if Berry No. 4 had bottomed underneath its surface location at the time it was drilled it would have been comparable to the existing well. A. A. Carrey, a consulting geologist who had been the engineer in charge for Hancock when Berry No. 4 was drilled, testified that he could not say with any degree of conviction whether a vertically drilled well would have been productive. He indicated some fear that it would have been too close to an existing fault to be a good producer, or a producer as profuse as Berry No. 4. He conceded there was no question that the existing well drained oil from the area directly beneath the Berry property, for the producing interval of a well draws equally from all sides "like a concentric circle".

The trial court found that by reason of the fact at the time the deed was written there was no known way to ascertain the subsurface location of a well, the parties intended that there be a well upon the surface of the land producing oil, gas or other hydrocarbons. It found that the Berry mineral rights continue to exist and that the lease was and is valid and in full force and effect.

From this adverse conclusion Paul F. McKenzie, Elenore McKenzie and John M. Clarke, cross-complainants and cross-defendants in certain pleadings, and Marjory R. Clarke cross-complainant, have appealed.

The trial court found that the provision of the deed to Tucker continuing the interest of the grantors for the period of twenty years "and so long thereafter as oil, gas or other minerals may or shall be produced" violates the rule against perpetuities. Appellant confronts us at the outset of this appeal with the contention that until 1951, California had no rule against perpetuities and that by legislative action in 1951 the mineral interest created by the deed was specifically validated.

Article XX, section 9, of the California Constitution provides that "No perpetuities shall be allowed except for eleemosynary purposes". That constitutional provision, read together with section 4468 of the Political Code making the common law, except in certain cases, the rule of decision in this state, has provided the basis for a commonly accepted belief that California always has had the common law rule against perpetuities.

Early cases assume, both in dictum and in decision, that the constitutional provision against perpetuities was self-executing. In the absence of any legislation "the courts of this State would go to the common law definitions to ascertain the meaning of the expression 'no perpetuities shall be allowed,' as used in the Constitution." In re Estate of Hinckley, 58 Cal. 457, 472. Estate of McCray, 204 Cal. 399, at page 406, 268 P. 647, at page 650, speaks of "The rule against perpetuities, ingrafted upon our system by the Constitution, * * *". And in Dallapi v. Campbell, 45 Cal.App.2d 541, 544, 114 P.2d 646, 648, it was held that "The rule against perpetuities, as it existed under the common law, appears at this time to be an established rule of property law in this state." That court also quoted with approval the language of McCray to the effect that the rule against perpetuities is engrafted upon our system by the constitution.

Nevertheless, throughout the years a number of text writers expressed some academic doubts as to the existence of a rule against perpetuities in California. [Gray, The Rule Against Perpetuities, (4th Ed.) pp. 692–693; The American Law Institute, Rest. of Prop., p. 2746; 1 So.Cal.L.Rev. 107; 16 Cal.L.Rev. 81; 9 Cal.L.Rev. 447; 1 Cal.L.Rev. 305.]

This doubt was given additional substance in Re Estate of Micheletti, 24 Cal. 2d 904, 908, 151 P.2d 833, 835, in which Mr. Justice Traynor, speaking for a unanimous court, stated that, "It is appellant's position that the rule against perpetuities is in force in this state by reason of article XX, section 9, of the California Constitution prohibiting perpetuities except for eleemosynary purposes and section 4468 of the Political Code, which makes the common law of England the rule of decisions in the courts of this state insofar as it is consistent with the laws and Constitution of the state. There is considerable uncertainty as to the soundness of this position (see 2 Simes, Law of Future Interest (1936), § 572, p. 473; Rest., Property (Group No. 1), Proposed Final Draft No. 5 (1944), pp. 109–110), * * *". It must be noted, however, that this was mere dictum for the court added that, "* * * it is unnecessary to determine that question in this case, * * *".

[1] Micheletti was decided in 1944. In 1948 a direct attack upon the existence of a rule against perpetuities in California was vigorously asserted in Re Estate of Sahlender, 89 Cal.App.2d 329, 201 P.2d 69. Taking cognizance of the doubt expressed in Micheletti, the court in Sahlender thoroughly reviewed the state of the law and

concluded that by virtue of the constitutional provision and the 1850 statute making the rule of the common law the rule of decision in this state, California has always had the rule against perpetuities. Sahlender was decided by a unanimous court, and the Supreme Court denied a hearing on February 25, 1949. This being after Micheletti, it must be assumed that the Supreme Court thereby approved the unequivocal decision in Sahlender.

But, maintains the appellant herein, the legislature spoke on this subject in 1951, and its enactment at that time compels a conclusion, prior judicial determination to the contrary notwithstanding, that there was no rule against perpetuities in California prior to 1951. There being no cases since the legislature last spoke on that subject we must give consideration to the effect of the 1951 statute.

At that time the legislature adopted section 715.2 of the Civil Code, providing as follows:

> "(Vesting of interest in property: Rule against perpetuities.) No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain. It is intended by the enactment of this section to make effective in this State the American common-law rule against perpetuities."

At the same time the legislature adopted section 8 of chapter 1463, Stats. of 1951, p. 3443, further providing:

> "This act shall not invalidate any part of any will or other instrument executed prior to the effective date of this act and any such part which would have been valid prior to said effective date shall be valid irrespective of the provisions of this act. The republication of a will executed prior to the effective date of this act by a codicil executed after said date shall not constitute execution of the will after said date within the meaning of this section."

From section 8 the appellant contends that there is a compelling inference that the legislature was not merely codifying a common law rule but was asserting a mandate that no wills, leases, deeds or other documents executed prior to 1951 were to be invalidated because of failure to meet the limitations imposed by the rule against perpetuities.

[2] With this hypothesis we cannot agree. That "*this act* shall not invalidate any part of any will or other instrument executed prior" to its effective date cannot be construed to preclude an instrument being declared otherwise invalid for running afoul of the constitution, other acts, or judicial construction of the common law.

The legislature must have so intended, for in the next clause of section 8, it provided that "any such part *which would have been valid prior to said effective date* shall be valid irrespective of the provisions of this act".

Therefore we must ascertain whether an instrument "would have been valid prior to" 1951, in order to determine its immunity under section 8.

[3] The validity of any instrument is determined by laws, both written and unwritten. A written law is that which is promulgated in writing and of which a record is in existence. Code Civ.Proc. § 1896. Unwritten law is the law not promulgated and recorded but which is, nevertheless, observed and administered in the courts of the country. It has no certain repository, but is collected from the reports of the decisions of the courts, and the treatises of learned men. C.C.P. § 1899.

[4–6] In this last body of law may be included judicial interpretation of the common law. In this state the common law, except so far as it is inapplicable to our conditions, or has been modified by statute, still remains in force. In re Estate of Elizalde, 182 Cal. 427, 432, 188 P. 560. The code establishes the law respecting the subjects to which it relates but where the code is silent the common law governs. Estate of Apple, 66 Cal. 432, 434, 6 P. 7.

[7, 8] It is true that decisions written on a subject prior to the enactment of a statutory provision thereon are not necessarily controlling. Harlie R. Norris Co., Ltd. v. Lovett, 123 Cal.App. 640, 12 P.2d 141. However, the necessity for adherence to the doctrine of *stare decisis* was very early decided in California in the landmark case of Hart v. Burnett, 15 Cal. 530, 601.

In deference thereto, we perforce return to the most recent decision immediately prior to 1951, In re Estate of Sahlender, supra. And once again the conclusion is inescapable that this instrument would not have been valid prior to 1951 because of its failure to conform to the rule against perpetuities.

[9] For more than 250 years at common law, and since 1849 in California, the rule against perpetuities has been generally acknowledged doctrine. Its reduction to formal legislative enactment in 1951 and inclusion in the code suggests continued acceptance rather than rejection as public policy at this late date.

Finally, on this subject, it is contended by appellant that there would be no purpose for section 8 of the Act of 1951 were it not the intention of the legislature to validate all documents executed prior thereto that might otherwise be in conflict with the newly enacted legislative rule against perpetuities. This is an unwarranted assumption, for the act comprising chapter 1463, 1951 Stats., did more than merely adopt in statutory form the rule against perpetuities. The same act also reduced the permissible period for restraints upon alienation from twenty-five years to twenty-one years after some life in being. A comparison of former Civil Code section 715, enacted 1872, amended in 1917 and repealed in 1951, with the present section 715.1, indicates that many documents might be invalidated were it not for section 8.

[10] In order that its distinction from the rule against restraints upon alienation may be more clearly understood, the rule against perpetuities is sometimes known as the rule against remoteness of vesting. That designation makes it apparent that a vested interest is not subject to the rule. Appellant maintains the Tucker interest was at all times vested.

A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest. Civ.Code, § 694. A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain. Civ.Code, § 695.

[11, 12] It is true that the law favors the vesting of interests and will presume every interest to vest unless a contrary intention is clearly manifested. Williams v. Williams, 73 Cal. 99, 14 P. 394. It does appear to be clearly manifest in this instance, however, that the termination of production of oil and gas is a dubious, uncertain event. As stated in County of Los Angeles v. Winans, 13 Cal.App. 234, 243, 109 P. 640, 645, "'* * * wherever the preceding estate is limited so as to determine only on an event which is uncertain, and may never happen, or wherever the remainder is limited to a person not *in esse* or not ascertained, or wherever it is limited so as to require the concurrence of some dubious uncertain event, independent of the determination of the preceding estate and duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent.'"

The rule is also stated in, and frequently quoted from In re Estate of Washburn, 11 Cal.App. 735, 740, 741, 106 P. 415, 418:

> "The existence of a contingency, irrespective of the duration of the remainder, on which contingency possession or enjoyment depends, is the fundamental characteristic of a contingent remainder, and forms a true, tangible, and practical criterion by which the contingent character of a remainder is limited on an uncertain event; that is, an event which may never happen, or on an event which may not happen till after the deter-

> mination of the particular estate, though it is certain to happen at some time, or when the remainder is limited to a person not in being or not ascertained. 24 Am. & Eng.Ency. of Law, p. 400."

Though semantics are not controlling, the case of In re De Vries' Estate, 17 Cal. App. 184, 196, 119 P. 109, 114, suggests that the adverbs "when", "then", "after", "until", and "from" are construed to relate merely to the time of the enjoyment of the estate and not the time of vesting in interest. Words such as "if", "'in the event'", and similar others are construed to denote contingency. The instant conveyance uses the expression "'in the event'" in one clause and "if" in the other.

[13] By the foregoing tests, it appears that the Tucker interest was not vested, but was dependent upon a dubious, uncertain future event and was therefore a contingent interest.

In furthering the assertion that this is a vested interest and thus beyond the reach of the rule against perpetuities, appellants urge that the pertinent habendum clause of the conveyence does not create an exception, but is a reservation of the *profit a prendre*, and a conveyance of the *profit a prendre* from grantee Tucker to grantor Berry by way of regrant. This, of course, would be purely a fictional regrant, since no such instrument was executed or recorded.

There is some authority in California in support of this theory. Aden v. City of Vallejo, 139 Cal. 165, 168, 72 P. 905; Wagner v. Hanna, 38 Cal. 111, 116; Painter v. Pasadena Land and Water Co., 91 Cal. 74, 81, 27 P. 539, 541.

The regrant concept, tenuous at best, was devised to obliterate the distinction between corporeal and incorporeal interests with regard to required words of inheritance. Painter v. Pasadena Land and Water Co., supra. Once the "great changes which have occurred in the political and business relations of life, however, have done away with the reason for such a rule," so stated Painter in 1891, the inheritable disability of *profit a prendre* was eliminated, and with it went any further usefulness of the fictional regrant.

[14, 15] There is a distinction between a reservation and an exception. A reservation creates some right or privilege for the benefit of the grantor in the land described and withholds it from the operation of the grant. By a reservation the grantor reserves to himself something which did not exist as an independent right before the grant, but which is thereby newly created. An exception, on the other hand, is a clause in a deed which withdraws from its operation some part of the estate granted. Stone v. Stone, 141 Iowa 438, 119 N.W. 712, 714, 20 L.R.A.,N.S., 221.

[16] Only a cursory examination of cases is necessary to indicate the terms reservation and exception often are used interchangeably and that their distinction is technical, "slight and shadowy". Van Slyke v. Arrowhead, etc., Power Co., 155 Cal. 675, 679, 102 P. 816, 818.

It is clear that the phraseology employed in the instrument in question is not controlling nor determinative of the question of whether a reservation or exception is created. Coon v. Sonoma Magnesite Co., 182 Cal. 597, 189 P. 271. In the instant conveyance both "excepting" and "reserving" were used.

There are no California cases discussing whether retention of the right to extract oil is a reservation or an exception. In many jurisdictions the terms are used indiscriminately. Summers, Oil and Gas, Vol. 1A, Sec. 133; Lovelace v. Southwestern Petroleum Co., 6 Cir., 267 F. 513; Rich v. Doneghey, 71 Okl. 204, 177 P. 86. In other jurisdictions, retention of the right to extract oil has been held to be an exception. Klein v. Humble Oil and Refining Co., Tex. Civ.App., 67 S.W.2d 911; Arnett v. Elkhorn Coal Corp., 191 Ky. 706, 231 S.W. 219; Allen v. Henson, 186 Ky. 201, 217 S.W. 120.

[17] The trial court found the instant conveyance to be an exception and that determination appears sound. However, even if this were held to be a reservation the rule of Dallapi v. Campbell, 45 Cal. App.2d 541, 545, 114 P.2d 646, would be persuasive, the court there finding a reser-

vation of a *profit a prendre* to be a violation of the rule against perpetuities, and therefore void and of no effect. See Pimentel v. Hall-Baker Co., 32 Cal.App.2d 697, 90 P.2d 588; Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788, 101 A.L.R. 871. To the same effect is Dabney v. Edwards, 5 Cal.2d 1, 53 P.2d 962, 103 A.L.R. 822, which holds that a *profit a prendre*, an incorporeal hereditament, is an estate in real property. Munsey v. Mills & Garitty, 115 Tex. 469, 283 S.W. 754, 759. There is no convincing authority holding this estate in real property, unlike others, to be exempt from the rule against perpetuities.

Finally we come to the contention of appellants that production from Berry No. 4, being bottomed outside the property, does not fulfill the duration clause of the deed—"and so long thereafter as oil, gas, hydrocarbons and other minerals may or shall be produced therefrom in paying quantities".

[18, 19] The severance of oil from the land of another with felonious intent is prohibited. People v. Brunwin, 2 Cal.App.2d 287, 37 P.2d 1072. Generally speaking, a theft, though prosecution therefor may be barred by the statute of limitations, is no less a theft.

[20] However, the circumstances in this case do not justify the aggrieved demeanor of appellants. For, as nearly as possible, we must place ourselves in the position of the parties at the time of the execution of the instrument involved. Miller v. Grunsky, 141 Cal. 441, 453, 66 P. 858, 75 P. 48; Walsh v. Hill, 38 Cal. 481, 487; Brannan v. Mesick, 10 Cal. 95, 106; Marlin v. Robinson, 123 Cal.App. 373, 375, 11 P.2d 70.

In so doing, we find the parties entered into this instrument at a time when techniques for the discovery of the subsurface location of an oil well and its producing interval were yet to be developed. From the visible surface a well could be drilled, but its course and terminal were unknown mysteries, beyond the ken of man and science.

[21] Thus the conclusion seems inescapable that the parties contemplated merely a well *surfaced* on the land in question, producing oil in paying quantities. They could not have intended proscribing the subsurface course of the well, nor restricting removal of oil to within the four vertical boundaries of their property. To ascribe such intention is to suggest a clairvoyant knowledge of future technological advance.

Berry No. 4 was drilled in 1930 to a depth of more than 6000 feet and deviated about 100 feet. Within a very few years thereafter, techniques for ascertaining and controlling a hole were developed, survey methods first, directional drilling methods later. No doubt thousands of inadvertent trespasses were revealed, for in 1935 the legislature found it necessary to declare public policy at some length:

"Sec. 2. *Declaration of policy.* It is declared that it is common knowledge that there are thousands of oil and gas wells, varying age, within this state, which are not wholly within land owned, leased or otherwise controlled by the past or present owner or operator of the well; that many such wells were drilled without intent so to invade the land of another; that until recent years there was no way for determining even approximately the subsurface location of the well; that now it is difficult and expensive to determine by any method of subsurface directional survey even the approximate subsurface location of the well, and in cases of many producing wells, to make such survey may jeopardize the well and its ability to produce; that in many instances wells could not have been drilled and hereafter cannot be drilled without some material deviation from the vertical; that the producing of most and perhaps all such wells has been and will be of great public benefit; that the possibility of commencement of large numbers of said causes of action, excepting where the acts hereafter are committed knowingly and intentionally as aforesaid, has brought great and undesirable confusion and uncertainty in the oil industry, may cause terrific financial distress and unemployment, and may cause the premature abandonment and prevent the full use of many wells, all contrary to true conservation of oil and gas; that the people have a public interest in removing said hazard and precluding said confusion, uncertainty, distress and unemployment, without doing violence to private rights; that vigilant persons can protect their rights within said one hundred eighty days; that public policy and the welfare of the people require the reduction of the time for commencement of such causes of action and that said one hundred eighty days is deemed reasonable; that public policy and the welfare of the people require the measure of damages to be as above provided, in all cases where the invasion of the rights of another person has here to fore been or shall hereafter be by reason of any honest mistake of law or fact, either by the departure of a well from the vertical or otherwise." Code of Civil Procedure, § 349¾; Stats.1935, p. 2285.

In 1946, when the original three wells were abandoned, and only Berry No. 4 remained, any action for conversion by the owners of adjacent property then would have been barred by C.C.P. § 349¾ for eleven years. The foregoing declaration of public policy had the effect of rendering legal and proper the continued withdrawal of oil from wells that deviated from the vertical. In fact, said the legislature, it was of great public benefit.

Here the appellants have been receiving royalties from Berry No. 4 up to the commencement of this suit with no audible remonstration. It becomes difficult to understand by what rationale they now assume a position that could have been maintained only by adjacent landowners within 180 days after adoption of C.C.P. § 349¾ in 1935.

[22] Respondents maintained at the trial that appellants waived their right to challenge the illegality or respondents' drilling operations by the acceptance of royalties. This question was decided contrary to respondents' contention in Renner v. Huntington-Hawthorne Oil and Gas Co., 39 Cal.2d 93, 101, 244 P.2d 895. The acceptance of royalties cannot be deemed any waiver of appellants' rights, nor an estoppel against their assertion.

Nevertheless, it would be strange indeed if the actual owners of the oil being removed, the adjacent landowners, were barred by law from indemnity for their loss, while these appellants and their predecessors were able to share handsomely in what they have inferentially characterized as ill-gotten gains and then more than two decades later urge illegality and immorality in support of their contentions.

At the time this instrument was executed, only one test of compliance therewith was available: the existence on the land of a well out of which oil was flowing in paying quantities. That test has been met at all times. In addition, uncontroverted expert testimony indicated Berry No. 4 did withdraw oil from resources directly beneath the leasehold involved herein, however circuitous may have been its itinerary to the surface. Certainly that oil could not be said to be tainted with conversion, and alone would indicate Berry No. 4 was properly productive within the meaning of the deed.

The judgment is affirmed.

WHITE, P. J., and DRAPEAU, J., concur.

125 Cal.App.2d 154

SMITH v. SMITH.

Civ. 19836.

District Court of Appeal, Second District, Division 3, California.

May 13, 1954.

Hearing Denied July 7, 1954.

Proceeding under Reciprocal Enforcement of Support Law, initiated in Connecticut against California defendant, to enforce support of minor child. The Superior court, Los Angeles County, H. S. Farrell, J., entered order commanding defendant to furnish support to his minor child, and defendant appealed therefrom, and from order denying motion for new trial. The District Court of Appeal, Vallée, J., held, inter alia, that the support law affords a defendant an opportunity to be heard, to examine and cross-examine, by deposition, plaintiff and any witness that may have testified in initiating state, to examine and cross-examine any witnesses that may testify in responding state, to meet opposing evidence, and to oppose with evidence, and hence is not unconstitutional as depriving a defendant of due process of law.

Order commanding defendant to furnish support affirmed; appeal from order denying motion for new trial dismissed.

1. Appeal and Error 🔑110

Order denying motion for new trial is nonappealable.

2. Parent and Child 🔑3(1)

The Reciprocal Enforcement of Support Law is designed to enable a dependent in one state to secure money for support from a person residing in another state who is legally liable for support of the defendant, and its purposes are to improve and extend by reciprocal legislation the enforcement of duties of support. Code Civ.Proc. §§ 1650–1681.

3. Parent and Child 🔑3(3)

In proceeding under Reciprocal Enforcement of Support Law, initiated in Connecticut against California defendant, to enforce support of minor child, failure to attach a copy of the Connecticut law to the petition did not invalidate the proceeding, in view of fact that a copy of Connecticut law was transmitted to Superior Court, which is all that the law requires. Code Civ.Proc. §§ 1650–1681.

4. Parent and Child 🔑3(3)

In proceeding under Reciprocal Enforcement of Support Law, initiated in Connecticut against California defendant, to enforce support of minor child, initiating papers were not required to show that defendant was present in Connecticut during period for which support was sought or that plaintiff was present in Connecticut when failure to support commenced, there being no difference in duty of support provided by the respective states. Code Civ. Proc. §§ 1650–1681, 1670; Civ.Code, § 196; Gen.St.Supp.1951 Conn. § 1396b.

5. Judgment 🔑443(1)

Equity, under proper circumstances, will set aside a judgment obtained by fraud, but fraud must be extrinsic and collateral.

6. Judgment 🔑443(1, 3)

Fraud which is collateral to and outside of court, so that a party, because of such fraud or concealment, is effectively deprived of presenting his case or all of his defense, and is thus prevented from having his day in court, and which prevents a trial of issues presented to court for determination, is "extrinsic fraud" such as will justify equity's setting aside the final judgment.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic Fraud".

7. Judgment 🔑428, 442

Equity will not vacate a judgment obtained through collusive connivance of parties to action, and to warrant such relief there must be extrinsic fraud, but where evidence of the fraud could have been presented to court during pendency of action so that full examination of facts could have been made and full protection given to rights of parties, equity will not interfere but will leave parties where they have placed themselves.

8. Judgment 🔑443(1)

Party who has been given proper notice of action, and who has not been prevented from full participation therein, has had opportunity to present his case to court and to protect himself from any fraud attempted by his adversary, and fraud perpetrated under such circumstances is "intrinsic", even though unsuccessful party does not avail himself of his opportunity to appear before the court, and having had opportunity to protect his interests, he cannot attack judgment once time has elapsed for appeal or other direct attack.

See publication Words and Phrases, for other judicial constructions and definitions of "Intrinsic Fraud".

9. Divorce 🔑375

Defendant, who appeared in Connecticut divorce and permitted judgment by default to be taken against him, had his day in court in such action and could not thereafter, in proceeding under Reciprocal Enforcement of Support Law to enforce support of minor child, attack as having been obtained by fraud the finding of Connecticut court that he was the father of the child, by asserting matters which could have been thoroughly heard during pendency of divorce action. Code Civ.Proc. §§ 1650–1681.

10. Divorce ⚷324

A father residing in California is under legal obligation to support his minor child residing in another state and in the legal custody of its mother by virtue of decree of divorce given to mother by courts of the state in which she and the child reside.

11. Parent and Child ⚷3(1)

A parent may not by any act, conduct, or arrangement of whatever sort, shift from his shoulders the legal responsibility and moral duty to support his minor child, who enjoys an inalienable right to support which no form of contract between the parents, nor change of domestic status of either of them, may affect.

12. Divorce ⚷384

Where defendant appeared in Connecticut divorce action, permitted default judgment to be taken against him and took no appeal therefrom, Connecticut decree, including a finding that defendant was father of minor child, was res judicata and entitled to full faith and credit in California, and hence defendant, in subsequent proceeding under Reciprocal Enforcement of Support Law, was precluded from proving that he was not the father of such child. Code Civ.Proc. §§ 1650–1681, 1913.

13. Constitutional Law ⚷251

The Fifth Amendment to the Federal Constitution applies to the Federal Government and not to the several states, and does not constitute a limitation on power of states, and hence had no application in proceeding under Reciprocal Enforcement of Support Law to enforce support of minor child. Code Civ.Proc. §§ 1650–1681; U.S.C.A.Const. Amend. 5.

14. Constitutional Law ⚷311

Denial of right of cross-examination may constitute a denial of due process.

15. Witnesses ⚷275(1)

A defendant in a proceeding under the Reciprocal Enforcement of Support Law has a right to cross-examine the plaintiff. Code Civ.Proc. §§ 1650–1681.

16. Courts ⚷78

In absence of prohibitive legislation, courts have inherent power to provide themselves with appropriate procedures for the performance of their tasks. Code Civ.Proc. § 187.

17. Affidavits ⚷18
Deposition ⚷8
Trial ⚷38

A defendant in a civil action or special proceeding is not guaranteed a right of confrontation at the trial of such action or proceeding, and testimony may be taken by affidavit or by deposition, as well as by oral examination. Code Civ.Proc. §§ 2002, 2020.

18. Constitutional Law ⚷305

The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. U.S.C.A.Const. Amend. 14.

19. Depositions ⚷1

The courts of two sovereigns may participate in the taking of evidence in a single case with the court of one sovereign acting in an ancillary capacity to the deciding court in another forum.

20. Constitutional Law ⚷305
Parent and Child ⚷3(1)

The Reciprocal Enforcement of Support Law affords defendant an opportunity to be heard, to examine and cross-examine, by deposition, plaintiff and any witness that may have testified in initiating state, to examine and cross-examine any witnesses that may testify in responding state, to meet opposing evidence, and to oppose with evidence, and hence is not unconstitutional as depriving defendant of due process of law. Code Civ.Proc. §§ 1650–1681; Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

21. Constitutional Law ⚷211

The equal protection clause does not preclude states from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to object of legislation, so that all persons similarly situated will be treated alike. U.S.C.A.Const. Amend. 14.

22. Constitutional Law 🔑209

The guarantee of equal protection is not a guarantee of absolute equality of operation or application of state legislation on all persons in the state. U.S.C.A.Const. Amend. 14.

23. Constitutional Law 🔑211

Parent and Child 🔑3(1)

The Reciprocal Enforcement of Support Law, in classifying certain persons as being entitled to support, is no different from support statutes which operate between residents of same state, and purpose of the classification is reasonable and has a fair and substantial relation to object of the law, and hence the support law provides a reasonable classification when tested in light of traditional judicial application of the equal protection clause. Code Civ.Proc. §§ 1650–1681; U.S.C.A.Const. Amend. 14.

24. States 🔑119

The Reciprocal Enforcement of Support Law does not compel county counsel or district attorney of a county to represent the plaintiff in California, but merely provides that when California court receives papers from initiating state it shall notify the county counsel or district attorney, and hence the support law is not unconstitutional as providing for a gift of public money or thing of value, in respect to furnishing of legal services to a plaintiff in proceeding thereunder. Code Civ.Proc. §§ 1650–1681, 1675; Const. art. 4, § 31; U.S.C.A.Const. Amend. 14.

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Savenick & Shapiro, Jerome D. Savenick, Los Angeles, Chester B. Shapiro, North Hollywood, and Martin S. Stolzoff, Beverly Hills, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., S. Ernest Roll, Dist. Atty., Harold Q. Pressman, Deputy Dist. Atty., Los Angeles, amici curiae on behalf of respondent.

VALLÉE, Justice.

[1] Appeal by defendant from an order in a proceeding brought under the "Reciprocal Enforcement of Support Law". Code Civ.Proc. §§ 1650–1681. Defendant also appeals from an order denying his motion for a new trial. Since the latter order is nonappealable the appeal therefrom will be dismissed.

[2] The "Reciprocal Enforcement of Support Law" was enacted in 1951. Stats. 1951, ch. 694. It was amended in 1953. Stats.1953, ch. 1290. This proceeding is governed by the law as originally enacted. The support law is designed to enable a dependent in one state to secure money for support from a person residing in another state who is legally liable for the support of the dependent. Its purposes are to improve and extend by reciprocal legislation the enforcement of duties of support. The dependent—or in case of a minor, its guardian—may commence proceedings in a court of the state in which she or he resides, called the initiating state, by filing a complaint and causing a summons to be issued. If the summons is returned "not found," the court determines whether the defendant owes a duty of support and whether a court of the state in which the defendant resides, called the responding state, may obtain jurisdiction of the defendant or his property. If it so determines, it certifies accordingly and causes certified copies of the complaint, the certificate, and an authenticated copy of the support law of the state to be transmitted to the court of the responding state. When this state is the responding state, upon receipt of the copies from the court of the initiating state the court dockets the cause, notifies the county counsel or district attorney of the county, sets a time and place for hearing, and takes such action as is necessary in accordance with the laws of this state to obtain jurisdiction. If on the hearing the court finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject his property to such order. The court then transmits to the court of the initiating state a copy of all orders of support or reimbursement. Security may be required; payments may be ordered to be made to the probation officer of the county; and viola-

tion of any order is punishable by contempt.

On November 20, 1945, plaintiff, Anita C. Smith, filed a complaint for divorce from defendant in the Court of Common Pleas, Litchfield County, Connecticut, in which she alleged jurisdictional facts, that she married defendant on August 19, 1944, grounds for divorce, and that there was one child, Carol, the issue of her marriage with defendant, born April 10, 1945. She prayed for a divorce, for custody of the child, and for support for herself and the child. Defendant was served with the complaint and on December 5, 1945, appeared in the action. On February 27, 1946, plaintiff moved the court to place the action on the uncontested list. The motion was granted on March 8, 1946. On March 15, 1946, judgment was rendered granting plaintiff a divorce, decreeing that the parties had one minor child the issue of the marriage, Carol, granting plaintiff custody of the child, and ordering defendant to pay plaintiff $15 a week for the support of Carol.

On April 7, 1952, plaintiff filed a petition for support of Carol in the Connecticut court in which she alleged that the child is in need of and entitled to support from defendant under Connecticut law; about December 1, 1946, and subsequent thereto defendant refused and neglected to provide fair and reasonable support for Carol according to his means and earning capacity; on information and belief, that defendant was residing or domiciled in Burbank, California; and that California has enacted a law similar to Connecticut's reciprocal support law.[1] The prayer was for an order of support directed to defendant. At the same time plaintiff filed with the Connecticut court an "Election to Proceed" which stated in effect that she understood that the filing of the petition of April 7, 1952, "might be interpreted by a Court of competent jurisdiction as an election by her to submit to the jurisdiction of the Court of the responding State where her" former husband resides. A summons issued ordering defendant to show cause why the order for support should not be made. The sheriff made a return that he could not with due diligence locate or serve defendant with the summons in Connecticut. A judge of the court then made a certificate which recited the above facts; stated he had examined plaintiff under oath and she had reaffirmed the allegations of the petition; stated that according to her testimony the needs of Carol for support from defendant are $15 a week; that defendant should be compelled to answer the petition; and ordered that the certificate together with exemplified copies of the petition and summons be transmitted to the superior court of Los Angeles County, California.

The documents were filed with the clerk of the superior court of Los Angeles County on May 6, 1952. Thereafter an order to show cause issued out of the superior court commanding defendant to show cause why an order should not be made on the basis of the petition, directing him to pay to plaintiff such sum as the court might determine for the support of Carol.

Defendant appeared in response to the order to show cause and a trial was had. The court found: the facts alleged in the petition are true; Carol is the minor child of plaintiff and defendant; Carol is living with plaintiff in Connecticut and is partially dependent on defendant for support; defendant owes a duty of support of Carol; $10 a week is a reasonable sum to be contributed to her support; defendant has the present ability to pay said amount. An order followed commanding defendant to pay $10 a week to the probation officer of Los Angeles County for the support of Carol and ordering the probation officer to send all monies received to the clerk of the Connecticut court. Defendant appeals.

The assignments of error are: 1. The initiating papers filed by plaintiff do not contain sufficient facts to constitute a claim or cause of action against defendant and do not comply with the statutory requirements. 2. The court erred in denying defendant the right to prove that the original Connecticut decree ordering him to support Carol was obtained by extrinsic fraud, and in refusing to permit him to prove that he is not the father of Carol and therefore he owed no duty of support. 3. The "Reciprocal Enforcement of Support Law" is unconstitutional.

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[1] **1951 Cum.Supp. to Conn.Gen.Stats., ch. 415a.**

At the time in question section 1674 of the Code of Civil Procedure provided: "If the court of this State acting as an initiating state finds that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support and that a court of the responding state may obtain jurisdiction of the defendant or his property, he shall so certify and shall cause certified copies of the complaint, the certificate and an authenticated copy of this law to be transmitted to the court of the responding state." Section 1675 provided that when the court of this state, acting as the responding state, receives from the court of an initiating state the aforesaid copies, it shall docket the cause and proceed. Section 1670 provided: "Duties of support enforceable under this title are those imposed or imposable under the laws of any state where the alleged obligor was present during the period for which support is sought or where the obligee was present when the failure to support commenced, at the election of the obligee."

[3] The first assignment of error is predicated on the claim that the petition filed April 7, 1952, states that a copy of the Connecticut law is attached thereto but that in fact such was not the case, and that the initiating papers do not show that defendant, the obligor, was present in Connecticut during the period for which support is sought or that plaintiff, the obligee, was present in Connecticut when the failure to support commenced. The point has no merit. A copy of the Connecticut law was transmitted to the superior court.[2] That is all the law requires.

[4] Under section 1670 it is only when there is a difference in the duty of support provided by the respective states that the initiating papers should show one or the other of the facts claimed by defendant, and in such case the obligee has an election as to the law of the state under which she shall proceed. There is no difference in the duty of support for a child under the age of 17 years provided by Connecticut law and that provided by California law. Civ.Code, § 196; 1951 Cum.Supp. To Conn. Gen. Stats., ch. 415a, § 1396b. The purpose of the section is to give the dependent an election in the event of conflicting laws. In any event, defendant cannot raise this question since the choice is that of the obligee-plaintiff.

At the trial defendant offered to prove that: at the time the parties were married plaintiff was pregnant "by another man"; on the evening they were married plaintiff told defendant she had made a mistake, she never should have married him, and she was not going to live with him; they stayed in a hotel room that night; the next morning she went back to her home; they did not live together thereafter; a week later she told him she was pregnant; he told her he was going to get an annulment, she said, "No, you are not"; she told him his job wouldn't be worth a nickel, "she was going to plaster all over town the fact that he assaulted and raped her sister," he was queer, and unless he let her get a divorce "she would do this"; she demanded $1,000; he told her, "I don't have that kind of money," she said, "Well, give me $15 a week, and that's all I will ever ask of you"; they had an oral agreement that if he would not defend the divorce action and would let her get a quiet divorce and pay for the hospitalization of the child, she would accept $15. a week through the year 1946 and there would be no further obligation on his part to pay her any money whatsoever; he paid her $15 a week, "not as support for any child, not in recognition that he was the father of the child, but because she made that demand on him, and because he was in a small town and didn't want his name plastered all over this small town in Connecticut"; on this understanding "he did not go in and defend the Connecticut action"; Carol was born 228 or 231 days after the marriage; he did not have intercourse with plaintiff prior to the marriage; he "was prevented from going in and defending the action on the grounds that she informed him that they had an understanding, and that she would never make any demand on him for any money other than the payments for 1945 and 1946"; he was induced not to defend the divorce action by her representation that she would make no further demand on him for the support of Carol; he paid her $15 a week through 1946, and paid the hospital bills at the birth of Carol; if he had known she was going to secure a decree for the support of the child, "which he claims and at all times has insisted was not his," he would have defended the action on the merits; he did not receive a copy of the divorce decree or any order of the Connecticut court; he had no knowledge that the Connecticut decree contained a finding that he was Carol's father; no demand was made on him at any time for the support of Carol until the present proceedings were instituted. Plaintiff's objection to the offer of proof was sustained. Defendant asserts that the facts stated in the offer constitute extrinsic fraud; that he was entitled to establish as a defense in this proceeding that the Connecticut decree which adjudged that he is Carol's father was obtained by extrinsic fraud; and that it was error to sustain the objection.

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[2] This court, on its own motion, ordered that the record on appeal be augmented by including therein the superior court file in this proceeding. It appears therefrom that an authenticated copy of the Connecticut law was transmitted to the superior court as provided in section 1675. It also appears therefrom that an exemplified copy of the testimony of plaintiff given in Connecticut was transmitted to the superior court.

Section 1916 of the Code of Civil Procedure provides: "Any judicial record may be impeached by evidence * * * of fraud in the party offering the record, in respect to the proceedings."

[5, 6] A court of equity under proper circumstances will set aside a judgment obtained by fraud. (15 Cal.Jur. 8, § 120.) The fraud must be extrinsic and collateral. Huron College v. Yetter, 78 Cal.App.2d 145, 149, 177 P.2d 367; Extrinsic or collateral fraud is defined in Gale v. Witt, 31 Cal.2d 362, at page 365, 188 P.2d 755, 757: "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. (Citations.) Where the fraud practiced is collateral to and outside of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. * * * [T]o constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court".

[7] We are of the opinion that the facts stated in the offer of proof do not constitute extrinsic fraud. Hendricks v. Hendricks, 216 Cal. 321, 14 P.2d 83, is decisive. The facts are concisely stated in the opinion in 216 Cal. at page 322, 14 P.2d at page 83: "The action is one to annul and set aside an interlocutory decree of divorce alleged to have been obtained by reason of the threats, coercion, and duress of the defendant. It appears from the complaint herein that in March, 1925, the defendant brought suit for divorce in the state of New York charging plaintiff with having committed adultery. In July of the same year the plaintiff instituted an action in California for maintenance. The defendant visited the plaintiff in California the following October and offered to dismiss the New York action if plaintiff would abandon her maintenance suit and, instead, bring an action for divorce charging the defendant with desertion. Upon this occasion and at divers other times during the ensuing years, the defendant is alleged to have stated that he had sworn confessions of certain named persons that each of them had committed adultery with plaintiff; that he would disgrace and degrade plaintiff; that her child would be taken from her by the court and that she would never be allowed to see the child again; and that he would secretly take the child from her unless she agreed to his demands. In 1925 the plaintiff apparently 'partially consented,' but nevertheless neglected to commence the divorce action until 1927. The matter then remained dormant until November, 1928, at which time an answer was filed and a stipulation signed by the respective attorneys that the divorce action should be tried as a default. Thereafter the interlocutory decree which it is here sought to have set aside was entered. The complaint in the present action then alleges that subsequent to the entry of said decree and between December, 1928, and April, 1929, the plaintiff for the first time ascertained that the statements and threats of the defendant were false and untrue and made solely for the purpose of intimidating and compelling plaintiff to bring the suit in divorce against her will and for the purpose of freeing the defendant from his marital obligations to plaintiff and their child." The court stated the familiar rule that equity will not vacate a judgment obtained through the collusive connivance of the parties to the action, that to warrant such relief there must be extrinsic fraud, and continued in 216 Cal. at page 323, 14 P.2d at page 83, "Where, however, evidence of the coercion or duress or the fraud could have been presented to the court or to an attorney of the complainant's own choosing during the pendency of the action so that full examination of the facts could be made and full protection given to the rights of the parties, equity will not interfere but will leave the parties to the fraudulent transactions where they have placed themselves. Mitchell v. Cline, 84 Cal. 409, 416, 24 P. 164.

"The alleged threats to blacken the plaintiff's reputation, the charges of adultery, and the threats to deprive plaintiff of the custody of her child by court order or other means, were matters over which the plaintiff herein could have had a thorough hearing during the pendency of the divorce action. The court before whom that action was pending was in a position to determine all issues pertinent thereto, including any question as to the custody of the minor child of the parties. It also possessed the necessary vitality to compel obedience to its decrees. Plaintiff should have informed her attorney in the divorce action of all the facts here alleged, and she would have received the protection of the court in all of her marital rights. Failing to seasonably do this, it is now too late to seek relief on the grounds here urged. There is nothing in the record to indicate that the attorney representing plaintiff in the divorce action was in fact the attorney for the defendant or that he was inimical in any respect to the best interests of the plaintiff. Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 27 P. 537, 13 L.R.A. 336, 25 Am. St.Rep. 159. The allegations of the complaint disclose, at best, intrinsic fraud and coercion, and plaintiff is therefore concluded by the interlocutory decree of divorce procured through the collusion of the parties litigant, which decree has long since become final. It is our conclusion, therefore, that the complaint fails to present a case of equitable cognizance." Similar representations and threats made under like circumstances were held not to constitute extrinsic fraud in Thompson v. Thompson, 38 Cal.App.2d 377, 101 P.2d 160.

[8] "A party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. (Citations.) Fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack." Howard v. Howard, 27 Cal.2d 319, 321, 163 P.2d 439, 440.

[9] Defendant made a personal appearance in the Connecticut action. He was represented by an attorney in the action. After making an appearance, he permitted judgment by default to be taken against him. Three months elapsed between the time he appeared in the action and the time the cause was placed on the uncontested list. The action was regularly tried and determined. It was decreed that defendant is Carol's father. Defendant was fully informed of all proceedings in the divorce action. He knew the complaint alleged that Carol was the issue of his marriage with plaintiff and that plaintiff prayed for sup-

port for Carol from him. He made no objection to the allegations of the complaint. No appeal was taken from the decree. The decree became final and conclusive against him with respect to all issues therein determined. Defendant was not prevented from having his day in court in the divorce action. As in Hendricks v. Hendricks, supra, 216 Cal. 321, 14 P.2d 83, 84, all of the alleged facts stated in the offer of proof were matters over which defendant "could have had a thorough hearing during the pendency of the divorce action." Having failed to assert his defenses in that action, it is now too late to seek relief on the grounds urged in the offer of proof.

[10, 11] The offer of proof says that plaintiff agreed to withdraw the allegation of the complaint for divorce that he was Carol's father and the prayer for support of Carol. If such an agreement was made, it was of no force or effect. A father, a resident of this state, is under a legal obligation to support his minor child residing in another state and in the legal custody of its mother by virtue of a decree of divorce given to the mother by the courts of the state in which she and the child reside. A parent may not by any act, conduct, or arrangement of whatever sort shift from his shoulders the legal responsibility and moral duty to support his minor child. It is an absolute, inalienable right enjoyed by the child which no form of contract between the parents, nor change of the domestic status of either of them, may effect. Southern California Edison Co. v. Industrial Accident Comm., 92 Cal.App. 355, 358, 268 P. 415; Nicholas v. Nicholas, 110 Cal.App.2d 349, 353, 242 P.2d 679.

We conclude that the court did not err in sustaining the objection to the offer of proof.

[12] The court did not err in refusing to permit defendant to prove that he is not the father of Carol. That issue was determined against him by the decree in the Connecticut action. The Connecticut decree is res judicata and must be given full faith and credit in this state. Code Civ. Proc. § 1913; Biewend v. Biewend, 17 Cal. 2d 108, 111–112, 109 P.2d 701, 132 A.L.R. 1264; 15 Cal.Jur. 240, § 246.

Defendant contends that he has been denied due process of law in contravention of the fifth and fourteenth amendments of the Constitution of the United States and article I, section 13 of the Constitution of California and that the provisions of the "Reciprocal Enforcement of Support Law" are in contravention of the equal protection clause of the Fourteenth Amendment and article IV, section 31 of the Constitution of California.

[13] The fifth amendment to the Constitution of the United States applies to the federal government and not to the several states and does not constitute a limitation on the power of the states. It has no application here. Corrigan v. Buckley, 271 U.S. 323, 46 S.Ct. 521, 70 L.Ed. 969; People v. Raffington, 98 Cal.App.2d 455, 456, 220 P.2d 967, certiorari denied 340 U.S. 912, 71 S.Ct. 292, 95 L.Ed. 659.

The purposes of the support law are to improve and extend by reciprocal legislation the enforcement of the duties of support and to make uniform the law with respect thereto. Code Civ.Proc. § 1651.[3] Great difficulties have been met in compelling husbands and fathers who have left a state to support their dependents.[4] The National Desertion Bureau in New York estimates that close to 100,000 persons annually attempt to escape their duties of support by desertion, and that nearly 1,000,000 women and children in America are the victims.[5] The increasing number of runaway husbands and fathers has created a social problem which has compelled interstate cooperation, an attempt to reduce state welfare expenditures, and led to the enactment of reciprocal enforcement laws.[6]

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[3] Forty-six states and the territories of Hawaii, Puerto Rico, Alaska, and the Virgin Islands have similar laws.

[4] 25 Temple L.Quar. 336.

[5] Zukerman, The Problem of Family Desertion, a report to the Legal Aid Association in Boston, October 1949.

[6] In June 1948 approximately 223,000 families were receiving some $178,000,000 a year in public assistance throughout the

[14] It is argued that because there is no provision in the support law giving defendant the right to cross-examine plaintiff with reference to the need of support, the ability of plaintiff to furnish support, and the resources of plaintiff and Carol—he is being deprived of his property without due process of law. Denial of the right of cross-examination may constitute a denial of due process. Massachusetts Bonding & Ins. Co. v. Industrial Accident Comm., 74 Cal.App.2d 911, 916, 170 P.2d 36.

The judicial function in these proceedings is divided. In one state court the complaint is filed and the evidence in support of its allegations is heard. If that court determines the defendant owes a duty of support and that the court of his state may obtain jurisdiction of the defendant or his property, it so certifies; and the complaint, the certificate, and a copy of the law of that state are transmitted to the court of this state. Code Civ.Proc. §§ 1674, 1675. The matter is then heard by the court of this state, and if it finds a duty of support it may order the defendant to furnish support. Code Civ.Proc. § 1676. In other words, the final decision and order is made by the court of this state. If any deprivation of due process is caused by the participation of two courts in disposing of a single action, it would have to be in the taking of *ex parte* evidence in one court for use in the deciding court.

[15, 16] A defendant in a proceeding under the support law has a right to cross-examine the plaintiff. While the support law does not specify the details of the procedure to be followed in this state on receipt of the papers from the initiating state, it is not to be treated as an isolated fragment of our judicial system. In the absence of prohibitive legislation, the courts have inherent power to provide themselves with appropriate procedures for the performance of their tasks. Ex parte United States, 7 Cir., 101 F.2d 870, 878, 131 A.L.R. 176. Section 187 of the Code of Civil Procedure provides: "When jurisdiction is, by the constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code."

[17] In this state testimony may be taken in three ways: by affidavit, by deposition, or by oral examination. Code Civ.Proc. § 2002. A defendant in a civil action or special proceeding is not guaranteed a right of confrontation at the trial of the action or proceeding. 26 C.J.S., Depositions, § 2, p. 808. See In re Bagwell, 26 Cal.App.2d 418, 79 P.2d 395. The testimony of a witness out of this state may be taken by deposition in an action at any time after the service of summons or the appearance of the defendant, and in a special proceeding at any time after a question of fact has arisen. Code Civ. Proc. § 2020.

[18, 19] The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Dohany v. Rogers, 281 U.S. 362, 50 S.Ct. 299, 74 L.Ed. 904, 912; City of Los Angeles v. Oliver, 102 Cal.App. 299,

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United States as a result of family desertion. See Aid to Dependent Children, in a Post War Year, Public Assistance Report No. 17, Federal Security Agency (Published June 1950.)

"The need for some type of legislation enforcing the duty of support on deserting husbands was pointed up by testimony at the committee hearings, indicating that the 1949 estimated total bill for aid to dependents where the father was absent and not supporting was approximately $205,000,000 a year for the Nation and the several states." (Progress Report of Senate Interim Judiciary Committee, pp. 11–13, Vol. I, Appendix to Journal of the Senate, 1951.)

The Attorney General says that "From July 1, 1952 to March 31, 1954 the aggregate sum of $93,070.20 was ordered paid to dependents residing in Los Angeles by courts of other states."

See Brockelbank, "The Problem of Family Support: A New Uniform Act Offers a Solution." 37 Am.Bar Ass'n Jour. 93.

315, 283 P. 298. There is nothing new in using a foreign court to take testimony (9 A.L.R. 966; 108 A.L.R. 384; 96 Univ.Pa. L.Rev. 241.), and there is nothing inherently wrong in allowing the courts of two sovereigns to participate in the taking of evidence in a single case with the court of one sovereign acting in an ancillary capacity to the deciding court in another forum. The courts of this state in acting under the support law do not abdicate any of their judicial power in deciding cases before them. If it be said that the defendant is at a disadvantage in having to take the testimony of the plaintiff and other witnesses in the initiating state, the answer is that he may always choose to return to that state to conduct his defense more directly and efficiently.

The Court of Appeals of Kentucky has recently had occasion to consider the constitutionality of the reciprocal support law of that state in Duncan v. Smith, Ky., 262 S.W.2d 373. The court said in 262 S.W.2d 377: "The third objection raised against the Act is that it is extraterritorial in its application, in that it purports to give Kentucky courts jurisdiction outside this state, and to give foreign courts jurisdiction in this state.

"It is true that the Act is so worded as possibly to give the impression that the Kentucky legislature is attempting to confer powers upon courts of other states to act within this state, and to give our courts powers in other states, but when the Act is examined as a whole it becomes clear that the Act merely provides what our courts may and shall do in this state, and that any powers exercised by foreign courts in their own states are exercised by virtue of a reciprocal law of that state and not by virtue of the Kentucky Act.

"Actually, the Act does not attempt to confer extraterritorial jurisdiction. The court of the initiating state exercises no jurisdiction over the respondent, but merely serves as a local agency of convenience for the court of the responding state. The latter court acquires jurisdiction of the respondent by virtue of personal service upon him, and exercises its jurisdiction over him solely within the confines of its state.

"While perhaps the court of the responding state does not have full technical jurisdiction over the *petitioner,* yet from a practical standpoint it has such jurisdiction over the petitioner as to enable the court to make a binding determination of the petitioner's rights, or to compel the petitioner to meet certain requirements as a condition of being granted the relief sought. The fact that the petitioner is not required to be physically present in the responding state is no obstacle, because in any ordinary action a petition may be filed in a court of this state without the plaintiff being physically present, and in cases tried on depositions it is possible for a case to be tried in a court of this state without the plaintiff being present in the state. As we view it, the question of whether the plaintiff shall be required to be physically present is a question of practice and not of jurisdiction."

[20] That there is no deprivation of due process is clear. When the court of this state receives the papers from the initiating state the defendant is given notice, an opportunity to be heard, by deposition to examine and cross-examine the plaintiff and any witness that may have testified in the initiating state, to examine and cross-examine any witnesses that may testify in this state, to meet opposing evidence, and to oppose with evidence. Thus the requirements of due process are complied with. Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129.

Furthermore, in this proceeding defendant appeared in the superior court on July 17, 1952, at which time he made various motions. The matter was continued to August 19, 1952, when a partial hearing was had. Various continuances were then had until January 13, 1953, when the matter was heard in its entirety by another judge. At the first hearing on July 17, 1952, the court suggested to counsel for defendant that the "matter go over for a period of time to permit you to take the plaintiff's deposition." Counsel did not take advantage of the suggestion. Again on November 19, 1952, the court said to counsel for defendant, "[I]f you want to take the depositions of the parties, I will give you time within which to do so." Again counsel ignored the court's offer. Defendant is in no position to say that he was denied the right to cross-examine plaintiff.

[21–23] The equal protection clause does not preclude the states from resorting to classification, but only requires that the classification be reasonable, not arbitrary, and rest on some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated will be treated alike. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, 106 A.L.R. 1476. The guarantee of equal protection is not a guarantee of absolute equality of operation or application of state legislation on all persons in the state. Stebbins v. Riley, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884, 44 A.L.R. 1454. The support law operates as to persons in this state on the same basis. The classification of certain persons as being entitled to support is no different from support statutes which operate between residents of the same state. The purpose of the classification is a reasonable one and it has a fair and substantial relation to the object of the law. The support law provides a reasonable classification when tested in the light of the traditional judicial application of the equal protection clause.

[24] It is claimed that furnishing legal services to a plaintiff in a proceeding under the support law constitutes a gift of public money or thing of value in violation of article IV, section 31 of the Constitution of this state and the equal protection clause of the fourteenth amendment. The claim is based on the erroneous premise that there is something in the support law which compels the county counsel or district attorney of a county to represent the obligee in this state. There is no such provision in the law. The law merely provides that when the court of this state receives the papers from the initiating state it shall notify the county counsel or district attorney of the county. Code Civ.Proc. § 1675. It did not, at the time of these proceedings, impose any duty on the county counsel or district attorney.[7] It appears that the district attorney of Los Angeles County represented plaintiff in the superior court in this proceeding. If he did so without authority, a fact we do not assume, that question cannot be raised by the defendant in this proceeding.

Appeal from order denying a new trial dismissed. Order commanding defendant to furnish support affirmed.

SHINN, P. J., and WOOD, J., concur.

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[7] In 1953 the Law was amended to provide that "The prosecuting official [district attorney, city attorney, or city prosecutor] may, upon the request of the court, represent the plaintiff in any proceeding under this title." Stats.1953, ch. 1290.

In response to a similar contention, it was said in Duncan v. Smith, Ky., 262 S.W.2d 373, 378: "Sixth, it is claimed that the Act violates Section 3 of the Kentucky Constitution, in that it grants the privilege of free legal representation to a dependent person when the person liable to furnish support is in another state, but denies such privilege when the person liable for support is in the same state. This is a question of reasonable classification. We think that the practical difficulties involved in the securing of support by one person from a person residing in another state constitute a valid basis for granting free legal representation in such cases and denying it in cases where both persons are residents of the same state. Besides, in the final analysis, the free legal representation is for the benefit of the public as a whole, and not of the particular dependent person."

RAMOS et al. v. LINGGI et al.

CASTELLO v. LINGGI et al.

Civ. 15863.

District Court of Appeal, First District, Division 1, California.

June 1, 1954.

Rehearing Denied July 1, 1954.

Hearing Denied July 28, 1954.

Action by husband and wife for injuries sustained by wife in automobile collision, with which was consolidated for trial an action brought by guest in wife's automobile against same defendants. The Superior Court, Santa Clara County, Leonard R. Avila, J., entered judgment on verdict in favor of guest against all defendants, but against the husband and wife, who appealed. The District Court of Appeal, McMurray, J. pro tem., held that where wife, driving at a proper rate of speed, was involved in collision occasioned when driver of oncoming truck, seeing vehicle ahead of him come to a stop, put on his brakes with result that truck skidded across center line of road and struck automobile being driven by wife, who had no time within which to react to the danger, wife, who did no positive act which contributed proximately to the accident and who was entitled to rely on presumption that other drivers would not be negligent in operation of their vehicles, was not contributorily negligent.

Judgment reversed with directions.

1. Trial ⚷252(7)

Where there is no showing that the inattention of driver proximately contributed to collision, or that the driver did any affirmative act which could properly be said to have brought on collision, there is no basis for a finding that such driver was contributorily negligent, and an instruction on contributory negligence is error.

2. Automobiles ⚷207

Where motorist, driving at a proper rate of speed, was involved in collision occasioned when driver of on-coming truck, seeing vehicle ahead of him come to a stop, put on his brakes, with result that truck skidded across center line of road and struck automobile being driven by motorist, who had no time within which to react to the danger, motorist, who did no positive act which contributed proximately to the accident and who was entitled to rely on presumption that other drivers would not be negligent in operation of their vehicles, was not contributorily negligent. Vehicle Code, §§ 530(a), 531, 582.

3. Appeal and Error ⚷1178(6)

Where jury's finding that defendants were negligent was not challenged on appeal, and District Court of Appeal found, on appeal, that plaintiff, as matter of law, was not guilty of contributory negligence, there was no need for new trial on issue of liability, but under such circumstances, defendants were liable as a matter of law.

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Melbert B. Adams, East Palo Alto, for appellants.

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, W. R. Dunn, Burlingame, of counsel, for respondents Wurster, Pureta Sausage Co. and Bonsi.

Clark & Heafey, Schofield & Hannegan, Oakland, Gerald P. Martin, San Francisco, of counsel, for Mildred Bohannon and L. C. Bohannon.

McMURRAY, Justice pro tem.

Plaintiffs Mr. and Mrs. Ramos, husband and wife, appeal from a judgment after verdict rendered for defendants. The action was consolidated for trial with one brought by Mr. Castello, the brother, and, at the time of an automobile collision, the guest of Mrs. Ramos. The jury returned a verdict in favor of Mr. Castello against all defendants but against Mr. and Mrs. Ramos.

On January 3, 1951, Mrs. Ramos was the driver of an automobile proceeding south in the southbound lane, on Lawrence Road, which is marked by a center line, in Santa Clara County. In the car with her was her brother, Mr. Castello. She was driving at a speed of from 35 to 40 miles per hour, a lawful rate on that road. It was daylight, about 8:30 in the morning, and the surface of the road was wet from a recent rain. Defendant Mrs. Bohannon was driving an automobile north in the proper marked lane, on the same road. She stopped to pick up a passenger. When she stopped, defendant Bonsi, an employee of defendant Pureta Sausage Company, who was driving a company truck north following Mrs. Bohannon, put on his brakes and skidded 42 feet. The front end of his truck crossed the marked center line of the road and the truck hit Mrs. Ramos' car, which was still in its proper lane, and Mrs. Bohannon's car, and tipped over on its side. Just before the accident Mr. Bonsi had been driving the truck at a speed of from 35 to 40 miles per hour.

Before stopping, Mrs. Bohannon had been driving at about 15 to 20 miles per hour.

Viewing the evidence in the light most favorable to defendants, Mrs. Ramos did not remember when she first noticed Mrs. Bohannon's car nor did she notice the truck until it started to come from behind the Bohannon car. She did not remember if the truck was immediately behind the Bohannon car at this time, although she was at the front of the Bohannon car. Neither did she remember if the Bohannon car was moving or stopped at the time, nor how close she herself was to the center line. She could not recall whether or not a hand signal had been given by Mrs. Bohannon, or whether that car was on or off the highway. She did not remember how much of the truck crossed the center line nor how far the truck was from the Bohannon car when she first observed it.

There was evidence that Mrs. Bohannon signalled before stopping (her own statement), and also that she parked her car off the highway, leaving only one foot of to one-quarter of the car on the highway (again her own statement). Bonsi stated that the Bohannon car stopped without signal and with the left side within about a foot and a half of the center line of the highway. Bonsi did not see the Ramos car until the accident was underway.

The skid mark left by the truck was 42 feet long, the last 24 feet being of a sort that would indicate a sidewise skidding. After skidding over the white line the truck struck the Ramos car almost instantly, its front light and bumper scraping along the entire length of the Ramos car and shearing its left rear fender off so that it was dangling on the front of the truck. The Ramos car went off the highway, bumped its right rear side on a tree, and both Mrs. Ramos and Mr. Castello were injured. There is no evidence that appellant Mr. Ramos was guilty of any negligence.

Appellants on this appeal contend that with such a state of facts it was error to instruct on contributory negligence, since there could be none as a matter of law. They also urge several other grounds of appeal which it will not be necessary to consider.

Respondents contend that the matter of contributory negligence was properly submitted to the jury since it might be inferred from her testimony that Mrs. Ramos was so inattentive as to give a basis for finding contributory negligence.

[1] Where, as here, there is no showing that the inattention of a driver proximately contributed to a collision, or that the driver did any affirmative act which could properly be said to have brought on the collision, the appellants' contention seems well founded.

[2] In order for the jury to have found Mrs. Ramos guilty of contributory negligence, having theretofore found both Mr. Bonsi and Mrs. Bohannon to have been negligent in the Castello case, it would impose upon Mrs. Ramos the following duties: First, that upon seeing the hand signal of Mrs. Bohannon, that Mrs. Ramos anticipate that Mrs. Bohannon would stop on the highway, a fact the jury must have found to have held Mrs. Bohannon negligent in the Castello case. Second, that having so anticipated Mrs. Bohannon's violation of Vehicle Code section 582, Mrs. Ramos was then to anticipate that Mr. Bonsi in the truck following Mrs. Bohannon was too close, a violation of Vehicle Code section 531. Third, Mrs. Ramos was then to anticipate that in attempting to stop, Mr. Bonsi would cross the marked center line of the highway, a violation of Vehicle Code section 530(a). The time within which these duties were to be performed by Mrs. Ramos was minimal.

Remembering that both the Ramos car and the truck were traveling at a speed of from 35 to 40 miles an hour, the evidence most favorable to respondents shows that Mrs. Ramos could not have foreseen Mrs. Bohannon's stopping on the highway until 80 feet before the collision; she could not have foreseen that Mr. Bonsi was following the Bohannon car too closely until his truck began to skid, 42 feet before the accident, at most; she could not have foreseen that Mr. Bonsi was going to cross the marked center line until the commencement of the sidewise skid, 24 feet before the accident. The mere statement of these distances shows that there was no time for her to react to the danger. No matter how attentive Mrs. Ramos had been, she still could not have avoided being struck unless she acted upon the perhaps not unwise assumption that all other operators of vehicles upon the highways are completely reckless. This was not, however, her legal duty.

The respondents contend that the accident could have been avoided if Mrs. Ramos had swerved a few inches. The record does not show how far into the southbound lane the point of impact was. That it was there at all shows a violation by Mr. Bonsi of section 530(a) of the Vehicle Code which provides, in part: "* * * no vehicle shall be driven to the left side of the center line of a roadway in overtaking and passing another vehicle proceeding in the same direction unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction * * *." Vehicle Code section 527(a) has no application here as this roadway was divided into traffic lanes. The fact that here Mr. Bonsi was not attempting to pass but slid across the center line does not affect the clear import of section 530 of the Vehicle Code.

Where there is so little time as here for a driver to react to danger, there can be no contributory negligence or question thereof to be submitted to the jury, if that driver did no positive act which contributed proximately to the accident, and the driver was entitled to rely on the presumption that other drivers would not be negligent in the operation of their vehicles. Flannery v. Koch, 103 Cal.App.2d 55, 228 P.2d 580; Bingham v. Greenamyer, 25 Cal.App.2d 467, 77 P.2d 867; Carr v. Holtslander, 112 Cal.App.2d 589, 246 P.2d 678.

[3] Inasmuch as the jury has found respondents guilty of negligence in the Castello case, a determination not challenged by respondents, and since, on this appeal, we have held that Mrs. Ramos, as a matter of law, was not guilty of contributory negligence, there is no need for a new trial on the issue of liability. Under such circumstances respondents are liable as a matter of law.

The judgment appealed from is reversed, with directions to the trial court to retry the issue of damages incurred by Mr. and Mrs. Ramos, and to enter judgment in their favor in the amount so fixed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; SPENCE, J., dissenting.

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125 Cal.App.2d 572

PEOPLE v. JUSTICE.

Cr. 960.

District Court of Appeal, Fourth District, California.

May 27, 1954.

Hearing Denied June 23, 1954.

Defendant was convicted of assault with a deadly weapon. The Superior Court, San Bernardino County, A. D. Mitchell, J., rendered judgment and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held that evidence was sufficient to support conviction.

Judgment affirmed.

1. Criminal Law 🔑1144(4)

Where record stated that defendant had been duly arraigned, it would be assumed, in absence of other evidence, that the law was obeyed. Pen.Code, § 987; Code Civ.Proc. § 1963, subd. 15.

2. Criminal Law ⚿1144(10)

Where record showed that defendant had been duly arraigned and had been informed of his right to counsel and asked if he desired counsel and that no counsel had been assigned him, it would be assumed that defendant had not desired counsel and that he had been informed of his right to counsel at all stages of the proceedings. Pen.Code, § 987.

3. Criminal Law ⚿641(1)

A defendant may waive his right to aid of counsel and defend himself subject to the requirement that his waiver of right to counsel be made understandingly, competently, and voluntarily, in the exercise of a free choice.

4. Criminal Law ⚿1141(2)

A defendant who, after judgment, seeks relief because of denial of counsel has the burden of establishing the fact that he did not in fact competently and intelligently waive the right, and whether he had made such waiver depends upon particular facts and circumstances in the case, including the background, experience, and conduct of the defendant.

5. Criminal Law ⚿641(1)

Facts in record established that defendant, who, after judgment, sought relief because of denial of counsel, not only realized that he had a right to counsel but knew that he could waive such right, and actually had, intelligently and competently, waived it. Pen.Code, § 1181; Const. art. 1, § 13.

6. Criminal Law ⚿1166½(6)

That defendant, on appeal from denial of his motion for new trial, claimed that he had meant to allege in motion that a juror had been acquainted with complaining witness instead of alleging that the acquaintanceship was with the defendant did not justify reversal, absent any showing that the former acquaintanceship would have had any effect on the verdict.

7. Criminal Law ⚿1166(7)

Absent a showing that defendant had subpoenaed a witness, or that the testimony of any witness so subpoenaed would have been material, that defendant's case had been continued without his consent, thereby allegedly depriving defendant of the presence of a witness, did not justify reversal.

8. Assault and Battery ⚿92

Evidence was sufficient to sustain conviction of assault with a deadly weapon.

Carl B. Shapiro, Fairfax, for appellant.

Edmund G. Brown, Atty. Gen., Wilbur B. Thayer, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant was charged with the offense of assault with a deadly weapon with intent to commit murder, alleged to have been committed on June 21, 1953. He was convicted by a jury of the included offense of assault with a deadly weapon. Defendant, according to the minutes of the court, was "duly arraigned". After stating he would appear without counsel for the purpose of entering a plea and having his case set for trial, he entered a plea of not guilty. A jury trial was ordered for August 25th. Defendant, in person, moved for a reduction in bail, which was denied. The date of trial was continued to August 26th (at whose request is not shown). All witnesses appearing on August 25th were instructed to return on August 26th. Defendant appeared at that time, in person, and made no request that he be represented by counsel.

According to the reporter's transcript, the jurors were called, selected, empaneled and sworn to try the case. Apparently defendant participated in the selection of the jury. The information was read and defendant's plea thereto stated. Witnesses were sworn and were fully cross-examined by defendant with some apparent ability. Thereafter, the people rested. Defendant was sworn and examined. The prosecution argued and defendant Justice, in person, argued his case to the jury. After his conviction the defendant, in person, moved for a new trial on the ground of insufficiency of the evidence and because a witness of his was not present at the trial. The motion was denied and time was fixed to pronounce judgment. Defendant then asked if that time could be waived and judgment pronounced immediately. The request was denied. During these entire proceedings the defendant did not request the services of an attorney and never made any point of that fact. He thereafter secured an attorney to appear for him at the time of pronouncement of judgment and to secure a continuance of the hearing. (What happened to that counsel thereafter is not indicated.) Defendant subsequently appeared in person for the pronouncement of judgment without counsel. Judgment was pronounced and he was committed to state's prison. Thereafter, in propria persona, he filed a notice of appeal. He subsequently contacted another attorney who prepared his brief on appeal in which he claims, for the first time, that defendant was deprived of his constitutional right to counsel at the trial and by reason thereof he was denied a fair trial.

[1-3] As to what was said by the court at the time of the arraignment for plea of the defendant is not reported. The record shows that defendant was "duly arraigned". We must assume or imply, in the absence of any other evidence, that the law was obeyed, Section 1963, par. 15, Code Civ.Proc.; that defendant was duly arraigned under section 987 of the Penal Code and was informed by the court of his right to counsel, and was asked if he desired the aid of counsel. Since none was assigned him it will be presumed he did not desire counsel to defend him. People v. Miller, 137 Cal. 642, 646, 70 P. 735. The fact that defendant waived his right to counsel at the time of his arraignment for the limited purposes indicated shows that the court must have fully informed him of his right to counsel at all stages of the proceedings. The record does not indicate anything to the contrary and defendant does not now contend otherwise but contents himself with the claim that he did not affirmatively waive his constitutional right to the services of an attorney. We see little merit to this contention. The statute does not prevent a defendant from waiving his right to the aid of counsel and defending himself, subject to the requirement that his waiver of the right to counsel be made understandingly, competently and voluntarily, in the exercise of a free choice. People v. Ballentine, 39 Cal.2d 193, 196, 246 P.2d 35; In re James, 38 Cal. 2d 302, 313, 240 P.2d 596.

[4, 5] It clearly appears from the record that defendant waived his right to the aid of counsel. A defendant who, after judgment, seeks relief because of denial of counsel has the burden of establishing the fact that he did not in fact competently and intelligently waive the right. In re Connor, 16 Cal.2d 701, 108 P.2d 10. Whether the waiver of the right to counsel has been intelligently and competently made depends upon the particular facts and circumstances in each case, including the background, experience, and conduct of the defendant. People v. Rose, 42 Cal.App. 540, 554, 183 P. 874. The facts show that defendant knew enough about his right to counsel on the day of arraignment, not only to realize he had such a right but to also know he could waive such right. People v. Chesser, 29 Cal.2d 815, 178 P.2d 761, sets forth some of the circumstances to be considered in determining this question. In the instant case the record shows that defendant considered himself a minister, and that he completed the Tenth grade of school; that he had been tried three times before for "traffic and drunk" offenses, and was represented by an attorney; that he was better acquainted with court trials and procedures than the average person, and undoubtedly gained knowledge of his rights. He was intelligent enough to speak in his own defense, to cross-examine witnesses for the prosecution, and to carry on an intelligent development of his case. These facts are self-evident, and he must have had intelligence enough to know what he was doing when he waived his right to counsel. The rec-

ord further indicates that the defendant had, previous to trial, consulted counsel on the charge in question. Based upon these facts and the authorities cited, it is clear that the defendant waived counsel and did so intelligently.

The complaint as to the lack of a fair trial is predicated mainly upon the fact that only 20 minutes was consumed in selecting the jury and that it took only one day to try the case; that the court should, in the interest of justice to the defendant, have made a more thorough examination of the jurors as to their qualifications to act, citing section 1181 Penal Code, and such cases as People v. Diaz, 105 Cal.App.2d 690, 234 P.2d 300; People v. Talle, 111 Cal.App.2d 650, 245 P.2d 633; In re Connor, 16 Cal.2d 701, 108 P.2d 10; and California Constitution, Art. I, § 13.

Contention is also made that the trial court improperly limited defendant's cross-examination of a witness; that a doctor, who testified for the people, was not shown to be qualified as an expert; that undue lapse of time between the time of the commission of the offense and the date of examination by the doctor elapsed; that there were inconsistencies in the testimony of the complaining witness and that he was prejudiced by continuing the case from August 25th to August 26th, without his consent. It is also claimed that by reason of defendant's lack of experience in legal procedure, not knowing when to make timely objections, he was denied a fair trial. He stresses the claim that by reason of the continuance, a witness whom he desired to produce or have present at the trial did not appear on August 26th, and accordingly he was deprived of the benefit of his testimony. He also argues that it was incumbent on the prosecution to produce the broken bottle neck and split masonite board involved in the incident, at the trial, before a conviction of assault with a deadly weapon could be sufficiently established.

We have examined in detail all of these claims and find them to be lacking in merit. This will be disclosed by a brief statement of the facts supporting the crime of which defendant was convicted, which evidence defendant claims is insufficient to support such charge.

[6] The jurors were examined by the court as to their qualifications. Defendant, in a motion for new trial, claimed that one of the jurors was acquainted with *defendant.* He now claims he then meant *complaining witness.* There is no indication that such acquaintanceship would have had any effect on the verdict rendered in the case.

[7] There was no showing at the trial that defendant ever subpoenaed any witness to testify in his behalf or that such a witness was present on August 25th. All witnesses present on that day were ordered to return on August 26th, and defendant made no complaint to the court because of the absence of any witness. In fact, after defendant testified, the court asked him: "Do you have any other witnesses?" and defendant replied: "No, I don't have, Your Honor". There still was no showing made in the trial court who the witness was supposed to be or what he would testify to, or that his testimony, if given, would be material.

[8] At the trial the complaining witness, Christina Justice, who was separated or divorced from defendant at the time, testified that she and her three small children were living in a house owned by defendant and her on a desert location about 10 miles from Desert Hot Springs; that one Shelley also lived there; that dirt roads were the only means of access to it; that about 8:15 a. m. on June 21st, she went to say good morning to defendant and she was met by a statement, in no uncertain terms, that he wanted her to die; that as she retired from his room she saw him raise a chair and heard him call her an offensive name; that she ran out of the door; that she had with her two half-gallon jugs used to carry drinking water from the nearby well; that defendant overtook her and hit her over the head with a masonite board, breaking the board in two, and knocking her to the ground in a stunned condition; that she, while

crouched in a sitting position, next noticed defendant with a broken beer bottle neck in his hand with long jagged edges threatening her; that she raised her arms to protect herself and defendant inflicted severe cuts about her hand and arm with the bottle neck; that he threatened to kill her and throw her in the well; that he kicked her and demanded that she go to the well; that she did so while defendant pressed her back with the jagged bottle neck; that he commanded her to run into a barbed wire fence which she did do and her leg was cut; that she talked defendant out of throwing her in the well by promising to help him to solicit funds for his missionary work; that the blood was running from her wounds and defendant thereafter helped bathe them and told her she could not call the police out there in the desert as she had done in Los Angeles; and that he was the law out there. She had no means of transportation to the nearest town, and no one to care for her children. It was not until July 3rd, when a deputy sheriff came to the residence, that she reported the claimed attack. On July 13th she filed the formal complaint.

The doctor, who was a resident physician at the county hospital and who received his medical degree from the University of Southern California six months prior thereto, testified he examined her on July 13th and that there were scars, one to two inches long and about three weeks old, on her wrist, little finger and thumb, and that in his opinion they were caused by some sharp object.

Defendant testified the complaining witness was running out of the house swearing, for some unknown cause, with two jugs in her hands, and that she fell and broke the bottles and cut her wrist; that she ran toward the well and he ran after her to "catch her"; that in running she looked back and ran into the barbed-wire fence; that her hands were cut and he helped her release herself from the wire and later bathed her wounds. Defendant claimed there had been a difference of opinion between them as to the ownership of the desert property.

A deputy sheriff interviewed the defendant after his arrest. He testified that defendant said this occurrence took place on July 1st, and that the cuts healed fast because he had applied a powerful healing antiseptic. At the trial defendant maintained that it occurred on June 20th and that he never told the officers it occurred on July 1st.

From the facts related and the record presented, we conclude that there is no merit to the claims set forth which would constitute grounds for a reversal of the judgment.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

125 Cal.App.2d 610

JONES et al.

v.

CITY OF LONG BEACH et al.

Civ. 20152.

District Court of Appeal, Second District, Division 3, California.

May 28, 1954.

Petition for mandate to command city and others to terminate proceedings for annexation of territory to city. The Superior Court, Los Angeles County, Arnold Praeger, J., entered judgment denying petition and plaintiffs appealed. The District Court of Appeals, Vallée, J., held that where unincorporated territory was entirely surrounded by city, and was inhabited except for a small portion thereof, annexation by city of small uninhabited portion, did not cause unincorporated territory to be completely surrounded by city within statute prohibiting such a result.

Affirmed.

Municipal Corporations ⟹29(4)

Where unincorporated territory was entirely surrounded by city, and was inhabited except for a small portion thereof, annexation by city of small uninhabited portion thus making two non-contiguous parcels out of the inhabited territory, did not cause unincorporated territory to be completely surrounded by city within statute prohibiting such a result. Government Code, §§ 35300 et seq., 35326.

◆

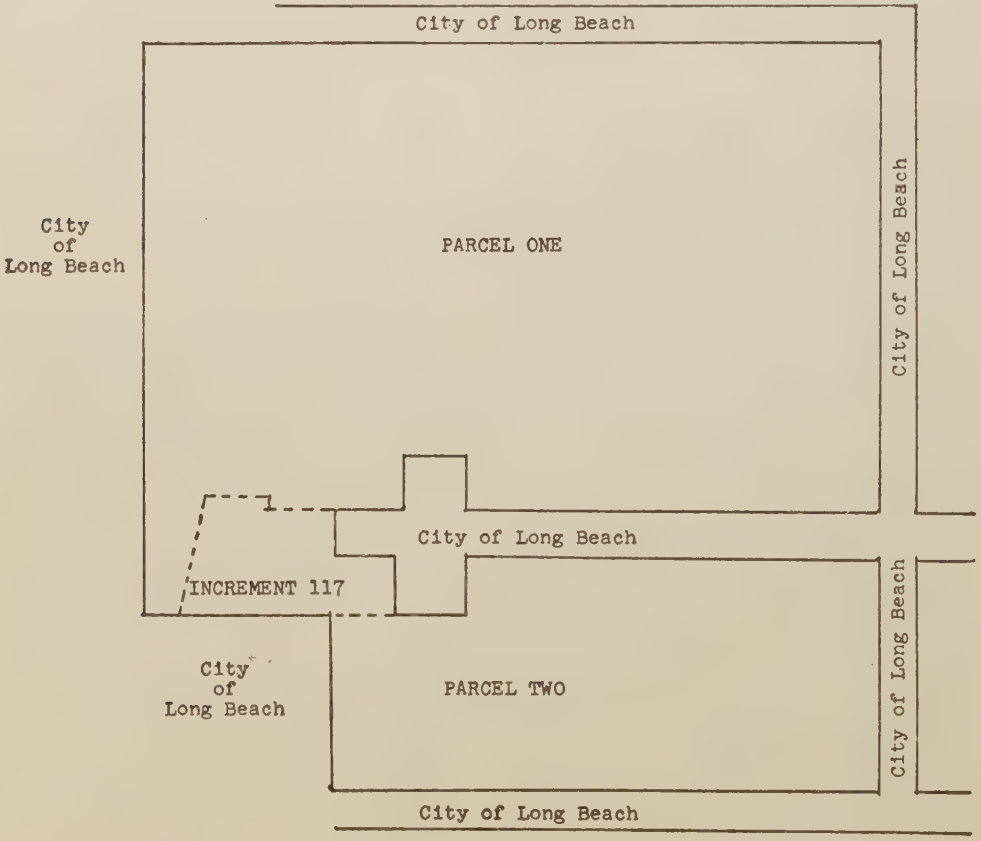
John Sanford Todd and Ted Sullivan, Lakewood, for appellants.

Irving M. Smith, City Atty., and Atlee S. Arnold, Deputy City Atty., Long Beach, for respondents.

VALLÉE, Justice.

Appeal by plaintiffs from a judgment which denied their petition for mandate to command defendants to terminate proceedings for annexation of territory described as "Increment 117" to the city of Long Beach.

Territory, which we call parcels one and two for convenience, is entirely surrounded by the city of Long Beach, consisting largely of so-called "shoestring strips." A narrow strip, part of Long Beach, separates parcels one and two except for a distance of about half a mile where they are contiguous. Parcels one and two, with the exception of Increment 117, are inhabited. They are unincorporated. Increment 117 is an area consisting of parts of parcels one and two. It is small in area compared with the combined area of parcels one and two. It is uninhabited. It is owned jointly by Douglas Aircraft Company and the United States. It is bounded on the north and west by parcel one, on the south partly by Long Beach and partly by parcel two, and on the east by Long Beach. The following very rough diagram will assist in understanding the areas involved:



This action was commenced after proceedings had been duly and regularly had for the annexation of Increment 117 to Long Beach to the point where the city council of Long Beach had a first reading of an ordinance annexing Increment 117. The annexation proceedings were had under the "Annexation of Uninhabited Territory Act of 1939." Government Code, § 35300 et seq.

The theory of plaintiffs is that annexation of Increment 117 to Long Beach would cause parcels one and two to be completely surrounded by Long Beach contrary to section 35326 of the Government Code.

The court found that annexation of Increment 117 will not result in unincorporated territory being completely surrounded by Long Beach for the reason that all of such unincorporated territory is, and was long prior to the institution of this proceeding, completely surrounded by Long Beach.

Section 35326 of the Government Code reads: "Territory shall not be annexed to a city pursuant to this article if, as a result of such annexation, unincorporated territory is completely surrounded by such city." The article referred to is the "Annexation of Uninhabited Territory Act of 1939." Section 35326 was added in 1951. Stats.1951, ch. 1702, § 6.

Plaintiffs state the question thus: "Are annexation proceedings of uninhabited territory void under Section 35326 of the Government Code where unincorporated territory was already completely surrounded by a city and as the result of the annexation of said city of uninhabited territory, said unincorporated territory is divided into two separate parcels of unincorporated territory, each completely surrounded by the City and separated from each other?" They argue that whether unincorporated territory was already surrounded by a city is immaterial because if the annexation of a part of the unincorporated territory will result in its being cut into two new smaller pieces, each completely surrounded by the city, then both parts considered separately have been completely surrounded by the city in violation of section 35326.

It is conceded that the territory in question, parcels one and two and Increment 117, was many years ago by antecedent annexation proceedings completely surrounded by Long Beach. Plaintiffs argument ignores the words "as a result of such annexation" in section 35326. Parcels one and two will not be completely surrounded by Long Beach "as a result" of the annexation of Increment 117. They were completely surrounded by Long Beach as a result of the prior, valid, annexation proceedings. What the section interdicts is annexation to a city the result of which would be the complete surrounding of unincorporated territory. Increment 117 is just a small part of parcels one and two. Separating it from those parcels does not now result in their being completely surrounded by Long Beach. They were completely surrounded by Long Beach before such separation. The fact that annexation of Increment 117 to Long Beach makes parcels one and two noncontiguous does not affect the question. If plaintiffs' contention were sustained, there would be no means of annexing a part of territory as large as parcels one and two and Increment 117 if such territory were completely surrounded by a city. It might well be that, due to the size of the territory, as in the case at bar, part thereof would be inhabited and part uninhabited so that both the inhabited and the uninhabited territories could not be annexed in one proceeding. The law provides one type of proceeding for the annexation of inhabited territory to a city, Annexation Act of 1913. Gov.Code, §§ 35100–35158, and a separate and distinct type of proceeding for annexation of uninhabited territory to a city. Annexation of Uninhabited Territory Act of 1939, Gov.Code, §§ 35300–35326. Section 35326 does not forbid annexation of a part of territory to a city which is already completely surrounded by such city.

Our conclusion makes it unnecessary to consider defendants' point that plaintiffs are not proper parties to obtain the relief sought.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

125 Cal.App.2d 670

PEARSON v. BALDWIN.

Civ. No. 19982.

District Court of Appeal, Second District, Division 3, California.

June 1, 1954.

Rehearing Denied June 17, 1954.

Hearing Denied July 28, 1954.

Suit for mandatory injunction to compel defendant to remove wall constructed along common property line in violation of ordinance. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment from which plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where wall on common property line of plaintiff and defendant was constructed by defendant in violation of zoning ordinance, but in good faith, and violation occasioned no damage to plaintiff, and resetting of wall would be costly and would materially interfere with full use of defendant's building, plaintiff would not be granted a mandatory injunction to compel removal.

Judgment affirmed.

1. Injunction ⚿50

Generally, in order to justify a mandatory injunction against encroachments there must be irreparable injury, although the damage need not be great.

2. Injunction ⚿51

Where wall constructed by defendant on common property line of plaintiff and defendant was erected in violation of zoning ordinance, but in good faith, and violation occasioned no damage to plaintiff, and resetting of wall would be costly and would materially interfere with full use of defendant's building, plaintiff would not be granted a mandatory injunction to compel removal.

3. Injunction ⚿128

In suit by which plaintiff sought a mandatory injunction to compel defendant to remove a wall constructed along common property line in violation of ordinance, but in good faith, evidence sustained finding that plaintiff suffered no damage because of presence of the wall.

4. Injunction ⚿126

Plaintiff who sought mandatory injunction compelling defendant to remove wall constructed along common property line in violation of ordinance, but in good faith, had burden of proving damage from the existence of the wall.

◆

Anderson & Howard, Arcadia, for appellant.

Courtney A. Teel, East Pasadena, for respondent.

SHINN, Presiding Justice.

Plaintiff owns lot 17 of the New Haven Tract in the City of Arcadia, improved with a one-story residence. Defendant owns lots 15 and 16 immediately to the north, improved with a two-story apartment building containing six one-bedroom and one two-bedroom apartments. The lots face west on Santa Anita Avenue. Defendant's lot 15 is bounded on the north by Haven Avenue. In building her apartment building recently defendant constructed a car port, the south masonry wall of which is on the common property line of lots 16 and 17 and but 4 feet from the wall of plaintiff's house. Defendant's wall is from 8½ to 10½ feet high and it extends 9 feet beyond plaintiff's front wall and 3 feet beyond his porch. It was erected in violation of the city zoning ordinance which permitted a wall 6 feet high on the property line but required a wall of greater height to be set back not less than 3 feet. Plaintiff brought this action for an injunction to require removal of the wall and for damages.

The court found that plaintiff had a plain, speedy and adequate remedy in damages and that he had sustained no damage. The court also found that the cost of resetting the wall would be from $2,000 to $2,500; also that defendant would suffer serious loss of use of her property if the wall should be set back 3 feet. It was found that defendant's plans and specifications were submitted to and approved by the building department of the city showing the wall as it was thereafter constructed and that the work was done under the supervision of the building department. It was also found that defendant had acted innocently and in good faith at all times. Judgment was for defendant and plaintiff appeals.

There was testimony given by plaintiff and one expert witness to the effect that plaintiff's property had depreciated from a value of $13,000 or $13,500 before the wall was constructed to a value of from $9,000 to $11,000. Plaintiff testified that the rental value had likewise been depreciated although the property was then, and had been for more than a year, rented for $80 per month, the highest rent it had ever brought. There was no evidence, however, that there would have been no depreciation, or less depreciation, if the wall had been only 6 feet high or had been set back 3 feet from the property line, in accordance with the ordinance. There was therefore no evidence of damage sustained by plaintiff by reason of defendant's violation of the ordinance. In fact, plaintiff does not discuss the evidence of his damage nor contend that it was insufficient to sustain the finding that he has suffered none. The evidence that it would cost from $2,000 to $2,500 to reset the wall was uncontradicted. The fact that defendant's plans and specifications were approved by the department of building is of no significance except as some evidence that defendant acted in good faith and did not knowingly violate the ordinance.

Upon the facts found defendant's wall was constructed in violation of the ordinance, but in good faith; the violation has occasioned no damage to plaintiff; resetting the wall would be costly and would materially interfere with the full use of defendant's building.

In cases where the factual elements to be considered were essentially the same as those we have enumerated the courts have invariably affirmed judgments denying a mandatory injunction. Blackfield v. Thomas Allec Corp., 128 Cal.App. 348, 17 P.2d 165; Ukhtomski v. Tioga Mutual Water Co., 12 Cal.App.2d 726, 55 P.2d 1251; McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134; Nebel v. Guyer, 99 Cal.App.2d 30, 221 P.2d 337.

[1, 2] The general rule is that in order to justify a mandatory injunction against encroachments there must be a showing of irreparable injury, although the damage need not be great. 43 C.J.S., Injunctions, § 23, page 446. And when an injunction is granted it is for reasons that are absent in the present case, see Carey v. Bowie, 130 Cal.App. 400, 19 P.2d 1032; Phillips v. Isham, 111 Cal.App.2d 537, 244 P.2d 716.

Although the court found that plaintiff had a plain, speedy and adequate remedy at law, we do not attach any importance to this finding. We doubt that it would have been consistent with a finding, had the court made one, that the wall, as constructed, would seriously and permanently deprive plaintiff of the full use and comfortable enjoyment of his property.

[3, 4] The denial of an injunction was not erroneous. The finding that plaintiff suffered no damage is supported by the evidence, and we may not disturb it. The burden of proof was upon plaintiff to prove damage. Even if the court could have regarded the evidence as sufficient to justify an award of damages, we cannot say that it was required to do so.

It is unnecessary to discuss the finding that plaintiff was estopped to object to the wall because he made no complaint or inquiry concerning it when he saw that it had reached a height of some 3 feet. Other findings support the judgment.

The judgment is affirmed. The purported appeals from certain of the findings and the order denying motion for new trial, are dismissed.

PARKER WOOD and VALLÉE, JJ.

We concur. It is difficult to understand the failure of the trial judge to award damages; however, this court is bound by his finding.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

125 Cal.App.2d 520

FOTH et al.
v.
CITY OF LONG BEACH et al.

Civ. 20102.

District Court of Appeal, Second District,
Division 3, California.
May 26, 1954.

Proceeding on petition of property owners for writ of mandate commanding city, its council and its clerk, to terminate proceedings for annexation to city of territory in which plaintiffs' property lay. The Superior Court, Los Angeles County, Frank G. Swain, J., entered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Vallée, J., held that where none of the protestants to annexation knew, prior to date of hearing on protests, that certain of the protests were questioned, nor did any of them have any prior knowledge that 99 protests were going to be disallowed on ground that protestants' ownership did not appear of record, nor did they know the identity of the signers of the 99 protests or the identity of the separate parcels of property the 99 signed a protest for, but notwithstanding such facts, the city council gave protestants only about 2½ hours within which to ascertain the facts, get the 99 before the council, and present evidence of their ownership, action of council was arbitrary, unreasonable, capricious, and in excess of its jurisdiction, and was in effect a denial of a hearing to protestants.

Affirmed.

1. Municipal Corporations 🔑33(1)

An annexation proceeding is commenced when the consent of the city legislative body is obtained. Government Code, § 35106.

2. Municipal Corporations 🔑33(4)

Purpose of publication of notice of intention to circulate petition relating to annexation of territory to city is to notify property owners of the pending annexation and the boundaries thereof and to give them an opportunity to protest, should they desire. Government Code, § 35111.

3. Municipal Corporations 🔑33(9)

Statute providing that protests to proposed annexation of territory to city may be made at any time not later than the hour set for hearing objections means at any time not later than the closing hour, and does not mean after the closing hour for protest has been fixed, and a protest can be signed earlier than date the council adopts a resolution setting date for hearing protests and fixing date for election. Government Code, § 35120.

4. Municipal Corporations 🔑33(9)

A protest to annexation proceedings is against the annexation to municipality of territory in which protestant owns property, and not merely a protest against the annexation election, and hence a protest may be signed before the election is set. Government Code, §§ 35120, 35121.

5. Municipal Corporations 🔑33(9)

Protests to annexation of territory by municipality, signed during period between date of publication of intention to circulate petition for annexation and date of adoption by city council of resolution setting date for hearing protests and fixing date for annexation election, were valid. Government Code, §§ 35120, 35121.

6. Municipal Corporations 🔑33(9)

A person may own property within territory proposed to be annexed to municipality without the fact of ownership being of record, and such person has a right to protest the annexation. Government Code, § 35120.

7. Municipal Corporations 🔑33(9)

The hearing required by statute on protests to annexation of territory by municipality contemplates a fair and impartial hearing at which competent evidence may be presented. Government Code, §§ 35120, 35121.

8. Municipal Corporations 🔑33(9)

Where none of the protestants to annexation of territory by municipality knew, prior to hearing on protests, that the protests were questioned, or that 99 protests were going to be disallowed on ground that protestants' ownership did not appear of record, nor did they know the identity of the signers of the 99 protests or the identity of the separate parcels of property the 99 signed a protest for, but notwithstanding such facts, the city council gave protestants only about 2½ hours within which to ascertain the facts, get the 99 before the council, and present evidence of their ownership, action of council was arbitrary, unreasonable, capricious, and in excess of its jurisdiction, and was in effect a denial of a hearing to protestants. Government Code, §§ 35120, 35121.

9. Municipal Corporations ⚷33(9)

Where, at time court adjudged that annexation proceedings were void, the annexation election had been held and the vote canvassed, and it was impossible for city council to hold a hearing or exercise its discretion, or to do anything other than terminate the proceedings, a remand of the matter to the council would be fruitless. Government Code, § 35102.

◆

Irving M. Smith, City Atty., and Atlee S. Arnold, Deputy City Attorney, Long Beach, for appellants.

John Sanford Todd, Ted Sullivan, Lakewood, and Angelo M. Iacoboni, Long Beach, for respondents.

VALLÉE, JUSTICE.

Appeal by defendants from a judgment which decreed that plaintiffs are entitled to a peremptory writ of mandate commanding defendants to terminate the proceedings for the annexation to the city of Long Beach of territory described as "Increment 110" and a special election set therefor on August 20, 1953. The judgment also decreed that the attempted proceedings for the annexation of the territory and every purported resolution and ordinance pertaining thereto are void and of no effect. Defendants demurred to the petition and filed a return to the order to show cause and answer to the petition. The demurrer was overruled and a trial had on the issues.

Plaintiffs are owners of real property in "Increment 110." They commenced and are prosecuting this proceeding on their own behalf and as representatives of the other owners of property in the territory who made protests in writing against the annexation. The territory is unincorporated, is inhabited, is contiguous to Long Beach, contains about 503 acres, and has 2,333 separate parcels therein.

On April 18, 1953, pursuant to the "Annexation Act of 1913," Govt. Code, §§ 35100–35158, the proponents of the annexation published a notice of intention to circulate a petition therefor. On June 23, 1953, after the receipt and checking of the petition which had been circulated, the city council of Long Beach adopted a resolution in which it gave notice of its intention to call an election to be held August 20, 1953, in "Increment 110" on the question of annexation, and fixed July 14, 1953, at 11 a. m., in the council chamber as the time and place where any person owning real property within the territory might appear and show cause why the territory should not be annexed. The resolution was duly published.

On July 14, 1953, and prior to 11 a. m., there was filed with the council a document protesting the annexation and the holding of the special election, signed by persons claiming to be the owners of 1,228 separate parcels of property in the territory proposed to be annexed. A majority of the separate parcels within the territory is 1,167. The council, without holding a hearing, adjourned the matter until July 21, 1953, at 11 a. m., and referred the protests to the city engineer and the city manager for checking and verification.

At the adjourned hearing, on July 21, 1953, at 11 a. m., the city engineer made a report based on a check made of the records of Title Insurance and Trust Company as to the ownership of the parcels included in the protests. He reported that of the persons claiming to be the owners of the 1,228 parcels protesting, the records of the title company disclosed that 99 of such persons had no record interest in the parcels they respectively claimed to represent, and that written protests had not been filed by the owners of a majority of the separate parcels. He also reported that of the claimed owners of the 1,228 parcels protesting, 367 had signed the protests between April 18 and June 23, 1953, the latter date being the date the council adopted the resolution giving notice of its intention to call the election, and that the protests were insufficient.

After the report had been made counsel for the protestants told the council "that a majority protest had been filed; that as respects the 99 disallowed protests, all of the signers thereof had an ownership interest in the separate parcels of real property represented by their signatures on the written protests; that some of said persons owned said realty by way of unrecorded deeds; some by recorded and unrecorded contracts of sale; some by survival of a deceased joint-tenant; that a person may be the owner of real property even though his interest is not of record." He then asked the council for time in which to examine the protests and the records compiled by the city engineer in order to ascertain the identity of the 99 disallowed protests. This was about 11:13 a. m. The council granted the request and first adjourned the hearing for 20 minutes and then until 1:45 p. m., the same day. Between 11:13 and 1:45 four or five of the protestants and their attorneys went through the 1,228 protests and compiled a list of and other information concerning the 99 disallowed protests. At no time prior to the recess at 11:13 did the protestants or any of them or their counsel know the identity of the signers of the disallowed protests or the identity of the parcels of property they signed a protest for, nor did any of them have any prior knowledge that said protests were going to be disallowed.

At 1:45 p. m., the same day, the hearing was resumed and counsel for the protestants addressed the council stating that he, his associate, and several of the protestants had compiled a list of the 99 disallowed protests; that a person could sign a valid written protest against annexation even though the person's ownership interest in land did not appear of record; that all of the persons signing the 99 disallowed protests had an ownership interest in the property they purported to represent; that if the council would continue the hearing if only for 24 hours, he would introduce evidence that all of said persons had an ownership interest in the property they purported to represent on the written protests. He was advised by the council that the second and final reading of the ordinance calling the annexation election and setting up the machinery therefor would have to take place on the following day or the election could not be held on the date previously set; that, therefore, said ordinance would have to be given its first reading that day; that if he had any evidence to present showing that the signers of the 99 disallowed protests were the owners of the real property he should present it then. At that time the city attorney advised the council that any signatures affixed prior to June 23, 1953, were invalid; that the owner of an unrecorded interest could not protest; and that if the hearing were continued the election could not be held on the date set. The council then denied the protestants a continuance, and immediately thereafter adopted a motion that the hearing be concluded and that it be found that written protests were not signed by the owners of a majority of the separate parcels of property in the territory proposed to be annexed.

The first reading of an ordinance calling the annexation election and setting up the machinery for holding it was had immediately. The next day, July 22, 1953, at 12:01 a. m. (one minute after midnight), the council met and the second and final reading of the ordinance was had. They met at that time because a number of the councilmen "were going on a fishing trip. * * * They had previously planned to leave at 11:30 a. m. on July 21st."

The court in part found: 1. The action of the council in refusing to recognize the majority protests was capricious, arbitrary, in excess of its powers and jurisdiction, and in violation and derogation of the rights of all of the protestants. 2. Neither the council, the city, nor any official of the city has any authority to conduct an election on August 20, 1953, or at any other time, for the purpose of effectuating an annexation of "Increment 110" pursuant to the proceedings described.

The court concluded: 1. The council acted in excess of its jurisdiction in overruling the protests and proceeding with the election. 2. Written protests against annexation filed with the council prior to the hour set for hearing protests are presumed to be valid. 3. The 367 protests dated between April 18 and June 23, 1953, both inclusive, were sufficient, valid in form, and met the requirement of law. The council did not have any evidence before it to justify it in refusing to allow the 367 protests, and acted arbitrarily, capriciously, and in excess of its jurisdiction in disallowing said protests. 4. An owner of an equity in real property may make a valid written protest against the annexation of his real property to a municipality pursuant to section 35120 of the Government Code, whether or not his ownership interest appears of record. 5. If a city council finds that some of the signers of written protests against annexation are not the owners of the separate parcels of real property they purport to represent on said protests, said protestants, on request, must be given a reasonable opportunity to present to said city council further evidence of their ownership interest in said real property. 6. If the council were legally permitted to conclude the protest hearing on the same date they announced for the first time the number of disallowed protests and the reasons therefor, this would, in effect, require all of the protestants (1,228 in this case) to appear before the council with evidence of their ownership of the real property because none of them would have any advance knowledge as to whose protests would be disallowed or the reasons therefor; to require all of said protestants to appear before the council would be unreasonable. 7. The council acted arbitrarily, capriciously, and in excess of its jurisdiction when it continued the protest hearing from July 14, 1953, to July 21, 1953, the latter date being the last day on which the first reading of an ordinance calling the election could have been had if the election was to have been held on the date previously set, where the result was that on said last mentioned day the council for the first time announced the number of disallowed protests and the reasons therefor and the signers of said protests were given no opportunity to appear before the council and meet the challenge of their protests. 8. Since the 99 protestants had no knowledge prior to July 21, 1953, that their protests were going to be disallowed, it would be unreasonable to require them to attend the hearing on that day armed with documents evidencing their ownership interest in the real property. 9. The continuance granted to the protestants from 11:13 a. m. to 1:45 p. m. on the same day for the purpose of compiling a list of the 99 disallowed protests was an unreasonably short time within which to compile said list, notify the signers of the disallowed protests, and arrange for their appearance before the council on that afternoon with their documentary evidence of ownership of the real property they purported to represent on the written protests. 10. The council abused its discretion when it refused to permit the signers of the 99 protests, all disallowed by the council on the basis that the signers were not the owners of the real property they purported to represent, a reasonable opportunity to appear and present further evidence of their ownership interest in the property which they purported to represent on their written protests where said protestants had no previous knowledge that their protests were going to be disallowed by said city council and where a request for a continuance for that purpose was made, and such action was arbitrary, unreasonable, capricious, and in excess of its jurisdiction.

Judgment was entered on August 25, 1953, that plaintiffs are entitled to mandate commanding defendants to terminate the annexation proceedings and the election, commanding the city clerk to refrain from carrying out any direction of the council with respect to the election, and adjudging the attempted annexation proceedings and each purported resolution and ordinance pertaining thereto void and of no effect. The election was held prior to the entry of judgment.

Section 35121 of the Government Code[1] provides that if the city legislative body finds that protest is made by the owners of a majority of separate parcels of property within the territory, no further proceedings for the annexation shall be taken for one year after the finding. If the 367 protests signed between April 18 and June 23, 1953, were invalid, the owners of less than a majority of the separate parcels of property within the territory filed protests. Also, if the protests of the 99 protestants whose ownership did not appear on the records of Title Insurance and Trust Company were invalid, the owners of less than a majority filed protests.

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[1] All section references are to the Government Code unless otherwise noted.

Defendants first contend the court erred in holding as valid protests the 367 that were signed between April 18 and June 23, 1953. The argument is that protests are premature and invalid if signed prior to receipt by the council of a sufficient petition requesting annexation and before the council has adopted a resolution setting the date for hearing protests and fixing a date for an annexation election. The contention is untenable.

Section 35106 provides: "The consent of the city legislative body shall be obtained before any proceedings are commenced pursuant to this article." Section 35108 provides: "In cities having a planning commission, consent shall not be given by the legislative body until it has received a report or recommendations from the commission." Long Beach has a planning commission. Stats.1921, ch. 32, p. 2123. Section 35111 provides: "Before circulating a petition relating to * * * annexation of territory to, a city, the proponents shall publish a notice of intention to do so pursuant to the Elections Code. The notice shall contain the names of the proponents intending to circulate the petition and the specific boundaries of the territory proposed to be annexed, and may be accompanied by a printed statement not exceeding five hundred words in length, containing reasons for the petition." Section 35112 provides: "Within ten days after publication the proponents shall file a copy of the notice and accompanying statement, if any, and an affidavit of the publishing or posting, with the city clerk." Section 35113 provides: "Within fifteen days after such filing, the legislative body may adopt a resolution acknowledging receipt of the notice and approving the circulation of the petition. A petition asking for the annexation of any portion of the territory described in the notice, shall not be filed with any other city for 50 days after the adoption of such a resolution." Section 35114 provides: "Twenty-one days after the publication or posting of the notice and statement, the petition may be circulated among the voters within the area proposed to be annexed pursuant to the Elections Code." Section 35116 reads: "Upon receiving a petition signed by not less than one-fourth of the qualified electors residing within the territory, as shown by the county registration of voters, containing a description of the new territory proposed to be annexed and asking that the territory be annexed, the city legislative body shall without delay pass a resolution of intention to call a special election giving at least fifty days notice thereof and of its intention to submit the question of annexation to the electors residing in the territory."[2] Section 35117 provides that the resolution shall contain a notice of the day, hour, and place any person owning real property within the territory may appear before the legislative body and show cause why it should not be annexed. A hearing must be held not less than 15 nor more than 40 days after the passage of the resolution. § 35118. A copy of the resolution must be published at least once a week for the two weeks prior to the hearing. § 35119. Section 35120 reads: "At any time not later than the hour set for hearing objections to the election, any owner of property within the territory may make a written protest against the election. The protest shall state in general terms the name of the owner of the property affected and the location and area of the property."

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[2] In 1953 the following sentence was added to section 35116: "The city clerk and the county officer having charge of the registration of voters shall within two weeks check the petition and certify the sufficiency thereof." Stats.1953, ch. 1125, § 1.

At the time set for hearing protests the city legislative body shall hear and pass on all protests so made. § 35121.

[1-3] An annexation proceeding is commenced when the consent of the city legislative body is obtained. § 35106. The property owners within the territory are first notified that it is proposed to annex their property by the publication of the notice of intention required by section 35111. Such notice of intention was published on April 18, 1953. On June 23, 1953, the council adopted the resolution calling the election. The protests were that it was in the interests and desires of the signers that the territory "*Not Be Annexed to* Long Beach and that the special annexation election contemplated by the Annexation Act of 1913 Not Be Called or Held." We think the purpose of publication of the notice of intention is to notify property owners of the pending annexation and the boundaries thereof and to give them an opportunity to protest should they desire. Protest may be made "At any time not later than the hour set for hearing objections". § 35120. This means just what it says: "At any time not later" than the closing hour. It does not mean after the closing hour for protests has been fixed as argued by defendants. Section 35120 may be contrasted with section 9756 of the Election Code which provides that "Not earlier than the sixtieth day nor later than 12 o'clock noon on the fortieth day before a municipal election" the voters may nominate candidates for election. Undoubtedly if the Legislature had intended that a protest could not be signed earlier than the date the council adopts a resolution setting the date for hearing protests and fixing a date for the election, it would have said "not earlier" than that date.

[4] We are not impressed by the argument that a protest is against the election and that, therefore, a protest may not be signed until the election is set. The election is only one step in effecting an annexation. What a protestant does is to protest against the territory in which he owns property being annexed to a municipality. The question submitted to the voters is whether the territory "shall be annexed to and incorporated within the city." § 35122. Speaking of a protest under the Street Improvement Act of 1889, Stats.1889, p. 158, § 3, the court in Los Angeles Lighting Co. v. City of Los Angeles, 106 Cal. 156, at page 161, 39 P. 535, at page 536, said: "It is sufficient if they indicate to the city council that the proposed improvement is objected to, and that this objection is made by the owners of a majority of the frontage upon the line of the work."

[5] We hold therefore that the 367 protests signed between April 18 and June 23, 1953, both inclusive, were valid.

[6] Defendants urged that the court erred in concluding that the protestants were not given a fair hearing on the protests by the council. The point cannot be sustained. The court found on uncontroverted evidence that none of the protestants knew, prior to 11 a. m. on July 21, 1953, that the protests were questioned; that they did not know, prior to 11:13 a. m. of that day, the identity of the signers of the 99 protests or the identity of the separate parcels of property the 99 signed a protest for nor did any of them have any prior knowledge that the 99 protests were going to be disallowed on the ground their ownership did not appear of record. Notwithstanding these facts which were made known to the council, the council only gave the protestants about two and a half hours within which to ascertain the facts, get the 99 before the council, and present evidence of their ownership. A person may own property within the territory without the fact of ownership being of record. And such a person has a right to protest. Gov.Code, § 35120. The city attorney erroneously advised the council that a non-record owner could not protest. As the trial judge said, it would be absurd to hold that 1,228 protestants are required to be present in the council chamber on the date set for hearing protests. The protests were valid on their face; and until they were questioned, the protestants had no means of knowing whether any of them would be questioned, and if questioned, the ground thereof.

[7] Speaking of the hearing on protests required by section 35121, the court in Morin v. City Council, 109 Cal.App.2d 268, at page 273, 240 P.2d 688, at page 691, said: "Such a hearing contemplates a fair and impartial hearing at which competent evidence may be presented. Saks & Co. v. City of Beverly Hills, 107 Cal.App.2d 260, 237 P.2d 32; Carstens v. Pillsbury, 172 Cal. 572, 158 P. 218; 29 C.J. 285".

[8] We are of the opinion that the action of the council was in flagrant disregard of the rights of the protestants. Some members of the council appear to have had more interest in getting away on a fishing trip than in giving the protestants a fair hearing. We agree with the trial judge that the action of the council was arbitrary, unreasonable, capricious, and in excess of its jurisdiction. Its action was in effect a denial of a hearing to the protestants.

[9] As noted, the court adjudged that the proceedings are void. Defendants contend the court should have remanded the matter to the council for further proceedings to determine whether any of the 99 protestants were owners of property within the territory. The same contention was made below. The implication is that we should reverse the judgment with directions to remand the matter to the council. We agree with the opinion of the trial judge. In concluding the trial on August 7, 1953, he said: "The proceedings therefore are void. It is too late for me to remand this back to the City Council to take evidence on this ownership. I have thought of that this morning, but there is no way I can send it back to the City Council now to take evidence of the ownership and still have the election on the date it is advertised, that is, on the 27th [sic], I believe. It would seem to me that the court, having found that there was an abuse of this discretion which invalidated the proceedings, and the time having expired for anything else, all the court can do is issue the return as prayed." The judge restated the date as the "20th."

To have remanded the matter to the council would have been a fruitless proceeding. The election had been held and the vote canvassed at the time judgment was entered. The council made it impossible to remand the matter for any purpose. After having set the election for August 20 it continued the hearing of protests to the last day on which first reading of the ordinance calling the election could be had. Without giving the protestants a hearing it found the protests insufficient. It read the ordinance notwithstanding the objection of counsel for the protestants, and the next day read it the second and final time. It is no longer possible for the council to hold a hearing. Section 35102 provides that if an election for annexation is not called or held in the manner specified in the Government Code all proceedings relating to the annexation are void. Since the council could not have done other than terminate the proceedings, it would have been futile to have ordered a remand. See American Distilling Co. v. City Council, of City of Sausalito, 34 Cal.2d 660, 213 P.2d 704, 18 A.L.R. 2d 1247. In Morin v. City Council, 109 Cal.App.2d 268, at page 273, 240 P.2d 688, at page 691, it was said: "Defendants urge that if the council incorrectly held these protests insufficient that the court should have remanded the matter to the council for a further hearing in accordance with the court's views. There would be no reason to remand it to the council for a further hearing. The trial court's finding of sufficiency required the conclusion that the city council had no discretion to do other than comply with the statute and terminate the proceedings."

Decisions relied on by defendants do not, in our view, support them.[3] Circumstances present in those cases are absent here. In La Prade v. Department of Water & Power, 27 Cal.2d 47, at page 53, 162 P.2d 13, at page 17, the court said: "If a hearing has been denied or the evidence is insufficient to sustain the action of the board, *and it is still possible for the board to hold a hearing or exercise its discretion,* then the matter should be remanded to the board for further consideration rather than having a trial de novo in the superior court and requiring that court to exercise independent judgment on the facts which should be determined by the board." (Italics added.) In the present case it is not possible for the council to hold a hearing or exercise any discretion. It exhausted its jurisdiction.

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[3] Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746; La Prade v. Department of Water & Power, 27 Cal. 2d 47, 162 P.2d 13; Steen v. City of Los Angeles, 31 Cal.2d 542, 190 P.2d 937; English v. City of Long Beach, 35 Cal. 2d 155, 217 P.2d 22, 18 A.L.R.2d 547; Fascination, Inc. v. Hoover, 39 Cal.2d 260, 246 P.2d 656; Thompson v. City of Long Beach, 41 Cal.2d 235, 259 P.2d 649; and Ware v. Retirement Board, 65 Cal. App.2d 781, 151 P.2d 549.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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125 Cal.App.2d 408

In re GUTHMAN'S ESTATE.

KIRKWOOD v. GLOGAU et al.

Civ. 19808.

District Court of Appeal, Second District, Division 3, California.

May 21, 1954.

Rehearing Denied June 14, 1954.

Hearing Denied July 14, 1954.

Proceeding in the matter of the estate of deceased testator. The Superior Court of Los Angeles County, Newcomb Condee, J., entered a judgment confirming a report of the State Inheritance Tax Appraiser assessing California inheritance taxes on interests passing under will, and devisees and legatees appealed. The District Court of Appeal, Shinn, P. J., held that California statute dealing with deduction of federal inheritance taxes in determining state inheritance taxes, though interpreted as allowing a deduction if a federal inheritance tax is payable on California property alone, but denying a deduction if California property is not subject to federal inheritance tax, even though California property, combined with other property, is subject to federal inheritance tax, does not violate the equal protection of laws guaranty of the federal Constitution.

Judgment affirmed.

1. Taxation 🔑895(7)

California statute dealing with deduction of federal inheritance taxes in determining state inheritance taxes, requires that deduction be computed as if property subject to state inheritance tax comprised entire estate, and, if there is out-of-state property, it is not to be taken into consideration. Revenue and Taxation Code, § 13989.

2. Taxation 🔑895(7)

If federal inheritance tax is payable on California property alone, there is a deduction under California statute dealing with deduction of federal inheritance taxes in determining state inheritance taxes. Revenue and Taxation Code, § 13989.

3. Taxation 🔑895(7)

If California property itself is not subject to federal inheritance tax, there is no deduction under California statute dealing with deduction of federal inheritance taxes in determining state inheritance taxes, even though California property, combined with other property, is subject to federal tax. Revenue and Taxation Code, § 13989.

4. Taxation 🔑895(7)

Where estate of deceased testator consisted of personalty in California worth $55,689.76 and realty in Illinois worth $115,000, and $21,406.14 was paid as federal inheritance taxes on the entire estate, and the California personalty contributed to the federal tax liability proportionately, and, if testator's estate had consisted only of the California personalty, there would have been no federal inheritance tax because of the $60,000 exemption, it was proper not to allow any deduction for federal inheritance taxes in computing state inheritance taxes on personalty in California. Revenue and Taxation Code, § 13989.

5. Constitutional Law ⚷209

The constitutional guaranty of equal protection of the laws is not a guaranty of equality of operation or application of state legislation on all citizens of a state. U.S.C.A.Const. Amend. 14.

6. Constitutional Law ⚷229(1)

Where the legislature has classified the subjects of taxation, the only question for the courts, in determining whether there has been a violation of the constitutional guaranty of equal protection of the laws, is whether the classification is based on some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justifies particular legislation. U.S.C.A.Const. Amend. 14.

7. Constitutional Law ⚷209

The constitutional guaranty of equal protection of the laws does not require that statutes operate uniformly with respect to persons or things which are in fact different. U.S.C.A.Const. Amend. 14.

8. Constitutional Law ⚷229(1)

California statute dealing with deduction of federal inheritance taxes in determining state inheritance taxes, though interpreted as allowing a deduction if federal inheritance tax is payable on California property alone, but denying a deduction if California property is not subject to federal inheritance tax, even though California property, combined with other property, is subject to federal inheritance tax, does not violate the equal protection of laws guaranty of the federal constitution. Revenue and Taxation Code, § 13989; U.S.C.A.Const. Amend. 14.

Desser, Rau, Christensen & Hoffman and Robert Haves, Beverly Hills, for appellants.

James W. Hickey, Sacramento, Walter H. Miller, Los Angeles, Raymond G. La Noue, Sacramento, William A. Parsons, Whittier, Charles Farley, Los Angeles, for respondent.

SHINN, Presiding Justice.

Appellants Laura Glogau and Jeanette Glogau, devisees and legatees under the Will of the decedent Alfred Guthman, appeal from a judgment of the superior court confirming a report of the state inheritance tax appraiser assessing California inheritance taxes on the value of the interests passing to them under decedent's Will. In the computation of the value of the interests passing from decedent to appellants which were taxable by California, no deduction was allowed on account of federal estate taxes paid.

The controversy arises out of these facts: Alfred Guthman died domiciled in California on April 12, 1951, leaving bequests and devises to appellants in the aggregate value of $54,850.40, before federal taxes. So far as relevant to this appeal, his estate consisted of personal property in California having an appraised clear market value of $55,689.76 and real property situated in the State of Illinois of the appraised value of $115,000. The personal property is subject to the California inheritance tax and the Illinois real property is not. $21,406.14 was paid as federal estate taxes on the entire estate.

The question is whether section 13989 of the California Revenue and Taxation Code requires that all or some portion of the federal estate tax payment on the entire estate be allowed as a deduction from the value of the property taxed under the California Inheritance Tax Law. The section reads as follows: "Federal inheritance or estate tax: Limitation. Any amount due or paid the Government of the United States as a Federal inheritance or estate tax in the estate of any decedent is deductible from the appraised value of property included in any transfer subject to this part made by the decedent. The amount deductible is limited to an amount computed by the inheritance tax appraiser upon an application of the Federal inheritance or estate tax exemptions and rates (commencing at the primary rates) in force at the date of decedent's death to that portion of the decedent's property the transfer of which is subject both to the tax imposed by this part, and to any Federal estate tax law, and upon his own valuation of that portion."

If the entire estate had consisted of the California property, worth $55,689.76, there would have been no federal estate tax, because the $60,000 exemption exceeded the value of the estate. However, a federal tax was paid on the California property as a part of a total estate of $170,689.76. The California property contributed to the federal tax liability proportionately, or slightly less than one-third.

Appellants contend that section 13989 must be interpreted so as to allow the deduction of the share of the federal tax contributed by the California property. They argue that this interpretation must be put upon the statute because the language of the statute permits it and if it is construed so as to deny a pro-rata deduction the result will be to deprive them of property without the due process of law guaranteed by the 14th Amendment to the United States Constitution, and also to deny them the equal protection of the laws as required by the same amendment. Respondent argues the reverse of these propositions.

[1-4] Although the first sentence of the section, standing alone, would require a deduction of the entire federal tax from the valuation of the property of the decedent which is subject to the state tax, it must be read as modified by the second sentence, and not as an enactment complete in itself. As we read the section it requires that the deduction provided for be computed and allowed as if the property which is subject to the state tax comprised the entire estate; if there is other property, such as out-of-state real property, it is not to be taken into consideration for any purpose; if a federal tax is payable on the California property alone there is a deduction; if the California property itself is not subject to a federal tax there is no deduction, even though that property, combined with other property is subject to the federal tax. There is no express or implied provision for an apportionment of the federal tax, in the latter case, viz., the deduction of the proportion of the federal tax which the value of the California property bears to the value of the entire estate.

Many other states have statutes providing for or permitting apportionment. Washington has such a statute.[1]

Appellants are correct in claiming there is inequality in the operation of section 13989 if apportionment is denied, but that fact cannot influence the court to disregard the clearly expressed purpose of the lawmakers to deny it. The actual amount paid as federal tax is not taken into consideration in any event. Where a deduction is allowed it is based not on the federal valuations, but solely upon the state appraiser's valuation of the property which is subject to the state tax. There is no provision for a state appraisal of property which is not subject to the state tax. There is no requirement for a determination of the proportionate value of the California property by the state, and no method prescribed by which it could be ascertained. After the California property has been valued the federal exemptions are applied, and if a sum remains, the deductible amount of tax is ascertained by applying to the remainder the primary federal rates. If the rates were to be applied, in disregard of the exemptions, and the tax thus computed were to be deducted, the result would be an apportionment of the tax as between the property which was and that which was not subject to the state tax. But it is expressly provided that the federal exemptions must be applied to the portion of the property which is subject to the state tax and the federal tax and it is the total amount of the exemptions, not merely a proportionate part, that must be applied. There is no uncertainty as to the legislative intention that there shall be no deduction whatever unless the portion of the property subject to the state tax exceeds the amount of the federal exemptions. The method followed by respondent is the one which the statute prescribes.

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[1] Sec. 83.40.050, Rev.Code of Wash.1951: "In all estates the amount of the federal estate tax, as paid by the estate, shall be deducted as a claim or indebtedness against the estate: *Provided, That* where there is property belonging to decedent both within and without the state the amount of federal tax deductible shall be the proportionate part thereof that the value of the property having a taxable situs within the state bears to all of the property within and without this state."

Upon the constitutional question appellants' first contention is that the state has measured the inheritance tax by the value of the real property in Illinois, which is beyond its taxing jurisdiction. This, of course, the state may not do. Appellants say that if the entire property had been situated in California the entire federal tax, computed in the manner provided, would have been deductible, which, of course, is true. And they say that since no deduction was allowed, California is taxing $21,406.14, the amount of the federal tax, and that the result is the measurement of the inheritance tax on the value of the Illinois property.

Appellants' second contention is that the law unjustly discriminates against estates owning real property in other jurisdictions by denying them the deduction that would be allowed to estates of equal value situated in California.

This state imposes an inheritance tax only upon property having situs in the state. Here the tax was upon property of the value of $55,000, which, admittedly, was taxable. The value of the Illinois real estate did not increase the tax. If there had been no property situated outside the state there would have been no federal tax and no deduction. The California tax would have been in the same amount. What California has done is to allow no deduction for federal tax liability in excess of an amount that would have been owing if the California property had comprised the entire estate. In other words, it grants a limited deduction, which, under the conditions prevailing, is of no benefit to appellants. It has not measured its inheritance tax by the value of out-of-state property. It has not taxed the sum of $21,406.14, the amount of the federal tax, nor anything except the California property. It is, of course, true that the California tax is greater because the valuation of the portion of the property taxed by the state is not subject to any deduction, but it cannot be said that the state has measured its tax by the value of out-of-state property, or has taxed the amount paid as federal tax, unless it is under a constitutional duty to deduct the amount of the federal tax, or some part of it, from the valuation of the California property. There is no such duty.

Appellants concede that the state may exact an inheritance tax which is not reduced in any manner by the amount of federal tax liability, but they say that if there is a reduction in one case there must be a comparable reduction in all cases; hence their claim of unlawful discrimination. Respondent, while conceding inequality in the operation of the law, justifies it upon the ground that it is based upon a classification of persons and estates subject to the tax which was clearly within the discretion of the legislature.

The governing principles have been expressed by the Supreme Court of California in Re Estate of Watkinson, 191 Cal. 591, 217 P. 1073, and by the United States Supreme Court in the same case. Stebbins v. Riley, 268 U.S. 137, 45 S.Ct. 424, 425, 69 L.Ed. 884. Inasmuch as the two opinions in the case are explicit and comprehensive we quote from them at some length.

[5] The courts considered the Inheritance Tax Act of 1917, Stats.1917, p. 883. The act provided (subd. 10, sec. 2): "In determining the market value of the property transferred, no deduction shall be made for any inheritance tax or estate paid to the government of the United States." The state court, after stating the general proposition that the rights of inheritance and of testamentary disposition are creatures of legislative will and subject to legislative control, said: "In other words, the tax is imposed and is sustainable upon the theory that a state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state." [191 Cal. 591, 217 P. 1075.] Upon this principle the court upheld the statute insofar as it denied a reduction of the value of the estate taxed in the amount of federal tax paid. The United States Supreme Court, after referring to the cases holding that the state, in granting the privilege of taking property by will or descent "is untrammeled in its power to tax the privi-

lege", spoke as follows: "But we do not find it necessary to discuss the issue thus raised, for it has been repeatedly held by this court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless as was said in Dane v. Jackson, 256 U.S. 589, 599, 41 S.Ct. 566, 568, (65 L.Ed. 1107 [1113]) the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—"to spoliation under the guise of exerting the power of taxing"'. (Citations.) * * *

"Even assuming that a state does not, under the Constitution of the United States, possess unlimited power to curtail the power of disposition of property at death or the privilege of receiving it by way of inheritance, there is nevertheless no constitutional guaranty of equality of taxation. The power of the states to discriminate in fixing the amount and incidence of taxation upon inheritance is undoubted. * * *

"The guaranty of the Fourteenth Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state. As was said in Magoun v. Illinois Trust & Sav. Bank, supra [170 U.S. 283], at page 293, (18 S.Ct. [594, at page] 598), [42 L.Ed. 1037, 1042]:

"'It only prescribes that that law have the attribute of equality of operation, and equality of operation does not mean indiscriminate operation on persons merely as such, but on persons according to their relations. In some circumstances it may not tax A. more than B. but if A. be of a different trade or profession than B., it may. * * * In other words, the state may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion.'

"The taxing statute may, therefore, make a classification for purposes of fixing the amount or incidence of the tax, provided only that all persons subject to such legislation within the classification are treated with equality and provided further that the classification itself be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. Magoun v. Illinois Trust & Sav. Bank, supra; F. S. Royster Guano Co. v. [Commonwealth of] Virginia, 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989. * * *

"It is not necessary that the basis of classification should be deducible from the nature of the thing classified. It is enough that the classification is reasonably founded in the 'purposes and policies of taxation.' Watson v. State Comptroller, 254 U.S. 122, 41 S.Ct. 43, 65 L.Ed. 170. It is not open to objection unless it precludes the assumption that the classification was made in the exercise of legislative judgment and discretion. Campbell v. [State of] California, supra [200 U.S. 87, 26 S.Ct. 182, 50 L.Ed. 382]."

Upon the question of discrimination appellants say that all estates, the conditions of which are the same, must be accorded the same treatment, which is true; and they say that the conditions of the Guthman estate are the same as those of an estate of the same value wholly subject to the state tax, which is not true.

As we have seen section 13989 allows a deduction on account of federal tax liability in the amount of that tax computed on the value of the California property. It allows no deduction unless the California property alone is taxable. It is uniform in its operation as to all estates consisting entirely of California property. It operates uniformly also in that it does not in any case take into account federal tax liability due to the combined value of property which is and property which is not taxable by California. All estates in which this condition occurs are treated alike.

Unless the state is required to accept federal appraisals of out-of-state real property or make its own appraisal of the same, for the purpose of computing its own inheritance tax, the estate which owns such property is not in the same, or substantially the same position as that of an estate which is entirely situated in California. We think there can be no question as to the state's power to grant a deduction on account of federal taxes which can be computed by the state upon property situated in California and at the same time refuse to take into account out-of-state real property. The dissimilarities of the two situations are obvious and substantial. If we were to hold otherwise what could we say as to the basis upon which a proportionate deduction of federal tax liability should be allowed? Could we declare that the state must accept the actual amount of the federal tax paid as fixed by federal authorities, or that it must make its own appraisal of the entire estate? The courts cannot prescribe an entirely new policy in the matter.

[6] Where the legislature has classified the subjects of taxation the only question for the courts is whether the classification is based upon some distinction, natural, intrinsic, or constitutional, which suggests a reason for and justified the particular legislation.

"The power to thus classify necessarily carries with it a wide discretion in the exercise thereof. The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the Legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason." Martin v. Superior Court, 194 Cal. 93, 101, 227 P. 762, 765; see, also, Stebbins v. Riley, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884, supra; 11 Cal.Jur.2d 717, § 272, et seq., 16 C.J.S., Constitutional Law, § 520, p. 1042.

[7, 8] The constitutional provisions relied upon by appellants do not require that statutes operate uniformly with respect to persons or things which are in fact different. County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal.2d 378, 196 P.2d 773. We conclude that section 13989, Revenue & Taxation Code, is a valid enactment and was properly applied in the present case.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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125 Cal.App.2d 566

BRYANT et al. v. TULARE ICE CO. et al.

GOODRICH et al.
v.
TULARE ICE CO. et al.

Civ. 4903, 4904.

District Court of Appeal, Fourth District, California.

May 27, 1954.

Rehearing Denied June 22, 1954.

Hearing Denied July 21, 1954.

Actions for wrongful death of occupants of automobile in headon collision with oncoming truck were consolidated for trial. The Superior Court of Tulare County, Frederick E. Stone, J., entered judgments on verdicts in favor of defendants and orders denying plaintiffs' motions for judgment notwithstanding verdict, and plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that whether collision was caused by negligence of owner or driver of truck or occurred because truck suddenly went out of control due to a latent defect which could not have been discovered with reasonable care was a question of fact for jury.

Judgments and orders affirmed.

1. Automobiles ⚷245(13)

That head-on collision with on-coming automobile occurred on truck driver's left-hand side of highway did not establish negligence of driver of truck as a matter of law.

2. Negligence ⇨6, 12

Violation of a statute is presumptive evidence of negligence, but in an emergency or under unusual conditions, circumstances may be shown to excuse the violation.

3. Automobiles ⇨245(60)

Whether head-on collision between automobile and on-coming truck on truck driver's left-hand side of highway was caused by negligence of truck driver or occurred because truck suddenly went out of control due to a latent defect in steering apparatus which could not have been discovered with reasonable care was a question of fact for jury in actions for death of occupants of automobile.

4. Automobiles ⇨245(35, 54)

In actions for death of occupants of automobile in head-on collision with ice truck, whether owner of ice company and truck was negligent in having a 16 year old boy, who was employed to cut ice and wait on customers and had only a temporary operator's license and no chauffeur's license, drive truck on delivery route when regular driver was injured and whether any causal connection existed between form or date of driver's license and happening of accident were questions of fact for jury, in view of evidence that collision occurred because truck suddenly went out of control due to a latent defect.

5. Trial ⇨114

In actions by adult children and two grandchildren of elderly couple, argument to jury that plaintiffs suffered little financial loss, other than for funeral expenses, was not improper.

6. Trial ⇨125(4)

In actions for wrongful death of occupants of automobile in collision with truck, arguments to jury that plaintiffs were seeking to break up small ice company owned by one defendant, that recovery would wreak financial havoc on minor driver of truck and his father and that plaintiffs were scrambling for $100,000 each from owner of ice company and from truck driver who found it necessary to work at 16 years of age were improper.

7. Appeal and Error ⇨1060(1)
Trial ⇨131(1)

Reversible error could not be predicated on improper arguments to jury where no objection was made to such arguments at trial, no request was made to have jury instructed to disregard them, and it was doubtful that they were prejudicial in the sense that they could have affected the verdict in view of the evidence as a whole.

8. Appeal and Error ⇨978(2)

Trial judge in passing on motions for new trial was in the best position to pass upon the question of any possible prejudicial effect of improper arguments to jury.

9. Appeal and Error ⇨1069(1)

That a juror, who had stated on voir dire examination that he was not acquainted with any of the parties, was seen talking to defendant in washroom during a recess did not disclose prejudicial error.

10. Automobiles ⇨246(16)

Requested instruction to find for plaintiffs in actions for wrongful death of occupants of automobile in collision with truck, if jury found that owner of truck failed to exercise ordinary care in selection of driver was erroneous, in that it called for a verdict for plaintiffs if owner of truck was negligent in selection of driver regardless of whether driver caused collision.

11. Trial ⇨251(8)

Refusal to give requested instructions as to liability of owner of motor vehicle for injury resulting from operation thereof by incompetent or inexperienced person to whom owner negligently entrusted vehicle and that jury should find for plaintiffs in actions for death of occupants of automobile in collision with defendant's truck if defendant failed to exercise ordinary care in selection of driver of truck was not error, where no such negligence, but only negligence based on doctrine of respondeat superior was alleged and a correct instruction with respect to such matter could not reasonably be expected to have affected the verdict in view of the evidence.

12. Appeal and Error ⚷1062(2)

Whether plaintiffs in actions for wrongful death of their father and mother suffered a pecuniary loss in being deprived of advice, comfort and society of parents was immaterial on appeal, where jury found for defendants on question of liability.

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Lane Williams, Encino, for appellants.

Crowe, Mitchell & Hurlbutt, Visalia, for respondents.

BARNARD, Presiding Justice.

These are actions for the wrongful death of Wiley S. Bryant and Nancy M. Bryant, who were killed in a collision between the car in which they were riding and an ice truck driven by Leonard Dewaine Brownlee, an employee of the ice company. The accident happened about 5:30 P. M. on September 27, 1952, on Highway 99, about 2½ miles north of Tulare.

The respondent Edgeworth was the sole owner of an ice company in Tulare, which he conducted under the fictitious name of Tulare Ice Company. He had employed Leonard Brownlee, who was 16 years old, for some four months preceding the accident, to cut ice and wait on customers at his place of business. At 7:00 o'clock on the morning of September 27, Edgeworth found that his regular driver for his 1936 model Ford panel delivery truck would not be able to drive the same because of an injury to his hand. Being unable to obtain anyone else experienced in cutting ice and servicing iceboxes Edgeworth had Leonard take over the route that day, accompanied by the regular driver. In servicing the route that day Leonard drove the truck in and about the city of Tulare and on the adjacent highways for a distance of approximately 75 miles. This truck had been overhauled, including the front end and steering apparatus, about two weeks before that day, after which it was tested by the mechanic who did the work and by Edgeworth, and was found to be in good condition. Nothing was observed by Leonard on the day of the accident to indicate that it was not in perfect mechanical condition until the time of the accident. The accident occurred on the last trip which Leonard was to make that day while he was taking 600 pounds of ice to the Tagus Ranch, about five miles north of Tulare. The regular driver did not go along on that trip, but another boy, a friend of Leonard's, went with him.

At the time and place of the accident Mr. and Mrs. Bryant were driving south on Highway 99 in a 1938 model coupe. According to the driver of a vehicle which was following them they were driving at between 35 and 40 miles an hour, were on their own right-hand side of the road, were proceeding in a straight line, and the course of their vehicle was not changed up to the point of impact. The vehicle then being driven by Leonard Brownlee in a northerly direction along this highway suddenly went out of control, veered abruptly across the white center line and struck the other car in the south-bound lane of traffic. Mr. Bryant, who was then 77 years of age, and Mrs. Bryant who was then 75 years old, were killed in the collision. An experienced mechanic who examined the Ford panel truck a few days after the collision testified that he found that both of the bolts or rivets at one end of the cross member, to which the radius rod or wishbone of the vehicle was attached, were gone; that in his experience he had found this condition in other vehicles; that this condition is caused by the wear and twist of the frame as it is in use over the years, causing these bolts or rivets to eventually work loose or break and fall out; that when this happens the wheels of the vehicle can turn without any corresponding turn of the steering wheel; and that when this occurs the vehicle goes out of control and there is nothing that the driver can do about it.

The plaintiffs in one of these actions are the seven adult sons and daughters of Mrs. Bryant. The plaintiffs in the other are the eight adult sons and daughters and two grandchildren of Mr. Bryant. The actions were consolidated for trial, and a jury returned a verdict in favor of the defendants. Motions for judgment notwithstanding the verdict and motions for a new trial were denied, and the plaintiffs have appealed from the judgments and from the orders denying their motions for judgment notwithstanding the verdict. The appeals are presented together.

It is first contended that it appears, as a matter of law, that each defendant was guilty of negligence; that Leonard Brownlee was negligent as a matter of law, in driving on the wrong side of the highway, and in taking the truck on the highway because of his lack of experience, since he did not have a chauffeur's license and had received a temporary operator's license only four weeks before; that Edgeworth was negligent as a matter of law, being charged with knowledge that the boy was incompetent to drive the ice truck since he had little knowledge of the boy's driving qualifications, and knew that the boy was too young to have a chauffeur's license; and that Edgeworth was negligent as a matter of law in hiring an unlicensed chauffeur to drive the truck.

[1-3] The fact that the accident occurred on the wrong side of the road does not establish negligence on the part of the driver of the truck, as a matter of law. While the general rule is that the violation of a statute is presumptive evidence of negligence it is also well established that in an emergency or under unusual conditions circumstances may be shown to excuse the violation. Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 177 P.2d 279; Jolley v. Clemens, 28 Cal.App.2d 55, 82 P.2d 51. While there was some conflict in that regard, there was strong evidence that this vehicle suddenly went out of control, that there was nothing which the driver could have done about it, and that this occurred because of a latent defect which could not have been discovered with reasonable care. Not only was the evidence sufficient to sustain the jury's implied finding with respect to these matters, but the record discloses an unusually strong showing to that effect. The question was one of fact for the jury.

[4] No negligence appears, as a matter of law, because the driver of this truck was not licensed as a chauffeur. Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, 123 P.2d 947. The driver of the truck was not hired for the principal purpose of driving a motor vehicle on the highway and no causal connection appears, as a matter of law, between the form or date of his license and the happening of the accident. There was evidence that this truck operated about the same as an ordinary passenger car, that the driver had a temporary operator's license, and that he had had considerable experience in driving cars. There is nothing in the evidence showing any disqualification as a driver on the part of Leonard Brownlee at any time prior to this accident, and none showing the employer's knowledge of any such disqualification. There is no evidence or proof that any other driver, regardless of qualifications or experience, would not have been just as powerless as he was to control this vehicle when the latent defect in the mechanism caused it to go out of control.

It is next contended that the evidence shows, as a matter of law, that this collision resulted from the negligence of the driver of the truck and does not indicate that the collision was in any way inevitable or unavoidable. It is argued in this connection that the evidence shows that Leonard Brownlee was accompanied on this last trip by another boy who was 17 years old, that the two boys "were examining a bee in a cup of ice while driving along," and that the only reasonable inference which can logically be drawn is that the driver of the truck lost control thereof because he was in some manner "playing while he was driving." Not only was the witness who testified to the "bee" incident rather completely discredited, but the evidence to that effect was vague as to the exact time when the incident was supposed to have occurred. Both of the boys denied that there had been any playing, there was ample evidence that the vehicle suddenly and abruptly swerved into the path of the other car, and there was ample evidence, including that of several witnesses, that the sudden swerving of the car was caused by the latent defect amply disclosed by other evidence. These various issues presented questions of fact for the jury.

[5–8] It is next contended that counsel for the respondents committed prejudicial error in arguing to the jury that the appellants suffered little financial loss, other than for the funeral expenses; in stating to the jury that "these people * * * now seek to break up the little ice company owned by my client, Mr. Edgeworth, and which would wreak financial havoc on Duane Brownlee and his father", and in stating that the plaintiffs are "scrambling for $100,000 apiece from the owner and proprietor of the little ice company and from Duane Brownlee, who finds it necessary to work at 16 years of age, and his father." We find nothing improper in the arguments made with respect to the amount of pecuniary loss to the appellants, as disclosed by the evidence. The other remarks objected to were improper and should not have been made. That they were prejudicial in the sense that they could have affected the verdict seems most doubtful, in view of the evidence as a whole. In any event, no objection was made and there was no request to have the jury instructed to disregard them. It does not appear that such an instruction would not have been sufficient. The trial judge, in passing on motions for a new trial, was in the best position to pass upon the question of any possible prejudicial effect. This is one of the instances in which a party should not be permitted to remain quiet, taking a chance on a favorable verdict, and then raise the objection on appeal if the verdict is unfavorable.

[9] It is next contended that the conduct of one juror in giving false answers on his voir dire examination was prejudicial error. It is argued that this juror said that he was not acquainted with any of the parties, that during a recess this juror was seen talking to Mr. Edgeworth in the men's wash room, and that it is obvious that the answer of the juror was false since it seems conclusive that if one party talks to another he is acquainted with the other. We are not impressed with this argument, and no prejudice is disclosed by the record.

[10, 11] It is next contended that the court erred in failing to give one instruction telling the jury that "the owner of a motor vehicle is liable when he negligently entrusts such vehicle to an incompetent or inexperienced person when such person causes injury while operating said vehicle upon a public highway," and that if it was found that Edgeworth failed to exercise ordinary care in the selection of Leonard Brownlee as the driver of this truck "then you will find for the plaintiffs and against the defendants." This instruction was erroneous in that it called for a verdict for the appellants if the jury merely found that Edgeworth was negligent in the selection of this driver, and regardless of whether or not the driver did or did not cause the accident. Moreover, no negligence of this sort was alleged, the complaints alleging only negligence based on the doctrine of *respondeat superior*. It may be further observed that had a correct instruction been given with respect to this matter it could not reasonably be expected to have affected the verdict in view of the evidence in that connection. No evidence indicating lack of proper qualifications on the part of this driver appears, other than the fact of his age, and he had been licensed to drive an automobile.

[12] Appellants' final contention is that the heirs of Mr. and Mrs. Bryant suffered a pecuniary loss through the death of their father and mother, respectively, in being deprived of their advice, comfort and society. While this may be conceded, this issue is immaterial on this appeal since the jury found for the respondents on the question of liability.

The judgments and orders appealed from are affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SHENK, J., dissenting.

125 Cal.App.2d 399

MYERS v. STEVENSON et al.

Civ. 15732.

District Court of Appeal, First District, Division 2, California.

May 21, 1954.

Rearing Denied July 14, 1954.

Action for personal injuries allegedly caused to infant plaintiff by negligence of physician, during the labor of plaintiff's mother prior to plaintiff's birth, and during birth. The Superior Court in and for the County of San Francisco, Melvyn I. Cronin, J., sustained defendants' demurrer to complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that under statute creating right of action by or on behalf of minor for personal injuries sustained prior to or in course of birth and requiring that it be brought within six years from date of birth, time limitation is procedural only and subject to all of the conditions which would operate to extend time of suit, except those conditions expressly excluded.

Judgment reversed, with directions.

1. Limitation of Actions 🔑55(3)

The statute of limitations for malpractice does not ordinarily commence to run while the physician-patient relationship continues between the defendant physician and the plaintiff, since during such relationship the patient does not ordinarily have knowledge of negligent treatment by the physician upon whose skill, judgment and advice he continues to rely.

2. Limitation of Actions 🔑95(1)

The statute of limitations begins to run in malpractice cases only from the date of discovery of, or date when by exercise of reasonable diligence there should have been discovered, the wrongful act of the physician or surgeon.

3. Appeal and Error 🔑1041(1)

Pleading 🔑225(1)

Where it appears that a pleading could be amended to meet objection of statute of limitations, by showing reason for not discovering cause of action for malpractice sooner, the sustaining of demurrer without leave to amend would be reversible error, if it appears that a cause of action could be stated. Code Civ.Proc. § 472c.

4. Limitation of Actions 🔑179(2)

Statute requiring an action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth to be brought from within six years of date of birth, casts the burden of bringing the suit on the parents of the child as his natural guardians, or his guardian if he has one, and allegations of lack of knowledge and discovery toll the statutory period should consequently be referred to lack of knowledge of, and discovery by, the parents or guardian, but in allegation by reference to lack of minor's knowledge is matter which can be cured by amendment. Code Civ. Proc. § 472c; Civ.Code, § 29.

5. Limitation of Actions 🔑165

Where a statute creates a right unknown to common law and fixes the time within which that action may be commenced, the limitation so fixed is ordinarily construed, not as a statute of limitations, but as an inherent element of the right so created, but whether an enactment is of such character, or whether it is a statute of limitations, is to be resolved by proper construction of its terms.

6. Limitation of Actions 🔑165

Fact that a limitation upon the bringing of an action, created by statute and unknown to common law, is contained in the very statute creating the right, is not conclusive that the time limit is an essential element of the right created, but is merely material as bearing on the question of construction. Civ.Code, § 29.

7. Limitation of Actions 🔑95(1)

In view of fact that statute creating right of action by or on behalf of minor for personal injuries sustained prior to or in course of birth and requiring that it be brought within six years from date of birth, thereafter states that time such minor is under any disability mentioned in stated section of Code of Civil Procedure should not be excluded in computing time limited for commencement of action, intent manifested is that the time limitation is procedural only, and subject to all of the conditions which would operate to extend time of suit unless those conditions, or some of them, were especially excluded, and thus the limitation period does not commence to run until date of discovery of, or date when by exercise of reasonable diligence plaintiff should have discovered, the wrongful act. Civ.Code, § 29.

8. Statutes 🔑228

If a statute specifies one exception to a general rule, other exceptions are excluded.

◆

Arthur C. Zief and R. A. Carmazzi, San Francisco, for appellant.

Lamb, Hoge & Killion, San Francisco, for respondent Stevenson.

Hadsell, Murman & Bishop, San Francisco, for respondent Franklin General Ben. Soc.

DOOLING, Justice.

Plaintiff appeals from a judgment in favor of defendants which was entered following an order sustaining defendants' demurrers to his second amended complaint without leave to amend.

The complaint is for personal injuries alleged to have been caused to plaintiff by the negligence of defendant Stevenson, a licensed physician, and defendant Franklin Hospital, during the labor of plaintiff's mother prior to plaintiff's birth, and during the birth of plaintiff, in defendant hospital. Plaintiff was born on or about November 1, 1945 and this action was commenced on March 18, 1952, a few months over six years after plaintiff's birth.

The question is presented whether the action is barred by the provisions of section 29 of the Civil Code. That section reads:

A child conceived, but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth; *but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of his birth must be brought within six years from the date of the birth of the minor, and the time such minor is under any disability mentioned in Section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action.*" (Emphasis ours.)

In Scott v. McPheeters, 33 Cal.App.2d 629, 639, 92 P.2d 678, 93 P.2d 562, the court held that an action would lie under section 29 for injuries negligently inflicted upon the plaintiff before his birth. At the next session of the legislature following this decision the legislature added the language above emphasized to the section. Stats.1941, p. 1579.

To excuse the filing of the complaint more than six years after plaintiff's birth it was alleged in the second amended complaint: (1) that plaintiff "remained under the care and control of defendant Stevenson until on or about the month of May, 1946" and (2) "(t)hat plaintiff was unaware that he had been injured during the course of his birth by the negligence and carelessness of defendants, and each of them, until the month of July, 1951 when it became necessary for the plaintiff to be again examined and treated by other physicians and surgeons, at which time his true condition, and the causes thereof, were made known to him."

[1] It has become settled law in California that the statute of limitations for malpractice does not ordinarily commence to run while the physician-patient relationship continues between the defendant physician and the plaintiff. The reason for this rule was stated in the land-mark case of Huysman v. Kirsch, 6 Cal.2d 302, 312, 57 P.2d 908, 913, "During all this time she was under the exclusive care of the respondent, a reputable and skillful physician and surgeon, and both Mrs. Huysman and her husband relied solely upon him for information as to her physical condition and as to her failure to regain her health. It cannot be said, therefore, that they had any knowledge whatever of the cause of her failure to recover from the operation, or that they could have gained that knowl-

edge by the exercise of due care and diligence prior to September 26, 1932."

The cases uniformly since this decision have followed the rule that while the physician-patient relation continues the plaintiff is not ordinarily put on notice of the negligent conduct of the physician upon whose skill, judgment and advice he continues to rely. Trombley v. Kolts, 29 Cal.App.2d 699, 85 P.2d 541; Petrucci v. Heidenreich, 43 Cal.App.2d 561, 111 P.2d 421; Ehlen v. Burrows, 51 Cal.App.2d 141, 124 P.2d 82; Greninger v. Fischer, 81 Cal.App.2d 549, 184 P.2d 694. If this rule is applicable to the six-year limitation of section 29, Civ.Code, the allegation that defendant Stevenson continued to treat plaintiff "until on or about * * * May, 1946", with the further allegation of lack of knowledge of the cause of plaintiff's injuries during that period would bring the action as to defendant Stevenson fairly within this rule. It would seem also to furnish reasonable grounds for the failure in the exercise of reasonable diligence to discover the negligent conduct of the defendant hospital during the same period.

[2] It is a further settled rule in malpractice cases that the statute of limitations only starts to run from the date of discovery of, or the date when by the exercise of reasonable diligence the plaintiff should have discovered, the wrongful act. Huysman v. Kirsch, supra, 6 Cal.2d 302, 57 P.2d 908; Costa v. Regents of University of California, 116 Cal.App.2d 445, 254 P.2d 85; Agnew v. Larson, 82 Cal.App.2d 176, 185 P.2d 851; Bowman v. McPheeters, 77 Cal.App.2d 795, 176 P.2d 745; Pellett v. Sonotone Corp., 55 Cal.App.2d 158, 130 P.2d 181; Faith v. Erhart, 52 Cal.App.2d 228, 126 P.2d 151. This rule has just been reaffirmed by the supreme court in Stafford v. Shultz, 42 Cal.2d 767, 270 P.2d 1.

[3] No particular criticism is leveled by respondents at the sufficiency of the allegations of the second amended complaint concerning the ignorance of the cause of action and its discovery, except as hereinafter noted. If the allegations might be more explicit as to the reason for not discovering the cause of action sooner, it does not appear that they could not be amended to meet any such objection and this being so the sustaining of the demurrer without leave to amend would be reversible error, if it appears that a cause of action could be stated. Section 472c, Code Civ.Proc.; Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358; Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 172 P.2d 867.

[4] It is suggested that an infant of six years or under could not in the nature of things know of his injury or the cause thereof and that the allegation of the plaintiff's lack of knowledge and discovery cannot therefore extend the period of a statute which expressly requires the bringing of the action within six years after the plaintiff's birth. We think it is obvious that the statute casts the burden of bringing suit on the parents of the child as his natural guardians, or on his guardian if he has one. See Artukovich v. Astendorf, 21 Cal.2d 329, 335, 131 P.2d 831. The allegations of lack of knowledge and discovery to toll the statute should therefore refer to the lack of knowledge of, and discovery by, the parents, but this is a matter in which the complaint can be readily cured by an appropriate amendment. Section 472c, Code Civ.Proc. and cases cited supra.

[5] The real weight of respondents' position rests on the rule that where a statute creates a right unknown to the common law and in the same statute fixes a time limit within which an action must be brought, ordinarily the limitation so fixed is construed as a condition on the right itself so that the right is extinguished by the lapse of the time fixed in the statute. Both respondents cite and quote from 34 Am.Jur., Limitation of Actions, sec. 7, pp. 16–17, which may be accepted as a fair statement of the rule and its limitations:

"A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. Such a provision will control, no matter in what form the action is brought. The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms. Generally, the limitation clause is found in the same statute, if not in the same section, as the one creating the new liability, but the fact that this is the case is material only as bearing on questions of construction; it is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion may be reached if the limitation is in a different statute, provided it is directed to the newly created liability so specifically as to warrant saying that it qualifies the right."

With few exceptions the courts of this country, when they have held such a time limit to be a condition on the right itself and not a mere statute of limitations affecting the remedy only, have held that no circumstances, whatever the hardship of the particular case, could operate to extend the period within which such an action could be brought. See the cases collected in Bookshire v. Burkhart, 141 Okl. 1, 283 P. 571, 67 A.L.R. 1070. Latterly a tendency to relax this harsh rule at least in certain cases has become apparent. Our own supreme court in Estate of Caravas, 40 Cal.2d 33, 250 P.2d 593, held that the fact that an alien was denied access to our courts by the existence of a state of war extended the time within which he could sue to recover the property of a decedent after it had been distributed to the State Treasurer. The attorney general argued, 40 Cal.2d at page 41, 250 P.2d at page 597, "that section 1026 is a substantive statute of limitation and that at the expiration of five years the nonresident alien not only lost his remedy * * * but that in addition the right itself was extinguished under section 1026." The court commented, 40 Cal.2d at page 42, 250 P.2d at page 597: "Clearly, whether a particular statute of limitation is viewed as substantive or procedural, the consequences of a failure to commence legal proceedings within the specified time are the same insofar as the claimant is concerned and, accordingly, the same considerations that lead to the conclusion that a procedural statute is tolled by the fact that the claimant is denied access to the courts similarly lead to the conclusion that the time specified in a substantive statute of limitation must likewise be extended."

We are moved to remark that as a practical matter access to the courts is no more open to one who cannot in the exercise of reasonable diligence discover that a cause of action exists than it is to one who knows of his cause of action but cannot commence it in the courts because of the existence of a state of war.

In the Caravas case the court cited and relied upon Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 178 F.2d 253, 15 A.L.R.2d 491, certiorari denied, 339 U.S. 919, 70 S.Ct. 621, 94 L.Ed. 1343. In that case the circuit court was met with the objection that the time fixed for commencing an action under the Federal Employers Liability Act was a condition of the right and could not be extended. See 35 Am. Jur., Master and Servant, sec. 469, p. 885. That court held that the representations of a claims agent that plaintiff's minority would extend the time to sue operated to extend the statute nonetheless. The court based its decision in the particular case on the ground that the representations relied upon were fraudulently made, 178 F.2d at pages 258–259. The court said, 178 F.2d at page 259: "Each type of statute, after all, still falls into the category of a statute of limitations. And this is nonetheless true even though we call a remedial statute a pure statute of limitations and then designate the substantive type as a condition of the very right of recovery. There is no inherent magic in these words."

The court in this decision assumed that the representations were fraudulently made, but in two subsequent appeals in the same case, 4 Cir., 190 F.2d 935; 4 Cir., 202 F.2d 84, the court made it clear that actual fraud in the representation made was not necessary. In Scarborough v. Atlantic Coast Line R. Co., 4 Cir., 202 F.2d 84, the court reversed because of the jury's belief, not cleared up by the trial judge, that actual fraud must be proved to toll the statute. The court on page 86 of 202 F.2d, after quoting from its previous opinion in 190 F.2d 935, stated clearly that the case should go to the jury solely on the questions: was the erroneous statement made and did defendant rely on it. The court said: "There is no occasion for the use of the word 'fraud' in this instruction."

These cases show a judicial trend, joined in by our own supreme court in the Caravas case, to ameliorate the harshness of the rule that under no circumstances can the time limited for bringing suit be extended where the time limitation is construed as a condition of the remedy created. They indicate a tendency to hold that where actual or practical access to the courts is prevented the distinction between so-called substantive and procedural statutes of limitations may be disregarded. The inability in the exercise of reasonable diligence to be able to discover the existence of the cause of action might be said to bar access to the courts as effectually as the representations relied upon in the Scarborough case.

[6] The facts of this case do not require us to rely upon this theory, however, because as we construe section 29, Civ.Code, it is not a condition of the right, but rather a special statute of limitations on the remedy. The following appears in the quotation from 34 Am.Jur. p. 17, above set out: "Whether an enactment is of this nature, or whether it is a statute of limitations, should be determined from a proper construction of its terms. Generally, the limitation clause is found in the same statute, but the fact that this is the case is material only as bearing on the question of construction. * * *" The fact that the limitation is in the same statute is persuasive of the fact that it is intended as a condition of the right created, but it is not conclusive. The particular language used may still demonstrate that it is intended by the legislature as a procedural statute of limitations only. See, for example, Rosenzweig v. Heller, 302 Pa. 279, 153 A. 346, where the limitation in the wrongful death statute of Pennsylvania was construed as procedural and not substantive, the court saying at page 348, of 153 A.: "The very language of the act marks it as a statute of limitation, not as one conditioning the right of action."

In our opinion the same may be said of the limitation added to section 29, Civ. Code, in 1941. To requote that limitation: "but any action by or on behalf of a minor for personal injuries sustained prior to or in the course of birth must be brought within six years from the date of the birth of the minor, and *the time such minor is under any disability mentioned in section 352 of the Code of Civil Procedure shall not be excluded in computing the time limited for the commencement of the action.*" (Emphasis ours.)

[7, 8] The emphasized provision is unnecessary and superfluous if the legislature intended the limitation as a condition of the right. It is only meaningful if the legislature intended the limitation as a procedural one which would be subject to all of the conditions which would operate to extend the time of suit unless those conditions, or some of them, were special-

ly excluded. The applicable rule of statutory construction is thus stated in City and County of San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 251, 135 P. 971, 974: "The fact, however, that it was thought necessary to embody a proviso saving such payments from the effect of preceding language affords persuasive indication that, in view of the framers of the amendment, such language, by itself, would have covered the excepted payments. This is the well-settled rule for construing provisos and exceptions. 'Where there is a prohibition, grant, or regulation in general words, and a saving of particular things, there is a strong implication that what is excepted would have been within the purview if it had not been excepted, and thus the purview may be made more comprehensive than it would otherwise have been.' 2 Lewis' Suth.Stat. Const. § 351; Wayman v. Southard, 10 Wheat. 1, 30, 6 L.Ed. 253; Thaw v. Ritchie, 136 U.S. 519, 541, 542, 10 S.Ct. 1037, 34 L.Ed. 531. By specially excepting payments in the nature of licenses from the effect of the amendment, the framers evidenced their intention to put licenses other than those covered by the proviso within the operation of the language preceding the proviso."

There is another rule of statutory construction which leads equally to the same conclusion. "If a statute specifies one exception to a general rule * * * other exceptions * * * are excluded." 23 Cal.Jur., Statutes, sec. 118, p. 741; Collins v. City & County of S. F., 112 Cal.App.2d 719, 731, 247 P.2d 362; Sterling Drug, Inc. v. Benatar, 99 Cal.App.2d 393, 397–398, 221 P.2d 965; Rothschild v. Superior Court, 109 Cal.App. 345, 348, 293 P. 106. Having expressly provided that the disabilities mentioned in Code Civ.Proc. § 352, i. e. infancy, insanity, etc., shall not extend the statute the legislature under this rule, as plainly indicated that other recognized legal grounds for extending the statute should be operative.

We conclude that the time limitation contained in section 29 was intended by the legislature as a procedural statute of limitations subject to being extended by any legal ground not specifically excluded in the section itself.

Judgment reversed with directions to permit plaintiff to further amend his complaint as he may be advised.

NOURSE, P. J., concurs.

Hearing denied; SCHAUER, J., dissenting.

Emmett R. BURNS and Alyce Burns, Plaintiffs and Appellants, v. AMERICAN CASUALTY COMPANY, a corporation, et al., Defendants and Respondents.

No. 15850.

District Court of Appeal, First District, Division 1, California.

May 28, 1954.

Prior opinion 269 P.2d 656.

PER CURIAM.

Respondents' petition for a rehearing is granted and the parties are requested to file points and authorities on the following questions:

1. Where the insurance policies purchased by the county cover risks for which the company legally could be liable as well as those for which it legally could not be liable, may the courts inquire into the divisibility of the premiums or is the amount of premiums a matter entirely within the control of the board of supervisors?

2. If such inquiry may be made, upon whom lies the burden of proof to show severability?

Appellants are granted 15 days to file their points and authorities, and respondents 15 days thereafter to reply; cause then to be submitted.

125 Cal.App.2d 440

DEMETRIS v. DEMETRIS et al.

Civ. 15921.

District Court of Appeal, First District, Division 2, California.

May 24, 1954.

Rehearing Denied June 23, 1954.

Action by a father against his son and daughter-in-law for reformation of a joint tenancy deed and partition of realty conveyed thereby to the parties. From a judgment of the Superior Court, County of San Mateo, Edmund Scott, J., for plaintiff, defendants appealed. The District Court of Appeal, Nourse, P. J., held that the allegations of the complaint and the trial court's findings were sufficient to state mistake, justifying reformation of the deed so as to constitute a tenancy in common deed, though the son's alleged fraud was not proved and his wife's fraud was neither alleged nor proved.

Judgment affirmed in part, and otherwise reversed.

1. Reformation of Instruments 🔑20

Fraud is not essential to justify reformation of written instrument, but it will be revised if it does not fully express parties' intention because of their mutual mistake or one party's mistake known to or suspected by other party at time thereof. Civ.Code, § 3399.

2. Reformation of Instruments 🔑17(1)

The equitable remedy of reformation of written instrument for mistake is not restricted to exact situations literally mentioned in statute authorizing reformation on such ground. Civ.Code, § 3399.

3. Reformation of Instruments 🔑41

In father's action against his son and daughter-in-law for reformation of joint tenancy deed and partition of realty conveyed to parties thereby, allegations of complaint and trial court's findings were sufficient to state mistake, justifying reformation of deed so as to constitute tenancy in common deed, though son's alleged fraud was not proved or expressly found and his wife's fraud was neither alleged nor proved, as defendants were not prejudiced in their defense that plaintiff's payments on purchase price were intended as gift to son and that deed represented parties' actual intent. Civ.Code, § 3399.

4. Reformation of Instruments 🔑41

Where allegations of complaint and trial court's findings in action to reform joint tenancy deed to parties sufficiently state mistake, justifying reformation independently of one defendant's alleged fraud, such unnecessary allegation need not be proved and can be treated as surplusage, if defendant is not prejudiced in his defense. Civ.Code. § 3399.

5. Reformation of Instruments 🔑46

In father's action against his son and daughter-in-law for reformation of joint tenancy deed to parties, trial court's findings that plaintiff trusted son to see that realty agreed to be purchased by them was conveyed to them as tenants in common, as plaintiff intended, and that defendants refused reformation of deed to conform to such understanding on plaintiff's demand, showed son's fraud, as alleged in complaint, though not expressly stated in findings.

6. Fraud 🔑7

There is a breach of fiduciary duty and at least constructive fraud when a person in confidential relation to another retains, notwithstanding such other's demand, an undue advantage which fiduciary knows that he obtained over other party because of his mistake, though originally mistake or advantage was not caused by fiduciary's act or influence.

7. Reformation of Instruments 🔑28

Reformation of joint tenancy deed to a father and his son and daughter-in-law was as much justified with respect to daughter-in-law as with respect to son by father's mistake in supposing that deed was tenancy in common deed, which he trusted son to obtain. Civ.Code, § 3399.

8. Husband and Wife 🔑212

A wife will not be protected in retaining fruits of her husband's fraud, though she is innocent thereof.

9. Partition 🔑83

In partition suit, all equities and conflicting claims existing between parties and arising out of their relation to property involved may generally be adjusted. Code Civ.Proc. § 759.

10. Partition ⚷83

Under Code provisions, equities of parties to partition suit are considered and disposed of on principles governing equity courts, parties may assert any title they have, whether legal or equitable, and court will decree what is equitable and proper. Code Civ.Proc. §§ 752–801.15.

11. Joint Tenancy ⚷8

A cotenant paying more than his proportion of purchase price of land conveyed to him and others as joint tenants is entitled to accounting for such excess on partition of land.

12. Partition ⚷89

In action for partition of realty conveyed to plaintiff and his son and daughter-in-law as joint tenants, where complaint alleged agreement that father and son would each own undivided half interest in property and pay half of purchase price thereof and father's actual payment of $1,000 more than his share, failure of complaint to allege his right to repayment of such excessive amount did not preclude his recovery thereof, as no pleading of legal conclusion as to such right was necessary to permit court to consider facts alleged in decreeing equitable solution.

13. Appeal and Error ⚷173(10)

Limitation of Actions ⚷182(5)

In action for reformation of joint tenancy deed and partition of realty conveyed thereby to parties, defense that plaintiff's rights, if any, to repayment of amount alleged to have been paid by him in excess of half of purchase price of realty, were barred by statute of limitations, was waived by defendant's failure to plead statute or rely thereon when equalization of parties' advances, including such excess payment, was discussed before trial court.

14. Partition ⚷87

A provision of partition decree for reimbursement of one of parties for amount paid by him on purchase price of realty involved in excess of one half thereof and amount paid by him for improvements on realty from half of proceeds of partition sale before satisfaction of mortgage lien on property was incorrect as to lien-holder. Code Civ.Proc. § 771.

15. Partition ⚷85

A provision of partition decree for reimbursement of owner of half share of property involved for amount advanced by him for improvements thereon out of half of proceeds of partition sale belonging to owners of other half share was erroneous, as owner making such advance must bear half of cost of such improvements.

◆

Fahey, Castagnetto & Gallen, Daly City, for appellants.

Samuel D. Hamburg, San Francisco, for respondent.

NOURSE, Presiding Justice.

This is an action for reformation of a joint tenancy deed and for partition of the real property to which it relates instituted by a father against a son and that son's wife, both mentioned in said deed as tenants jointly with the father. The court gave judgment for the father; the son and daughter-in-law appeal.

The findings of the court, made mainly in conformance with the allegations and testimony of the father, were in substance as follows:

The father who was about sixty years old and not sufficiently educated to understand completely the transactions and documents involved, trusted his son to see that the transaction was carried out according to the father's intent, he having full trust and confidence in the son, so that in this matter there existed a confidential relation between them. The father had agreed orally with the son to buy a home at 1545 Meadow Lane, Burlingame, California, each to pay half the purchase price and to own a half interest in it as "partners", i. e., as tenants in common, the father to pay his share in cash, the son by secured financing in installments. The father—who also had two daughters—told the son that he wished such ownership because in case of his death he wished to leave the same to each of his children and that he had executed a will accordingly. The father and the son purchased the property for the price of $17,000 in accordance with a deposit receipt, which mentioned father and son as purchasers and depositors without any indication of joint tenancy. The father entrusted the son with the obtaining of a deed according to this agreement. The transaction was closed through escrow in the settlement of which the father paid $9500, $1000 of which was for the account of the son who was to repay it; later the father expended $557 for improvement of the property. The son and his wife procured from Prudential Life Insurance Company of America a loan on the property in the amount of $7500 on the principal of which they repaid $718.69 and on which is still due $6,929.73, secured by a deed of trust on the property. The deed of the property obtained in the escrow was not in accordance with what was agreed to by father and son in that it was a joint tenancy deed mentioning the father, the son and the son's wife as joint tenants with right of survivorship. The deed was recorded so that the property stands in the name of all three as joint tenants with right of survivorship. The father became aware of the joint tenancy on June 19, 1952, only when he consulted an attorney about partition of the property because of differences which had arisen between father and son (who had both lived in the purchased home). The son and his wife refused the reformation of the deed to make it conform to the understanding of the parties as demanded by the father. It is not true, as contended by the son, that the payments by the father were a gift of $10,000 to him. The son's wife has an interest in the property as a tenant in common with her husband of an undivided half only of said property. The son paid $427.85 for real estate taxes of 1951 and 1952. According to stipulation the property cannot be partitioned in kind but will have to be sold, Robert Duffy to be appointed as referee for that purpose.

The court ordered the deed reformed so as to become a tenancy in common deed, the father to have an undivided one-half interest and the son and his wife to hold the other undivided half as tenants in common, and further decreed a partition of the property by sale, the proceeds of the sale to be divided as follows: After deduction of all costs and disbursements of the sale, one-half of the proceeds plus from the remaining half $1000 as reimbursement of the advance made to the son and $557 paid for improvements to go to the father, less $213.93 being one-half of the taxes paid by the son; the son to receive the other half minus the two amounts awarded to the father and plus the $213.93, but from the amount so found the unpaid amount of the loan, being $6,929.73 in principal, to be deducted.

[1-4] Appellants' main grievances are that reformation was granted although fraud of the son, alleged in the complaint, was not proved, and fraud of his wife was neither alleged nor proved. The contentions are without merit. The court did not make an express finding of fraud, probably because there was no evidence that the son intentionally caused the deed to be made up as it was. However, no fraud is essential to justify the reformation of a written instrument. If the instrument does not truly express the intention of the parties it will also be revised if the discrepancy is caused through mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected. § 3399, Civil Code; 9 Cal.Jur. 241, Deeds § 115; Holt v. Holt, 120 Cal. 67, 52 P. 119. The remedy of reformation for mistake, which is equitable in nature, is not restricted to the exact situations literally mentioned in section 3399, Civil Code. Merkle v. Merkle, 85 Cal.App. 87, 105, 258 P. 969, in which case reformation of a deed was upheld which because of mistake of the grantor did not contain a sufficient description of the grant, although the grantee, at whose instance the reformation took place, saw the deed and noticed the mistake many years later only after the death of the grantor.) The allegations of

the complaint and the findings in the case before us are in all respects sufficient to state mistake, justifying the reformation of the deed independent of the alleged fraud of the son. In such a case the unnecessary allegation need not be proved and can be treated as surplusage if the defendant is not prejudiced in his defense. Alonso v. Hills, 95 Cal.App.2d 778, 784, 214 P.2d 50; Karsh v. Haiden, 120 Cal. App.2d 75, 83, 260 P.2d 633. In the Holt case, supra, where mutual mistake had been alleged, the reformation was upheld on the ground that the mistake of the grantor was known to grantee, there being also sufficient allegation of grantee's knowledge. The court relied also on section 469, Code of Civil Procedure, reading: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." See also Treu v. Kirkwood, 42 Cal.2d 602, 268 P.2d 482. In this case defendants can not have been prejudiced as their defense was that the payments of the father were intended as a gift to the son and that the deed represented the actual intent of the parties, a defense equally good as against the allegations of both fraud and mistake but rejected by the trial court which believed the testimony of the father.

[5, 6] Moreover the findings show fraud of the son, though not expressly stated. There is a breach of fiduciary duty and at least constructive fraud when a person in a confidential relation to another retains, notwithstanding the other's demand, an undue advantage which he knows he obtained over the other because of the other's mistake, even though originally the mistake or advantage was not caused by the act or influence of the fiduciary. See Allen v. Bryant, 4 Cal.App. 371, 376, 88 P. 294; 9 Cal.Jur. 241, Note 9.

[7, 8] With respect to the defendant daughter-in-law, the reformation is as much justified by mistake as with respect to the son. Moreover with respect to the fraud of her husband, California adheres to the principle that a wife, although herself innocent, will not be protected in retaining the fruits of her husband's fraud. Kemp v. Enemark, 194 Cal. 748, 230 P. 441; Shinn v. Macpherson, 58 Cal. 596. All legitimate interests of the wife are sufficiently protected by the recognition of her interest in that part of the house and its proceeds to which the father has no better claim.

[9–12] It is next contended that in the partition no repayment of the amount of $1000 paid by the father over and above his half of the purchase price could be granted because the right to such repayment was not alleged. It was alleged (paragraph V of complaint) that it was agreed that father and son would each own an undivided half interest in the property and that each would pay for his one-half share and further (paragraph VIII) that the father actually paid $9500 (which is $1000 more than his share). "In a suit for partition * * * it is a general rule that all equities and conflicting claims existing between the parties and arising out of their relation to the property to be partitioned may be adjusted", 68 C.J.S., Partition, § 135, p. 208; § 759, Code of Civil Procedure. Also under our code provisions—sections 752 to 801.15, Code Civil Procedure—"the equities of the respective parties are considered and disposed of upon principles which govern courts of equity. In such action the parties may assert any title they have, legal or equitable, and the court will decree what is equitable and proper." 20 Cal.Jur. 597. "Where one cotenant has paid more than his proportion of the purchase price of the land, he is entitled on partition to an accounting therefor." 68 C.J.S., Partition, § 136, p. 212. The right of repayment of such advance is recognized in Donnelly v. Wetzel, 37 Cal.App. 741, 174 P. 689. As the facts with respect to the father's excess payments were alleged in the complaint no legal conclusion as to his right need be pleaded to permit the court to take these facts into consideration in decreeing an equitable solution. The same was done with respect to all other advances of the parties.

[13] Appellants' statement that respondent's rights, if any, with respect to the repayment of the $1000, would be barred by the statute of limitations can not be reviewed by us because they did not plead the statute and did not rely on it when the equalization of the advances, among which the excess payment of $1000 was specifically mentioned, was discussed before the trial court, nor at any other time in that court. The defense of the statute was therefore waived. 16 Cal.Jur. 603–604; Hall v. Chamberlain, 31 Cal.2d 673, 679, 192 P.2d 759.

[14, 15] However, appellants' criticism of two other points as to the division of proceeds decreed in the judgment is correct. Although as between the parties the defendants are responsible for the satisfaction of the debt owing to Prudential Life Insurance Company of America, said company has a lien on the property as such, which lien, under section 771, Code of Civil Procedure, must be satisfied out of all proceeds after deduction of costs, before division among the parties. That the satisfaction of the lien creditor after satisfaction of the father, as ordered by the court, is incorrect as to the lienholder becomes immediately clear if we consider the possibility of low proceeds of the sale. Another small defect of the division ordered is that to reimburse the father for the advance for improvements in the amount of $557, this total amount is awarded to the father out of the half of the proceeds belonging to defendants, whereas the father clearly must himself bear half of said costs.

On those grounds the section of the provisions of the judgment as to plaintiff's second cause of action, governing the manner in which the proceeds of sale shall be applied, (6), must be reversed with directions to amend that section to read:

(6) That the proceeds from said sale shall be applied as follows:

From the net proceeds after deduction of all necessary and legal costs first deductible, including any allowed attorney fees, and disbursements in effectuating such sale there shall be paid to the Prudential Life Insurance Company of America, a corporation, the unpaid balance due to it amounting as of March 16, 1953, to the sum of $6,929.73 as principal, and any accrued interest thereon; from the balance remaining of the net proceeds after said payment therefrom there shall be paid to the plaintiff an amount equal to half of the net proceeds of the sale (without any deductions for said payment to the Prudential Life Insurance Company of America, which must be borne by defendants) plus $1000 as reimbursement for said sum advanced by plaintiff for the benefit of the defendant, John D. Demetris, Jr. in the purchase of the said property, plus the further sum of $64.57, being half the difference between the amount of $557 expended by plaintiff in behalf of the parties for improvements to said property and the amount of $427.85 expended by defendant John D. Demetris, Jr. in behalf of the parties for real estate taxes upon said property during the tax years 1951 and 1952. Any balance remaining from said net proceeds after said payments to plaintiff shall then be paid to defendants. In case the balance remaining from the net proceeds after the payment to the Prudential Life Insurance Company of America should be insufficient to make therefrom all of the above payments to the plaintiff, the plaintiff shall by way of compensation be entitled to payment of the amount lacking by the defendant John D. Demetris, Jr.

Except as specified above the judgment is affirmed, otherwise reversed. Each party to bear his own costs.

DOOLING and KAUFMAN, JJ., concur.

124 Cal.App.2d 747

SHENSON v. SHENSON et al.

Civ. No. 15596.

District Court of Appeal, First District,
Division 2, California.
May 27, 1954.

Action between co-owners of building for accounting of rents. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment for plaintiff and cross-complainants against a defendant, and such defendant appealed. The cross-complainants also appealed on ground that awards to them should be increased. The District Court of Appeal, 269 P.2d 170, reversed the judgment. On petition for rehearing, the District Court of Appeal held that a claim, raised for first time on appeal, that trial court made a mathematical error of $54 in each of respondents' judgments, and a request that new findings be made and judgment be amended accordingly, came too late.

Rehearing denied.

1. Appeal and Error ⚷832(4)

Claim, raised for first time on petition for rehearing, that trial court made mathematical error in judgments, and request that new findings be made and judgments amended accordingly, came too late.

2. Appeal and Error ⚷832(4)

Counsel may not argue an appeal piecemeal by raising new questions for first time on petition for rehearing.

3. Appeal and Error ⚷1071(6)

The lack of findings showing the manner in which the trial court disposed of an accounting is not fatal to judgment if reviewing court can ascertain from record the manner in which the court arrived at its judgment, and if, by allowing certain items and disallowing others, the reviewing court can arrive at amount of judgment, it then becomes clear from the record how the judgment was arrived at by trial court.

4. Appeal and Error ⚷835(2)

Where, after District Court of Appeal found that there was no mathematical calculation discoverable from record which would support judgments as given, respondents, in petition for rehearing, admitted such fact and claimed for first time that trial court made mathematical error of $54 in each of their judgments, District Court of Appeal could not make new findings and amend judgment in respondents' favor accordingly, since to do so would require an assumption not only that trial court allowed certain items but in doing so made a mathematical error, an assumption which would necessarily be based on pure speculation.

Leo R. Friedman, San Francisco, for Joseph Shenson.

Albert Picard, San Francisco, for Viola Shenson.

M. Mitchell Bourquin and John E. Lynch, San Francisco, for Berman.

Jefferson E. Peyser, San Francisco, for Kaplan.

PER CURIAM.

[1, 2] In their briefs on this appeal respondents Berman and Kaplan included figures which they then claimed supported the exact amounts of the judgments awarded to them. As we pointed out in our opinion, 269 P.2d 170, there was no mathematical calculation which we could discover from the record which would support the judgments as given. Belatedly in their petition for rehearing respondents Berman and Kaplan admit this fact and now claim for the first time that the trial court made a mathematical error of $54 in each of their judgments. They accordingly ask us now to make new findings and amend the judgments in their favor accordingly. This request comes too late. Counsel may not argue an appeal piecemeal by raising new questions for the first time on petition for rehearing. Bradley v. Bradley, 94 Cal.App.2d 310, at page 312, 210 P.2d 537, 211 P.2d 638 and cases cited.

[3, 4] However there is a more fundamental objection to our doing what counsel ask. Under the rule of Whann v. Doell, 192 Cal. 680, 684–685, 221 P. 899, the lack of findings showing the manner in which the trial court disposed of an accounting is not fatal to the judgment if the appellate court can ascertain from the record the manner in which the court arrived at its judgment, i. e. if by allowing certain items and disallowing others the appellate court can arrive at the amount of the judgment, it then becomes clear from the record how the judgment was arrived at by the trial court. The difficulty here is, that as counsel now admit, this cannot be done. They ask us to assume that the trial court allowed certain items *but in doing so made a mathematical error.* Such an assumption would take us into the field of pure speculation.

Rehearing denied.

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125 Cal.App.2d 470

BRYANT v. COUNTY OF MONTEREY.

Civ. No. 15831.

District Court of Appeal, First District,
Division 2, California.
May 25, 1954.

Personal injury action by former county jail inmate against county, sheriff, deputy sheriff, and surety for injuries allegedly sustained as result of illegal kangaroo court in such jail. The Superior Court, County of Monterey, Anthony Brazil, J., overruled demurrers of all defendants except that of county, which was sustained without leave to amend, and former inmate appealed only in regard to judgment for county. The District Court of Appeal, Nourse, P. J., held that county was not liable for such injuries.

Judgment affirmed.

1. Counties ⇨143

The public liability act applies only when a party is injured while public property is being used by him in the ordinary, usual, and customary use thereof Government Code, § 53050 et seq.

2. Counties ⇨141

Scope of public liability act is question of law to be determined by the court. Government Code, § 53050 et seq.

3. Counties ⇨146

A public agency is not liable for torts of its public officers. Government Code, § 53050 et seq.

4. Municipal Corporations ⇨734

A public corporation is not liable for injuries received by prisoner from fellow prisoners. Government Code, §§ 53050 et seq., 53051; Pen.Code, §§ 4000 et seq., 4019.5.

5. States ⇨112

Doctrine of respondeat superior is not applicable to a state, and state is not liable to individuals for misfeasance, laches, or unauthorized exercise of power by state officers or agents unless state voluntarily assumes such liability. Government Code, § 53050 et seq.

6. Counties ⇨1, 142

Municipal Corporations ⇨1

A county is merely a state agency exercising powers and duties delegated to it by state, and municipality is corporation exercising powers and duties assumed under municipal charter, and, therefore, county cannot be liable for injuries received by inmate of county jail as result of an illegal "kangaroo court" if a municipality is not liable in such case.

7. Counties ⇨142

County was not liable for injuries received by county jail inmate as result of illegal kangaroo court. Government Code, §§ 53050 et seq., 53051; Pen.Code, §§ 4000 et seq., 4019.5.

8. Counties ⇨142

In absence of statute fixing upon county liability for injuries received by county jail inmate as result of illegal kangaroo court, such liability could not be assumed by implication or by so called "interpretation".

Fahey, Castagnetto & Gallen, Daly City, Milton L. Ageson, Salinas, for appellant.

Hoge, Fenton & Jones, Monterey, for respondent.

NOURSE, Presiding Justice.

This is an action for personal injuries brought by William A. Bryant against County of Monterey, Jack L. McCoy, Sheriff of the County of Monterey, Bert Cahoon, Deputy Sheriff, and the Massachusetts Bonding and Insurance Company.

After the sustaining of a demurrer to the original complaint (filed by the defendants who are not a party to this appeal) plaintiff served a first amended complaint on all the defendants. All demurred, the county for the first time. The demurrers of defendants McCoy, Cahoon and Massachusetts Bonding and Insurance Company were overruled and the demurrer of the County of Monterey was sustained without leave to amend. Appellant appeals from the judgment entered following the sustaining of the demurrer of the defendant Monterey County. This appeal is taken on the judgment roll and is concerned only with the judgment for the county.

The first amended complaint sets forth two causes of action. (1) Plaintiff alleges that on December 30, 1951, he was lawfully incarcerated in the Monterey County jail at Salinas, California, where he there came under the care of defendants McCoy and Cahoon; that there existed at the time in the jail where plaintiff was confined an illegal "kangaroo court", the existence of which was known to the sheriff and his deputy; that having incurred the displeasure of the prisoners controlling the "kangaroo court" plaintiff was severely beaten and kicked, injuring his face, body and particularly his left eye. (2) The second cause of action alleges that immediately after said assault it became known to defendants McCoy and Cahoon that plaintiff was in need of medical treatment, but that for a space of three and one-half days following the assault defendants negligently and carelessly failed and neglected to provide plaintiff with necessary medical treatment and that as a proximate result of the failure to receive medical treatment plaintiff permanently lost the sight of his left eye.

In his argument on the demurrer appellant had based his case solely on the Public Liability Act. He now contends that while his principal point is that the demurrer should not have been sustained because of the provisions of the Public Liability Act, certain sections of the Penal Code are also controlling, namely, 4019.5, which makes it unlawful for any sheriff, deputy sheriff, etc., to permit "kangaroo courts" to operate, and sections 4000–4024 which set up the rules and regulations concerning county jails and the duties of persons in charge of such jails. Appellant contends the political subdivision in charge of the jail should not be allowed to escape liability when there is a departure from the protective rule set up by the law solely on the ground that no "structural defect" is involved.

The controlling question presented on appeal is whether the county is liable for damages under the "Public Liability Act" as contained in Government Code, sections 53050 through 53056. Section 53051 reads: "A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

In support of his contention that the county was liable under the Public Liability Act, appellant cites Bauman v. City and County of San Francisco, 42 Cal.App. 2d 144, 108 P.2d 989 and Harper v. Vallejo Housing Authority, 104 Cal.App.2d 621, 232 P.2d 262. Both cases held that the act applied to public agencies maintaining a public playground or recreation center. This was in accord with numerous earlier authorities.

Respondent contends that statutes in derogation of sovereign immunity will be strictly construed, quoting from Dineen v. City and County of San Francisco, 38 Cal.App.2d 486, 494, 101 P.2d 736, 740: "* * * by the passage of the Public Liability Act, the legislature has properly determined the extent of the liability of governmental agencies. The liability so fixed should not be unduly extended by judicial construction." In Campbell v. City of Santa Monica, 51 Cal.App.2d 626, 629, 125 P.2d 561, 563, the court held that: "Under the act mentioned [Public Liability Act] the city is liable only for a 'dangerous or defective condition of (its) public streets * * * and property.' The scope of the protection afforded by the statute is against a physically dangerous or defective condition of streets and sidewalks. The statute is not designed to protect against moving objects such as motor vehicles upon streets or highways, but only as to risks directly due to a physically dangerous or defective street or sidewalk."

[1] The theory of the cases is that the Public Liability Act applies only when a party is injured where the public property is used by him in the "ordinary, usual, and customary use thereof." Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993, 998; Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472; Loewen v. City of Burbank, 124 Cal.App.2d 551, 269 P.2d 121.

[2, 3] The scope of the Public Liability Act is a question of law to be determined by the court. Under it the agency is liable for a "dangerous or defective condition of * * * property". The question of the liability of the public agency for negligence of its employees presents an entirely different problem. That such an agency is not liable for the torts of its public officers see Oppenheimer v. City of Los Angeles, 104 Cal.App.2d 545, 548, 232 P.2d 26, 28, where the court said: "The demurrer of the city was properly sustained. A municipality cannot be held in damages for the torts of its police officers acting in a governmental capacity. Stedman v. City and County of San Francisco, 63 Cal. 193; Brindamour v. Murray, 7 Cal. 2d 73, 78, 59 P.2d 1009; Wood v. Cox, 10 Cal.App.2d 652, 653, 52 P.2d 565; Abrahamson v. City of Ceres, 90 Cal.App.2d 523, 526, 203 P.2d 98. A municipal corporation exercises a purely governmental function in maintaining and operating a jail."

[4] On this point the authorities are uniform. Wood v. Cox, 10 Cal.App.2d 652, 52 P.2d 565, cited in the Oppenheimer case, contains a long list of cases to the same purport and also cites McQuillin's Municipal Corporations 2d ed. sec. 2591, reading: "'A municipality is not liable for false imprisonment by police officers; illegal arrest or wrongful acts in making an arrest; unjustifiable assault in making an arrest; arresting and carrying to jail a person too sick to bear the removal. * * * on the same theory, a municipality is not liable to prisoners for injuries received during imprisonment from the negligent or malicious acts of police or other officers, such as failure to provide a convict with proper medical attention.'" The text of the early edition has been modified in the third edition of McQuillin without change in the conclusions of the author. See sections 53.80 and 53.94 of the 3rd edition. Particularly applicable is the statement in the latter section that the public corporation is "not liable for injuries received from fellow prisoners."

[5] The same rule is stated in 41 Am. Jur. p. 896, where it is said: "The doctrine of respondeat superior is not applicable to a state, and the latter is not liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers or agents, unless it voluntarily assumes liability in such a case."

The second cause of action relates to the failure of the sheriff and his assistant to furnish the plaintiff necessary medical assistance for treatment of injuries received from his fellow prisoners. The question of the liability of the county rests on the same principles as those discussed. It was expressly held in Nisbet v. City of Atlanta, 97 Ga. 650, 25 S.E. 173, that the municipality was not liable for such neglect.

[6-8] The question of the freedom from suit of a county in cases of this nature is all the more clear when the suit is against a county than when a municipal corporation is defendant. A county is merely an agency of the State exercising such limited powers and duties as the State may delegate to it. A municipality is a corporation exercising such powers and duties as are assumed under its municipal charter. Thus, if a municipality is not liable under a case of this kind, a county is so much the less liable unless the legislature has expressly declared such liability. Since there is no statute fixing such liability on the county none can be assumed by implication or by what is called "interpretation".

Judgment affirmed.

DOOLING and KAUFMAN, JJ., concur.

* * *

125 Cal.App.2d 734

LIGHT et al. v. CAGLE et al.

Civ. 4678.

District Court of Appeal, Fourth District, California.

June 3, 1954.

Action by automobile driver and passengers for personal injuries and property damage sustained in head on collision between automobile and truck. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment upon verdict for owner and driver of truck. One passenger appealed. The District Court of Appeal, Mussell, J., held that evidence sustained verdict.

Judgment affirmed.

1. Appeal and Error 🔑930(1), 1001(1)

On appeal the reviewing court will not weigh evidence but will view it in light most favorable to respondent, will indulge all intendments and reasonable inferences which favors sustaining finding of trier of fact, and will not disturb finding if there is substantial evidence to support it.

2. Automobiles 🔑244(10)

In action for injuries sustained in head-on collision between automobile and truck, wherein photographs of scene disclosed skid marks of automobile on wrong side of center line, and that truck, after accident was partially on wrong side of center line, evidence sustained implied finding that truck was not being driven on wrong side of highway and that truck driver was not negligent.

David E. Peckinpah, Denver C. Peckinpah, and Charles F. Hamlin, Fresno, for appellant.

Stammer, McKnight & Barnum, Fresno, for respondents.

MUSSELL, Justice.

This is an action to recover for personal injuries and property damage sustained by plaintiffs in a collision between a Packard automobile being driven by plaintiff Robert K. Light and a Mack truck and trailer owned by defendant F. N. Rumbley Company, a corporation, and being driven by Ira Cortes Cagle. In a second cause of action, plaintiff Kathryn Christine Light, who was riding in the Packard automobile with her father and mother, sought recovery for personal injuries sustained by her in the same collision. A jury trial resulted in a verdict in favor of the defendants in both causes of action and the minor plaintiff, alone, appeals from the judgment.

The contentions of appellant are that the verdict of the jury was not justified by the evidence and that the testimony of the witnesses for the defendants in direct conflict with the proved physical facts does not create a substantial conflict in the evidence as to the negligence of the defendants as the proximate cause of the collision.

The accident occurred at approximately 6:00 p. m. on June 22, 1951, at the west entrance to an underpass on U. S. Highway 40, which, at the scene of the collision runs in a generally easterly and westerly direction and is a two lane highway with a white center dividing line. The highway, for approximately 800 feet westerly of the underpass, slopes downward into the underpass and near it there is a highway sign indicating a curve to the left and limiting speed of vehicles to thirty miles per hour. Defendant Cagle was driving the truck and trailer in a westerly direction and entered the underpass at a speed of 12 to 15 miles per hour. He observed plaintiff Robert Light's car approaching from the west at a speed of 50 to 55 miles per hour. Cagle testified that he brought his equipment to a full stop as he was emerging from the west entrance of the underpass. Light applied his brakes when about 150 feet west of the entrance. His Packard car swerved over the center line of the highway and struck the left front end of Cagle's cab. The Packard left skid marks on the highway for approximately 150 feet west of the point of impact and the last 6 feet of these marks west of this point were approximately 31 inches on the north side of the white line.

Photographs of the truck and trailer taken soon after the collision and before the truck was removed show the left front wheel of the cab to be several inches south of the dividing line of the highway and the left rear wheel of the trailer to be on the white line. Appellant argues that these photographs, together with testimony of plaintiffs' witnesses, establish as a matter of law that the truck and trailer were traveling over the white line and on the wrong side of the highway at the time the accident occurred. We cannot agree with this proposition. Cagle testified that at all times before the collision his equipment was entirely on the right or north side of the dividing white line and that his truck was stopped at the time of the impact. This testimony was corroborated by another witness (Brown) who also testified that the Packard was still moving at a speed of 35 to 40 miles per hour at the moment of the impact. Further corroboration of the testimony of these two witnesses is found in that of the traffic officer who visited the scene of the accident shortly after it occurred and observed the position of the truck and trailer and the skid marks on the highway. Witnesses for the plaintiffs testified that the truck and trailer were over the white line on the wrong side of the highway as they came through the underpass. This testimony presented a substantial conflict in the evidence. The jury evidently believed the testimony of Cagle, Brown and the other witnesses for the defendants and resolved the conflict in their favor. While the photographs show that the left front wheel of the truck cab was over the white line, Brown testified that when the Packard hit the truck "It just seemed like he kind of angled the front end of the truck a little over with him." Cagle testified that his equipment was knocked backward about 12 or 18 inches. Cagle also testified that the truck and trailer he was driving weighed about 34,000 pounds at the time of the accident and it was stipulated that the Packard weighed 3,800 pounds. When we consider the weight of the vehicles involved, the angle at which the Packard collided with the truck, and the speed of the Packard (35 to 40 m. p. h. at the moment of the impact), we cannot say as a matter of law that the truck was traveling over the white line at the time of the collision or that the testimony of defendants' witnesses in this connection is inherently improbable. The fact that the left front wheel of the cab was over the white line and the left rear wheel of the trailer was on it, does not establish as a matter of law that the truck and trailer were traveling over the white line at the time of the collision as contended by appellant. It is apparent from the photographs that all of defendants' equipment, except the left front wheel of the cab and the left rear wheel of the trailer, was north of the white line. If, as plaintiffs argue, the equipment was being driven through the underpass over the white line and partially on the south side of the highway, it seems reasonable to assume that all of the wheels on the left side of defendants' equipment would be on the south side of the dividing white line and would remain there after the collision.

[1] It is a settled rule that on appeal the appellate court will view the evidence in the light most favorable to respondent; will not weigh the evidence; will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557. Substantial evidence is defined in Re Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54, and it is there said that the word "substantial" clearly implies that such evidence must be of ponderable legal significance; that the word cannot be deemed synonymous with "any" evidence; that it must be reasonable in nature, of solid value; and that it must actually be "substantial" proof of the essentials which the law requires in a particular case.

[2] In the instant case, as is our duty, Potter v. Pacific Coast Lumber Co., 37 Cal. 2d 592, 598, 234 P.2d 16, we have analyzed the record for the purpose of determining whether or not there is any evidence of a substantial character which reasonably supports the judgment as applied to the particular facts of this case and our conclusion is that the question of whether defendants' truck was being driven over the white line and in the south traffic lane was a question of fact for the jury; that its determination of this fact is supported by substantial evidence within the meaning of the term as defined in Re Estate of Teed, supra.

In Bramble v. McEwan, 40 Cal.App.2d 400, 409, 104 P.2d 1054, 1059, the court said, quoting from Nagamatsu v. Roher, 10 Cal.App.2d 752, 756, 53 P.2d 174:

> " 'Perhaps there is nothing more certain about an automobile accident than the fact that the visible results afterward are not an infallible guide in determining what occurred.' * * * "

And in Taylor v. Gear, 108 Cal.App.2d 517, 239 P.2d 11, 13, we find the following language:

> " 'Experience and observation teach that strange things sometimes happen in the world of physical phenomena and accidents sometimes appear to happen in a manner unaccountable. For these reasons an appellate court must be careful not to give to dogmatic and undemonstrated conclusions respecting natural laws precedence over the testimony of apparently credible witnesses; and the mere fact that the admitted circumstances make the story of the witnesses seem improbable will not justify a reversal by an appellate tribunal on the ground that the verdict is contrary to the evidence. * * *' "

There was evidence that for about an hour after the accident defendants' truck was not moved from its position when struck by the Packard; that during this period traffic passed through the underpass south of the truck and trailer, indicating that the Packard had ample room to pass to the right of the truck and thus avoid the accident. There was substantial evidence to support the implied finding of the jury that the driver of the truck involved was not negligent; that his conduct was not the proximate cause of the accident; and that the sole cause of the accident was the failure of plaintiff Light to drive his car in his proper traffic lane. These were conclusions of fact for the jury and its determination will not be disturbed on appeal where, as here, it is supported by substantial evidence.

Judgment affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

PACIFIC TEL. & TEL. CO.
v.
CITY OF LOS ANGELES.*

Civ. 19443.

District Court of Appeal, Second District,
Division 3, California.
May 25, 1954.
Rehearing Denied June 14, 1954.
Hearing Granted July 21, 1954.

Telephone company brought suit against city for declaration of rights under statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state. The Superior Court of Los Angeles County, Joseph W. Vickers, J., entered judgment adverse to city, and city appealed. The District Court of Appeal, Vallée, J., held that company had franchise under statute to use its lines along public highways and other public places of city, which had been annexed after May 19, 1905, for transmission of teletypewriter messages, those parts of radio programs and those parts of sound phase of television programs which consisted of transmission of human voice, and mobile and ship-to-shore communications, but that company did not have a franchise for transmission of telephotographs, image phase of television programs, so much of sound phase of radio and television programs as consisted of instrumental music, or wired instrumental music.

Judgment reversed in part and affirmed in part.

1. Municipal Corporations 🔑680(1)

Where city charter merely authorized city to regulate telephone rates and services and to regulate or prohibit erection of telephone poles and wires, city had no power under charter to issue franchise to telephone company for privilege of conducting telephone business in city, as distinguished from right of telephone company under statute to use public highways and other public places. Civ.Code, § 536.

2. Telegraphs, Telephones and Radio 🔑7

Right of telephone company to carry on business of supplying telephone service was a "franchise". Civ.Code, § 536.

See publication Words and Phrases, for other judicial constructions and definitions of "Franchise".

3. Telegraphs, Telephones and Radio 🔑26

The conducting of a telephone business in a city by a telephone company is not a municipal affair, but is a matter of statewide concern. Civ.Code, § 536.

4. Telegraphs, Telephones and Radio 🔑7

Right of telephone company to be a corporation and to conduct a telephone business came from the state. Civ.Code, § 536.

5. Municipal Corporations 🔑680(1)

Where amendment of section of Constitution dealing with municipal operation or regulation of public works merely authorized city to exercise such powers over public utilities as were given by its charter to extent that such powers were municipal affairs, amendment did not confer on city power to grant or refuse franchise to telephone company to conduct telephone business within city, as distinguished from right to use public highways and other public places. Civ.Code, § 536; Const. art. 11, § 19.

6. Municipal Corporations 🔑680(1)

If city ever had power to grant a franchise to telephone company to engage in business in city, such power was taken away by constitutional amendment vesting in Railroad Commission such power and jurisdiction to supervise and regulate public utilities as should be conferred on the Railroad Commission by the Legislature, and by Public Utilities Act adopted pursuant to such constitutional amendment. Public Utilities Code, § 203 et seq.; Const. art. 12, § 23.

7. Public Service Commissions 🔑6.5

The Public Utilities Commission has all power of supervision and regulation of public utilities consistent with context and purpose of section of the Constitution dealing with supervision of public utilities and the Public Utilities Act. Public Utilities Code, § 203 et seq.; Const. art. 12, § 23.

8. Public Service Commissions 🔑6.6

One of the objects of the Public Utilities Act was to vest in the Railroad Commission the power of the state to determine whether rights and interests of the general public will be advanced by permitting a particular public utility to engage in business. Public Utilities Code, § 203 et seq.

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* Vacated 282 P.2d 36.

9. Public Service Commissions ⇨6.6

One of the objects of the Public Utilities Act was to authorize the Railroad Commission to prevent a public utility from withdrawing either entirely from public service or from public service in any part of the territory served. Public Utilities Code, § 203 et seq.

10. Municipal Corporations ⇨618

First proviso of section of the Constitution dealing with supervision of public utilities, as adopted in 1911, that such section will not affect powers of control over any public utility vested in any city as the electors in such city should vote to retain, and that until such election such powers shall continue unimpaired, is limited to those powers possessed by a charter city which relate solely to regulation and control of municipal affairs. Const. art. 12, § 23.

11. Municipal Corporations ⇨680(1)

First proviso of section of the Constitution dealing with supervision of public utilities, as adopted in 1911, that such section will not affect powers of control over any public utility vested in any city as the electors in such city should vote to retain, and that until such election such powers shall continue unimpaired, did not confer on city the power to grant or refuse telephone company franchise to conduct telephone business in city, in view of fact that at time of adoption of such section city had no power to grant such franchises. Const. art. 12, § 23.

12. Municipal Corporations ⇨680(1)

Second proviso of section of the Constitution dealing with supervision of public utilities, as adopted in 1911, providing that such section should not affect right of city to grant franchises for public utilities on terms and conditions and in manner prescribed by law, did not give city power to grant or refuse franchise to telephone company to conduct telephone business in city, in view of fact that at time of adoption of such section city had no power to grant such franchises. Const. art. 12, § 23.

13. Telegraphs, Telephones and Radio ⇨7

Telephone company had same rights within city of Los Angeles, excluding territory within the boundaries on May 19, 1905, under its state franchise that it had from time it constructed and began to maintain and operate its first telephone line within borders of the state, embracing within scope of its state franchise highways in territories annexed to and consolidated with city since May 19, 1905, new highways opened and highways located in such territories since annexation or consolidation, widened parts of highways existing prior to annexation or consolidation, and embracing other public places whether existing before or created after annexation or consolidation. Civ.Code, § 536.

14. Municipal Corporations ⇨680(1)

Power to grant franchises to telephone companies to engage in business of furnishing special types of communication service, such as teletypewriter messages, telephotographs, radio programs, television programs, wired music, and ship-to-shore and mobile communications, does not rest in city. Civ.Code, § 536.

15. Telegraphs, Telephones and Radio ⇨7

Only that which is granted in clear and explicit terms to a telephone company passes by a grant of a franchise.

16. Telegraphs, Telephones and Radio ⇨7

Statutory grants of a franchise to a telephone company are to be construed strictly in favor of the public, and whatever is not unequivocably granted is withheld, and nothing passes by implication. Civ. Code, § 536.

17. Telegraphs, Telephones and Radio ⇨10(10)

Telephone company, in accepting its franchise under statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state, did not undertake to render types of service, which were not only nonexistent but unanticipated. Civ.Code, § 536.

18. Telegraphs, Telephones and Radio ⊜10(10)

Statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state gave telephone company the right and the obligation to use its telephone lines along and on public highways in those portions of the city of Los Angeles which had been annexed after 1905 for transmission of teletypewriter messages without a franchise from the city. Civ.Code, § 536.

19. Telegraphs, Telephones and Radio ⊜10(10)

Statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state did not give telephone company the right and the obligation to use its telephone lines along and on public highways in those portions of the city of Los Angeles which had been annexed after 1905 for transmission of telephotographs over its telephone wires, since such use exceeded limits of its franchise. Civ.Code, § 536.

20. Telegraphs, Telephones and Radio ⊜10(10)

Statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state gave telephone company the right and the obligation to use its telephone lines along and on public highways in those portions of the city of Los Angeles which had been annexed after 1905 for transmission of those portions of radio programs consisting of transmission of the human voice, but not for transmission of instrumental music. Civ.Code, § 536.

21. Telegraphs, Telephones and Radio ⊜10(10)

Statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state gave telephone company the right and the obligation to use its telephone lines along and on public highways in those portions of the city of Los Angeles which had been annexed after 1905 for transmission of that sound phase of television programs consisting of the transmission of the human voice, but not for transmission of sound phase consisting of transmission of instrumental music, and not for transmission of the image phase of television. Civ.Code, § 536.

22. Telegraphs, Telephones and Radio ⊜10(10)

Statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state gave telephone company the right and the obligation to use its telephone lines along and on public highways in those portions of the city of Los Angeles which had been annexed after 1905 for transmission of mobile and ship-to-shore communications. Civ.Code, § 536.

23. Telegraphs, Telephones and Radio ⊜20(5)

In action by telephone company against city for declaration of rights under statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along and on any public road and highway and across any waters or lands in the state, evidence sustained finding that company, by accepting provisions of city ordinance, did not agree to surrender at option of city the company's rights and obligations under statute. Civ.Code, § 536.

24. Appeal and Error ⊜1010(1)

Trial court's finding, which was supported by the evidence, could not be disturbed on appeal.

25. Telegraphs, Telephones and Radio ⊜10(10)

Use of public highways within the city of Los Angeles, as it existed on May 19, 1905, effective date of statute providing that telegraph or telephone corporations may construct telegraph and telephone lines along or on any public road and highway and across any waters or lands in state, is a municipal affair, and provisions of city charter are controlling. Civ.Code, § 536.

26. Telegraphs, Telephones and Radio ⚿10(9)

Payment to city by telephone company, as holder of franchise, is in the nature of a toll or charge for privilege of using public highways covered by franchise.

27. Telegraphs, Telephones and Radio ⚿10(9)

Where city ordinance required that holder of telephone franchise pay percentage of gross annual receipts received from use, operation, and possession of franchise, holder of franchise was not required to pay a charge determined by a percentage of total gross receipts derived by holder from its business within the city.

28. Telegraphs, Telephones and Radio ⚿10(9)

City had no power either directly or indirectly to exact rental from telephone company as holder of franchise for use by telephone company of its own property not located along or on public highways or other public places in city.

29. Telegraphs, Telephones and Radio ⚿10(8)

In advertisement for bids on telephone franchise, city could impose such terms as city saw fit, so long as the terms complied with city ordinance and so long as terms imposed reasonable rental for use of public highways and other public places by telephone company.

30. Telegraphs, Telephones and Radio ⚿10(9)

City could, as part of reasonable rental charged the telephone company for franchise, include free telephone service for city, if value of free telephone service plus other rental charged did not exceed reasonable rental for use of public highways and other public places by telephone company.

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Roger Arnebergh, City Atty., Bourke Jones, John L. Flynn, Asst. City Attys., and Weldon L. Weber, Deputy City Atty., Los Angeles, for appellant.

John A. Sutro, Francis N. Marshall, Noble K. Gregory, and Pillsbury, Madison & Sutro, San Francisco, and Oscar Lawler, Leslie C. Tupper, and Lawler, Felix & Hall, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant, city of Los Angeles,[1] from an adverse judgment in an action in which plaintiff, Pacific Telephone and Telegraph Company,[2] sought a declaration: (a) that it owns, and has not surrendered any part of its state-wide franchise, and is entitled, without obtaining a franchise from the city, to operate its telephone and telegraph system and business in, and to occupy with its telephone and telegraph lines the public highways and other public places within, the areas which have been annexed to and consolidated with the city since May 19, 1905, in such manner as not to incommode the public use of the roads or highways or interrupt the navigation of the waters; and (b) that to the extent to which plaintiff is required to obtain a franchise from the city, the latter may not charge it for such franchise more than 2% of the gross annual receipts arising from the use, operation, or possession of such franchise.[3]

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[1] The city of Los Angeles is referred as "the city."

[2] Pacific Telephone and Telegraph Company is referred to as "Pacific."

[3] Plaintiff also prayed that it be declared that the amount of such gross receipts should be determined by applying the following formula:

(a) That proportion of plaintiff's gross receipts arising from the rendering of local (exchange) service in the Los Angeles extended area that the amount of exchange plant on the streets and other public places within the franchise area bears to the total plant of the plaintiff used in rendering local service in the Los Angeles extended area; and

(b) That proportion of plaintiff's total gross receipts arising from the rendering of toll service attributable to the state of California that the amount of toll plant located on the streets and other public places within the franchise area bears to the total toll plant of plaintiff in the state of California.

The principal questions presented for decision involve Pacific's rights and obligations under section 536 of the Civil Code which reads: "Telegraph or telephone corporations may construct lines of telegraph, or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters." [4]

In 1891 the city, by Ordinance 1130, granted Sunset Telephone and Telegraph Company,[5] its successors and assigns, a franchise to continue and maintain its then telephone system and to erect telephone poles upon and to run wires over and upon the public highways within the city for 25 years.

In 1902 the city granted M. A. King and his assigns a franchise to construct, maintain, and operate conduits, poles, and wires upon the public highways within the city for 50 years, and to transmit sound, signals, conversation, and intelligence through and over its lines by means of electricity[6]. In 1903 this franchise was assigned to Home Telephone and Telegraph Company.[7]

Pacific was organized on December 31, 1906, and after January 2, 1907, engaged in the telephone business in various parts of the state, including parts of the city. It acquired the entire capital stock of Sunset, leased its properties, and operated its system. It constructed and maintained telephone lines along and upon the public highways in unincorporated territories then surrounding the city, including areas annexed to the city after 1891, without obtaining a franchise from the county or from the city.[8] In 1916, pursuant to an order of the Railroad Commission, it acquired all of the properties of Sunset, including its rights under section 536. In 1916 Pacific organized a subsidiary, Southern California Telephone Company.[9] Pursuant to an order of the Railroad Commission, [10] Southern acquired all the franchises and properties of Home and all the properties and franchises theretofore owned by Sunset, including its rights under section 536, [11] and such franchises and properties of Pacific as would enable Southern to furnish telephone service within the areas in which service had been furnished by Home and Pacific, not including Pacific's toll lines.

After the order of the Railroad Commission had been made, consent of the city was sought to the assignment of the King franchise to Southern. On December 29, 1916, the council of the city enacted Ordinance 35,474 by which the city reserved the right to purchase the properties of Southern under specified procedure. Ordinance 35,474 provided that Southern, its successors and assigns, should operate within the limits of the city as the limits then or might thereafter exist, solely under the rights and privileges granted by the King franchise; and that it, its successors and assigns, should surrender without compensation at the option of the city all rights acquired by it by or through any other franchise theretofore granted and effective in any part of the city as the same then existed, or by or through any other franchise theretofore or thereafter granted in any territory outside the limits of the city as the same then existed and which might thereafter be incorporated in or annexed to the city, or which might become part of the city by consolidation. The city, by Ordinance 35,474, reserved the right to require Southern to install service and to extend its system into all parts of the territory within the limits of the city as the limits might then or thereafter exist, and imposed the condition that the principal office of Southern, its successors or assigns, should be located and remain in the city. Southern accepted the terms and conditions imposed by Ordinance 35,474 on April 30, 1917.

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[4] In 1951 section 536 was repealed and re-enacted in its identical wording as Public Utilities Code, section 7901. For convenience, however, we refer to the statute as "section 536."

We refer to a franchise under section 536 as a "state franchise."

The term "public highways" includes the streets of cities. Western Union Telegraph Co. v. Hopkins, 160 Cal. 106, 118, 116 P. 557.

[5] Sunset Telephone and Telegraph Company is referred as "Sunset."

[6] The franchise to M. A. King is referred to as the "King franchise."

[7] Home Telephone and Telegraph Company is referred to as "Home."

[8] There is evidence that "all development outside of the Old Charter Boundary [of the city in 1891] and within the City Limits of to-day [1916] have been constructed and operated to date without any franchise right so to do."

[9] Southern California Telephone Company is referred to as "Southern."

[10] 11 C.R.C. 806.

[11] 12 C.R.C. 115, 118.

From May 1, 1917, until 1930, Southern engaged in an exchange telephone business within parts of the city and adjacent areas; and Pacific continued to engage in both an exchange and toll business in other parts of the state and provided exchange service within parts of the city not served by Southern.

In 1930, pursuant to authorization of the Railroad Commission, Pacific sold to Southern all its franchises and properties in the southern part of the state and withdrew from service in those areas.[12] Thereafter until 1947 Southern provided exchange and toll service in the Los Angeles area. In 1947, pursuant to authorization of the Railroad Commission, Southern merged with Pacific.[13] Before the merger became effective, the city by Ordinance 91,409 consented to the assignment of the King franchise to Pacific. Ordinance 91,409 amended Ordinance 35,474 to the extent that the latter required Southern to maintain its principal office in the city; and, as a condition to the city's consent to the assignment, it required Pacific to agree to the terms and conditions imposed by Ordinance 35,474 and to an agreement entered into January 31, 1947, under which the city and Southern had settled a dispute over the compensation provisions of the King franchise. Pacific accepted the assignment and agreed to the conditions.

From 1850 to 1899 there were 5 annexations to the city. From 1899 to 1906 there were none. From 1906 to October 1951 there were 10 consolidations, 1 exclusion, 6 detachments, and 101 annexations.

On May 24, 1950, the council of the city adopted a resolution purporting to exercise the option reserved in Ordinance 35,474 to require Pacific to surrender rights acquired by it under franchises other than those granted by Ordinances 6,959, 35,474, and 91,409.

The King franchise was to expire on February 8, 1952. On August 24, 1951, Pacific applied to the city for a 21-year franchise to continue to construct, maintain, and operate telephone and telegraph lines along and upon the public highways and other public places within the city as it existed on May 19, 1905, the effective date of section 536 of the Civil Code. On December 17, 1951, the city rejected the application on the grounds that it did not cover the areas annexed to or consolidated with the city after May 19, 1905, and that the city was entitled to compensation in excess of the amount provided in the application. Pacific then filed this action, seeking a declaration of its franchise rights and obligations within the city.

The court in part declared:

1. Pacific is not required to obtain a franchise from the city to operate its business within the city.

2. Pacific has a valid and subsisting franchise from the state under Civil Code section 536 in all areas annexed to or consolidated with the city since May 19, 1905, which has not been surrendered or forfeited in whole or in part.

3. Under its state franchise, Pacific may, without the payment of any money compensation, and has the obligation to, occupy with its telephone and telegraph lines the public highways and other public places, including all the lands owned by the city in

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[12] 34 C.R.C. 584. The order provided that Southern "may engage in the telephone and telegraph business in said territory," which included parts of the city and adjacent areas.

[13] 47 C.R.C. 152.

its governmental capacity, now or hereafter located within all areas which have been annexed to or consolidated with the city since May 19, 1905, for the purpose of providing a communication service to the people of the state.

4. Pacific's lines include all equipment used in rendering a communication service by means of the transmission of electrical impulses and may be used for transmitting telephone messages, telegraph messages, teletypewriter messages, telephotographs, program services (including radio and television broadcasts), and any other communication service by means of the transmission of electric impulses.

5. The lines must be constructed and maintained in such manner and at such points as not to incommode the public use of public highways and public places.

The city's first point is that the power to issue primary franchises to operate a telephone business rests in the city. A primary franchise as defined by the city is not the franchise to be and exist as a corporation, but is the privilege of conducting a telephone business within the city, as distinguished from the right to use the public highways and other public places. It is argued that after the expiration of the King franchise, Pacific cannot do any business within the city without first obtaining a franchise so to do from the city. The contention cannot be upheld.

[1] The contention is first premised on the ground that the city is a freeholders' charter city and on the assertions that the power to grant a franchise to a telephone company to engage in business is a municipal affair not controlled by general laws and that the city's charter gives it the power to grant such a franchise. The power to grant so-called primary franchises to telephone companies does not rest in the city. There is nothing in the charter provisions on which the city relies giving it such power.[14] They merely authorize the city to regulate telephone rates and service and to regulate or prohibit the erection of telephone poles and wires. See Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 473–480, 147 P. 118.

[2–4] The right of Pacific to carry on the business of supplying telephone service is a franchise. The conducting of a telephone business in the city is not a municipal affair; it is a matter of state-wide concern. City of San Diego v. Southern California Telephone Co., 92 Cal.App.2d 793, 800, 208 P.2d 27. See Bay Cities Transit Co. v. City of Los Angeles, 16 Cal.2d 772, 776–777, 108 P.2d 435; People v. Willert, 37 Cal. App.2d Supp. 729, 733, 93 P.2d 872.[15] The operation of Pacific's business is not local to the city; it extends over and outside the state.[16] The right of Pacific to be a corporation and to conduct a telephone business comes from the state. City and County of San Francisco v. Pacific Tel. & Tel. Co., 166 Cal. 244, 251, 135 P. 971; Bank of California v. San Francisco, 142 Cal. 276, 279–280, 75 P. 832, 64 L.R.A. 918.

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[14] See Stats.1889, pp. 455, 462–4. Stats. 1911, pp. 2051, 2063–4.

[15] In the recent case of People ex rel. Public Utilities Comm. v. Mountain States Tel. & Tel. Co., 125 Colo. 167, 243 P.2d 397, 401, the court, holding telephone service to be a state-wide affair, stated, 243 P.2d 401: "No good purpose would be served by including in this opinion the numerous authorities from the various states which hold that telephone service has come to be generally recognized as not being local or municipal to any particular city or town; and that the only effective and logical regulation to which major telephone companies should be subjected is regulation upon a state-wide basis. The weight of authority to this effect is overwhelming." (See, also, City of Owensboro v. Cumberland Tel. & Tel. Co., 230 U.S. 58, 72, 33 S.Ct. 988, 57 L.Ed. 1389, 1396; City of Wichita v. Old Colony Trust Co., 8 Cir., 132 F. 641, 650; City of Tulsa v. Southwestern Bell Tel. Co., 10 Cir., 75 F.2d 343, 353; Iowa Tel. Co. v. City of Keokuk, D.C.S.D.Iowa, 226 F. 82, 97–99; Bland v. Cumberland Tel. & Tel. Co., 109 S.W. 1180, 1181, 33 Ky.L.Rep. 399; Cumberland Tel. & Tel. Co. v. City of Calhoun, 151 Ky. 241, 151 S.W. 659, 661; Metropolitan Home Tel. Co. v. Emerson, 202 Mass. 402, 88 N.E. 670, 671; Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512, 80 N.W. 386, 388, 47 L.R.A. 87; City of Duluth v. Duluth Tel. Co., 84 Minn. 486, 87 N.W. 1127, 1130; Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140, 83 N.W. 527, 86 N.W. 69, 70, 53 L.R.A. 175; State, by Van Riper v. Traffic Tel. Workers' Federation, 2 N.J. 335, 66 A.2d 616, 9 A.L.R.2d 854, 864–865; Village of Carthage v. Central New York Tel. & Tel. Co., 185 N.Y. 448, 78 N.E. 165, 166, 113 Am.St.Rep. 932; City of Rochester v. Bell Tel. Co., 52 App.Div. 6, 64 N.Y.S. 804, 807; People ex rel. Long Acre Electric Light & Power Co. v. Public Service Comm., 137 App.Div. 810, 122 N.Y.S.

[5] The city says that section 19, article XI of the Constitution as amended in 1911 conferred on it the power to grant or refuse primary franchises, and places reliance on Matter of Russell, 163 Cal. 668, 126 P. 875. The facts are not analogous. Russell only involved the power of a city to refuse to allow a gas company to occupy the streets. Dictum on which the city relies was disapproved in Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 482, 147 P. 118. The 1911 amendment of section 19, article XI did not in itself confer any power on the city. It merely authorized the city to exercise such powers over public utilities as were given by its charter to the extent that such powers were municipal affairs. Oro Electric Corp. v. Railroad Commission, supra, 169 Cal. 482, 147 P. 123, 124; People v. Willert, 37 Cal.App.2d Supp. 729, 734, 93 P.2d 872.

[6] If the city ever had the power to grant a franchise to a telephone company to engage in business, it was taken away in 1912. In 1911, section 23 of article XII of the Constitution was amended to vest in the Railroad Commission such power and jurisdiction to supervise and regulate public utilities as should be conferred upon it by the Legislature.[17] Pursuant to this provision the Legislature adopted the Public Utilities Act of 1911.[18] In 1915 the Act of 1911 was re-enacted in substantially its

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641, appeal dismissed, 199 N.Y. 254, 92 N.E. 629; City of Brownwood v. Brown Tel. & Tel. Co., 106 Tex. 114, 157 S.W. 1163, 1165; Wisconsin Tel. Co. v. City of Oshkosh, 62 Wis. 32, 21 N.W. 828, 832.

[16] The court found: "Plaintiff's telephone and telegraph lines are used by it in rendering a local, statewide and interstate communication service to the people of the State of California. Said communication service includes exchange and toll telephone service, private line telephone service, telegraph service, teletypewriter service, private line teletypewriter service, the transmission of telephotographs, program transmission (including radio and television programs), and other communications by means of the transmission of electrical impulses. Such communication business and service is regulated by the Public Utilities Commission of the State of California and by the Federal Communications Commission. As a part of such communication service plaintiff provides telephone service directly, and by connecting with sixty-seven other telephone companies in California, to the people throughout the State of California; it provides a communication service by connecting with other telephone companies outside of California to people throughout the United States and other countries. Plaintiff also provides telephone and other communication services to agencies of the State and Federal governments and to statewide and local businesses and industries. Plaintiff's local exchange telephone business is integrated with its statewide and interstate communication service and is not related to the political boundaries of any city or political subdivision. Plaintiff's right to engage in such communication service and business is not a municipal affair but is a matter of state and nation concern regulated by the State and Federal governments."

In 1951 over 17 million telephone calls were made from the Los Angeles Extended Area, which includes the city, to places throughout the state and the world; and over 20 million telephone calls were made from outside the Los Angeles Extended Area to subscribers within that area.

[17] The germane part of section 23, article XII, reads: "The Railroad Commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the Legislature, and the right of the Legislature to confer powers upon the Railroad Commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this Constitution."

[18] Stats.Ex.Sess.1911, p. 18.

same form as the Public Utilities Act of 1915.[19]

[7–9] Under the statutes referred to, the Railroad Commission had, and the Public Utilities Commission now has, all power of supervision and regulation of public utilities which are consistent with the context and purpose of section 23, article XII of the Constitution and the Public Utilities Act. Motor Transit Co. v. Railroad Commission, 189 Cal. 573, 579–580, 209 P. 586. One of the objects of the Public Utilities Act was to vest in the Railroad Commission the power of the state to determine whether the rights and interests of the general public would be advanced by permitting a particular public utility to engage in business. Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 475–476, 147 P. 118. Another object was to authorize the Commission to prevent a public utility from withdrawing either entirely from public service or from public service in any part of the territory served. Van Hoosear v. Railroad Commission, 184 Cal. 553, 554–556, 194 P. 1003.[20]

[10, 11] It is asserted that two provisos found in section 23, article XII of the Constitution as adopted in 1911 conferred on cities rather than the state the power to grant primary franchises to conduct a telephone business.[21] The first proviso said that section 23 would not affect "such powers of control over any public utility vested in" any city as the electors in such city should vote to retain, and until such election such powers should continue unimpaired. In 1914 section 23 was amended to its present wording to deprive cities of any powers they may have had other than the making and enforcement of such police regulations as the electors of a city should vote to retain, and until such election such powers should continue unimpaired.[22] The first proviso is limited to those powers possessed by a charter city which relate solely to the regulation and control of municipal affairs. Bay Cities Transit Co. v. City of Los Angeles, 16 Cal.2d 772, 775–777, 108 P.2d 435; Los Angeles Ry. Corp. v. City of Los Angeles, 16 Cal.2d 779, 783–788, 108 P.2d 430; People v. Willert, 37 Cal.App.2dSupp. 729, 736–740, 93 P.2d 872.[23] Since, as we have seen, at the time of the adoption of section 23, article XII, the city had no power to grant primary franchises, this proviso did not preserve a power the city did not have.

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[19] Stats.1915, p. 115.
In 1951 the Act was incorporated in the Public Utilities Code, section 203 et seq.

[20] See 44 C.R.C. 396, 406.
Since 1917, exchange telephone service in a large part of the city and surrounding territory has been provided by Pacific and its predecessors pursuant to specific authorization of the Railroad (or Public Utilities) Commission. 11 C.R.C. 806, 860; 34 C.R.C. 584, 593–4; 47 Cal. P.U.C. 152.

[21] The two provisos in the 1911 provision were: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of control over any public utility vested in any city and county, or incorporated city or town as, at an election to be held pursuant to laws to be passed hereafter by the Legislature, a majority of the qualified electors voting thereon of such city and county, or incorporated city or town, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers, they shall thereafter vest in the Railroad Commission as provided by law; and provided, further, that where any such city and county or incorporated city or town shall have elected to continue any powers respecting public utilities, it may, by vote of a majority of its qualified electors, voting thereon, thereafter surrender such powers to the Railroad Commission in the manner to be prescribed by the Legislature; or if such municipal corporation shall have surrendered any powers to the Railroad Commission, it may, by like vote, thereafter reinvest itself with such power."

[22] The pertinent part of the 1914 amendment of section 23 reads: "From and after the passage by the Legislature of laws conferring powers upon the Railroad Commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission; provided, however, that this section shall not affect such powers of con-

[12] The second proviso on which the city relies states that section 23 shall not affect the right of a city to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law. This proviso granted no rights. It merely reserved to a city such rights to grant franchises as may have been vested in it before 1914. It does not refer to the right to engage in a public utility business. People v. Willert, 37 Cal.App.2dSupp. 729, 740, 93 P.2d 872. Section 50 (b) of the Public Utilities Act of 1911 authorized the Railroad Commission to grant certificates of public convenience and necessity to exercise any right or privilege under any franchise or permit theretofore granted.[24] Section 51 (a) required an order of the Commission before any public utility could dispose of "any franchises."[25] Sections 50 (b) and 51 (a) are virtually identical with sections 68 and 70 of chapter 429 of article IV of the 1907 Laws of New York. In People ex rel. Long Acre Electric Light & Power Co. v. Public Service Commission, 137 App.Div. 810, 122 N.Y.S. 641, appeal dismissed 199 N.Y. 254, 92 N.E. 629, it was said, 122 N.Y.S. 646, that "the word 'franchise' as used in these sections refers to the secondary franchise or consent of the local authorities, and not to the primary franchise to be a corporation, and carry on business as such, derived from the fact of incorporation."[26]

We conclude that the power to issue primary franchises to engage in the telephone business does not rest in the city.

The second contention of the city is that a franchise granted by section 536 of the Civil Code is not controlling on a charter city, that such a city alone possesses the power to grant a franchise. The argument is predicated on the premise that a fran-

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trol over public utilities as relate to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town as, at an election to be held pursuant to law, a majority of the qualified electors of such city and county, or incorporated city or town, voting thereon, shall vote to retain, and until such election such powers shall continue unimpaired; but if the vote so taken shall not favor the continuation of such powers they shall thereafter vest in the Railroad Commission as provided by law; and provided, further, that where any such city and county or incorporated city or town shall have elected to continue any of its powers to make and enforce such local, police, sanitary and other regulations, other than the fixing of rates, it may, by vote of a majority of its qualified electors voting thereon, thereafter surrender such powers to the Railroad Commission in the manner prescribed by the Legislature; and provided, further, that this section shall not affect the right of any city and county or incorporated city or town to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law." Const. art. XII, § 23.

[23] In Bay Cities Transit Co. v. City of Los Angeles, 16 Cal.2d 772, at page 776, 108 P.2d 435, at page 438, the court said: " 'It is settled that the term "vested" as used in section 23, article XII of the Constitution is limited to those powers possessed by a chartered city relating solely to the regulation and control of municipal affairs.' "

[24] Stats.Ex.Sess.1911, ch. 14, p. 43. Section 50(b) of the Public Utilities Act of 1911 is now Public Utilities Code section 1002.

[25] Stats.Ex.Sess.1911, ch. 14, p. 44. Section 51(a) of the Public Utilities Act of 1911 is now Public Utilities Code section 851. See, also, sections 31 and 35 of the Public Utilities Acts of 1911 and 1915 now Public Utilities Code sections 701 and 761.

[26] See, also, People ex rel. New York Edison Co. v. Willcox, 207 N.Y. 86, 100 N. E. 705, 709–710, 45 L.R.A.,N.S., 629; cited with approval in Oro Electric Corp. v. Railroad Commission, 169 Cal. 466, 475, 147 P. 118.

chise granted by section 536 is a sort of piecemeal proposition—that section 536 grants a franchise on different public highways and other public places progressively as the state's offer is accepted by the installation of telephone lines along and upon a public highway or other public place, called the *pro tanto* theory. Therefore, so the city says, Pacific's franchise under section 536 does not embrace new streets, the widened portions of streets existing prior to annexation or consolidation, relocated streets, or public property owned by the city which was in private ownership at the time of annexation or consolidation. Pacific's contention, upheld by the trial court, is that section 536 constitutes an offer of a franchise; by the construction of telephone lines along or upon public highways within the state it accepted the offer; having accepted the offer it may construct lines along and upon the public highways and other public places in any part of the state except within the boundaries of certain freeholders' charter cities as they existed on May 19, 1905, such as Los Angeles, called the entirety theory.

Section 536 did not confer any rights on telephone companies prior to its re-enactment in 1905. Accordingly it has been held that the re-enacted section did not grant such companies a franchise to use the highways of a city within the boundaries of such city as they existed on May 19, 1905, if such city previously had been given full control of its streets under a freeholders' charter. Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796; City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal. App.2d 494, 164 P.2d 905. Los Angeles has been a freeholders' charter city since 1889.[27] Its charter was amended with respect to its power to grant franchises on February 16, 1905.[28] On May 19, 1905, it possessed the power to grant franchises to telephone companies to use the public highways within the city.

The history and legal effect of section 536 is succinctly stated by Mr. Chief Justice Gibson, writing for the court, in County of Los Angeles v. Southern California Telephone Co., 32 Cal.2d 378, at page 381, 196 P.2d 773, at page 776, as follows: "Section 536 was originally enacted at the time of the adoption of the codes in 1872, but similar provisions had existed for many years prior thereto. (See Stats. 1850, p. 369; Stats. 1857, p. 171.) When first enacted the section applied only to telegraph corporations. It made no mention of *telephone* companies, and it did not grant any rights to such companies prior to 1905, when the section was repealed and reenacted to apply to both telegraph and telephone corporations. (Citation.) As applied to *telegraph* companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state which was secured by the federal Constitution against impairment by subsequent state legislation. (Citations.) The purpose of the change in 1905 was to add *telephone corporations* to the section, and, except for this extension, there is nothing in the amendment to indicate any intention to alter the effect and operation of the statute. (Citation.) In view of the construction given to this section as it existed prior to 1905, and the absence of other changes, it must be held that the intention was to offer the grant of a franchise to telephone as well as telegraph companies upon acceptance by the construction and operation of communication facilities. * * * [32 Cal.2d at page 384, 196 P.2d at page 777.] The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. The grant under section 536 must be construed in favor of the state. (Civ. Code, § 1069.) As so construed it must be held to be a grant to use public roads and highways so long as telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to fur-

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27. Stats.1889, p. 455.

28. Stats.1905, p. 980.

nish proper and adequate communication service to the public." The grant was "free from any grant made by subordinate legislative bodies". County of Inyo v. Hess, 53 Cal.App. 415, 425, 200 P. 373, 377.

The city's *pro tanto* theory has been repudiated repeatedly. Russell v. Sebastian, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912, Ann.Cas.1914C, 1282; Lukrawka v. Spring Valley Water Co., 169 Cal. 318, 326–332, 146 P. 640; City of Beverly Hills v. City of Los Angeles, 175 Cal. 311, 314, 165 P. 924; Postal Telegraph-Cable Co. v. Railroad Comm., 200 Cal. 463, 472–474, 254 P. 258; County of Inyo v. Hess, 53 Cal. App. 415, 420–425, 200 P. 373; City of Salinas v. Pacific Tel. & Tel. Co., 72 Cal. App.2d 494, 497, 164 P.2d 905.

A telephone line from its nature and the service to be rendered is never complete. To meet the demands of the public it must be, and it is in fact, constantly extended by adding new lines, using public highways therefor. The cases recognize the fact. In Russell v. Sebastian, supra, the Supreme Court of the United States, discussing the nature and extent of a statewide franchise to use the public highways granted directly by the Constitution of California, said, 233 U.S. 205, 34 S.Ct. 520, 58 L.Ed. 921: "The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the Constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant, and hence defined the limits of its operation. * * * [233 U.S. at pages 206, 207, 34 S.Ct. at pages 520, 521, 58 L.Ed. at page 922] There is no ambiguity as to the scope of the offer. It was not simply of a privilege to maintain pipes actually laid, but to lay pipes so far as they might be required in order to effect an adequate distribution. * * * The breadth of the offer was commensurate with the requirements of the undertaking which was invited. * * * [I]t [the constitutional offer] did not attempt to confine the privilege to particular streets or areas, or to make the laying of the necessary pipes conditional upon the renewal of the offer street by street, or foot by foot, as the pipes were put in the ground. * * * When accepted and acted upon it would become binding—not foot by foot, as pipes were laid, but as an entirety, in accordance with its purpose and express language. * * * [233 U.S. at page 208, 34 S.Ct. at page 521, 58 L.Ed. at page 923] In view of the nature of the undertaking in contemplation, and of the terms of the offer, we find no ground for the conclusion that each act of laying pipe was to constitute an acceptance *pro tanto*. We think that the offer was intended to be accepted in its entirety as made, and that acceptance lay in conduct committing the person accepting to the described service. The offer was made to the individual or corporation undertaking to serve the municipality, and when that service was entered upon and the individual or corporation had changed its position beyond recall, we cannot doubt that the offer was accepted. * * * In this view, the grant embraced the right to lay the extensions that were needed in furnishing the supply within the city."[29]

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[29] In People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 47 N.E. 787, approved in Illinois Central R. Co. v. City of Chicago, 176 U.S. 646, 666, 20 S.Ct. 509, 44 L.Ed. 622, and quoted from in Russell v. Sebastian, 233 U.S. 195, 34 S.Ct. 517, 58 L.Ed. 912, Ann.Cas.1914C, 1282, a grant of authority to lay conduits for gas through the streets of a town so as to render service to the people of the town, was held to extend as a property right not only to the streets then existing but to those later opened. The court said, 153 N.Y. 533, 47 N.E. 788: "It is well known that business enterprises such as the relator is engaged in are based upon calculations of future growth and expansion. A franchise for supplying gas not only confers a privilege, but imposes an obligation, upon the corporation to serve the public in a reasonable way. * * * When the right to use the streets has been once granted in general terms to a corporation engaged in sup-

Speaking of a franchise under section 536, the court in Postal Telegraph-Cable Co. v. Railroad Comm., supra, 200 Cal. 463, at page 473, 254 P. 258, at page 262, said: "In view of the nature of the business of the telegraph company, and the broad and unrestricted terms of the offer contained in section 536, which has not been withdrawn or modified, we find no ground for the contention that each act of constructing a telegraph line, or an extension of service, was to constitute an acceptance *pro tanto.* The offer was intended to be, and was, accepted in its entirety as made. Petitioner has now exactly the same rights under its state franchise that it has had from the time it constructed and began to maintain and operate its first telegraph line within the borders of the state."

[13] The offer made by the state in section 536 was accepted in its entirety by Pacific's predecessors on May 19, 1905, by constructing, maintaining, and operating telephone lines along and upon the public highways of the state; the rights thereby acquired were assigned to Pacific; and Pacific, after January 2, 1907, accepted the offer in its entirety in the same manner.[30] Since January 2, 1907, Pacific has continuously been engaged in operating a local, state-wide, and interstate telephone system and business and has constructed its lines along and upon the public highways and other public places within the state. As new public highways are opened, or relocated, or widened, and as new public places are created, Pacific has the right and the obligation to furnish telephone service. It follows that Pacific has the same rights within the city, excluding the territory within its boundaries on May 19, 1905, under its state franchise "that it has had from the time it constructed and began to maintain and operate its first [telephone line] within the borders of the state",[31] embracing within the scope of its state franchise highways in territories annexed to and consolidated with the city since May 19, 1905, new highways opened and highways relocated in such territories since annexation or consolidation, widened parts of highways existing prior to annexation or consolidation, and embracing other public places whether existing before or created after annexation or consolidation.[32]

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plying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the privilege may be exercised in the new streets as well as in the old."

[30] The court found: "Sunset Company and Home Company on May 19, 1905, accepted the offer of a statewide franchise contained in section 536 of the Civil Code in its entirety by the construction, maintenance and operation of telephone and telegraph lines within this state, and by so accepting said franchise assumed obligations commensurate with their rights under said section to furnish the people of this state with a communication service. Plaintiff by constructing, maintaining and operating telephone lines within this state since January 2, 1907, accepted and as the assignee of Sunset Company, and as the surviving corporation on the merger of Southern California Telephone Company into plaintiff, became the owner of the franchise offered by section 536 of the Civil Code and assumed the obligation commensurate with its rights under said franchise to provide the people of the State of California with a communication service. Pursuant to said franchise and the rights and obligations thereunder, as uninhabited areas have become populated and there has been a demand for service plaintiff has recognized and carried out its obligation to extend its lines, in so far as it has been reasonable so to do, to provide communication service to the people in said areas except where and to the extent that service has been and is provided by other telephone companies."

[31] Postal Telegraph-Cable Co. v. Railroad Comm., 200 Cal. 463, 473, 254 P. 258, 262.

[32] The court found: "Plaintiff's said telephone and telegraph lines were constructed, maintained and operated by plaintiff or its predecessors and are now maintained and operated by plaintiff in, upon, over, under, along and across the public roads, highways and streets (including streets, the underlying fee of which is owned by the City of Los Angeles) and other public places (including such real property as is owned by the City of Los Angeles in its governmental capacity) located within those areas which have been annexed to and consolidated with the City of Los Angeles since May 19, 1905, under

Further, Pacific must continue to construct, maintain, and operate such lines in order to provide telephone service to the public.

The city next contends that section 536 did not confer on Pacific any right to engage in the business of receiving and transmitting telephotographs, teletypewriter messages, radio programs, television programs, wired music, or mobile and ship-to-shore communications; and that, in any event, it has no right to use the public highways of the city in the rendition of such services.

Section 536 from its original enactment in 1872 until its re-enactment in 1905 granted a state franchise to "telegraph corporations" to construct "lines of telegraph" along and upon any public highway. Similar provisions had existed from 1850.[33] As re-enacted in 1905, it granted a state franchise to "telegraph or telephone corporations" to construct "lines of telegraph or telephone lines" along and upon any public highway.[34] Section 536 has not been amended since it was re-enacted.

The section was re-enacted for the purpose of "subjecting telephone corporations to the duties imposed upon, and conferring upon them the privileges granted to telegraph corporations."[35]

The court found that those parts of Pacific's lines which are located along and upon the public highways in the city are and may be used interchangeably for the transmission of electrical impulses of telephone conversations and the other types of communications to which the city objects, and that such other communications are all of

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and by virtue of plaintiff's state franchise under section 536 of the Civil Code (now Public Utilities Code section 7901), and plaintiff has the right and obligation, without obtaining a franchise from said City, to construct, maintain and operate said lines in said roads, highways and streets whether the same were laid out, opened and became public roads, highways and streets before or after annexation to or consolidation with the City of Los Angeles or may hereafter be laid out, opened and become public roads, highways and streets and public places for the purpose of providing a communication service to the people of the State of California; said service includes the transmission of any communication by means of electrical impulses; said lines include lines maintained by plaintiff on poles jointly owned and occupied by plaintiff and others. * * * Since May 19, 1905, there have been areas annexed to or consolidated with the City of Los Angeles, and between May 19, 1905, and the time said areas were annexed to or consolidated with said City plaintiff or one or more of its predecessors were engaged in the communication business within and furnished communication service to subscribers within all but a comparatively few of said annexed or consolidated areas. Said comparatively few areas in which plaintiff or one or more of its predecessors did not furnish communication service to subscribers were uninhabited at the time of annexation or consolidation. Plaintiff or its predecessors, pursuant to section 536 of the Civil Code, extended its or their lines throughout said annexed or consolidated areas to meet the demand for communication service as said areas became populated except to the extent that said areas were and are now served by other telephone companies."

Cases in other jurisdictions, holding that subsequent incorporation or annexation of territory covered by a franchise does not affect the rights and obligations under that franchise, include: People ex rel. Woodhaven Gaslight Co. v. Deehan, 153 N.Y. 528, 47 N.E. 787; City of Prichard v. Alabama Power Co., 234 Ala. 339, 175 So. 294; Mountain States Tel. & Tel. Co. v. Town of Belen, 56 N.M. 415, 244 P.2d 1112, 1120–1121. In City of Westport v. Mulholland, 159 Mo. 86, 60 S.W. 77, 53 L.R.A. 442, the Missouri Supreme Court said with respect to this proposition: "That the city could not by its ordinance deprive the railroad company of its franchise, or impair the obligation of its contract with the county court, treating the grant of the franchise and its acceptance as a contract, is a proposition of law that has not been gainsaid in this country since the decision in the Dartmouth College Case [Trustees of Dartmouth College v. Woodward] in 1819, 4 Wheat. 518, 4 L.Ed. 629."

[33] Stats.1850, p. 369; Stats.1857, p. 171.

[34] Stats.1905, p. 491.

[35] Report of the Commissioners for the Revision and Reform of the Law, Recommendations Respecting the Civil Code, September 1, 1900, pp. 69–70.

the same types, kind, and character as have been used since prior to 1905 by telephone companies for rendering telephone and other communication services.[36] The city argues that in re-enacting section 536, the Legislature distinguished between those electrical impulses required for the transmission of telegraph messages and those required for the transmission of articulate speech; that this was accomplished by the enumeration of "telephone corporations" and "telephone lines" separately and distinctly from "telegraph corporations" and "lines of telegraph"; that the special types of communication service were unknown in 1905; that it is obvious the Legislature did not intend to make "electrical impulse" the measure of Pacific's authority to engage in its activities and that it did not grant any rights to engage in the special types of service we have enumerated; that such power rests in the city; and in any event, Pacific has no right to use the public highways of the city in the rendition of such services. Pacific does not contend that it may use the highways within the 1905 city for these purposes without a franchise from the city. The judgment so declares. It claims it may do so outside the 1905 city under its section 536 franchise.

[14] We have held that the power to grant primary franchises to operate a telephone business does not rest in the city. For the same reasons, the power to grant primary franchises to engage in the business of furnishing the special types of communication service does not rest in the city. The question is whether Pacific, under its state franchise granted by section 536, may use its lines along and upon the public highways and other public places within the city, excluding the 1905 city, to transmit teletypewriter messages, telephotographs, radio programs, television programs, wired music, or ship-to-shore and mobile communications.

[15, 16] Only that which is granted in clear and explicit terms passes by a grant of a franchise. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocably granted is withheld. Nothing passes by implication. Civ.Code, § 1069; Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 273–274, 118 P. 796; County of Los Angeles v. Southern California Telephone Co., 32 Cal.2d 378, 384, 196 P.2d 773.

The city relies on City of Richmond v. Southern Bell Tel. & Tel. Co., 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162; Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., 127 Ind. 369, 24 N.E. 1054, 8 L.R.A. 539; Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co., 81 Tex. 494, 17 S.W. 57, 59; Peru Turnpike Co. v. Town of Peru, 91 Vt. 295, 100 A. 679, L.R.A.1917E, 559; Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796; and City of Hanford v. Hanford Gas, etc., Co., 169 Cal. 749, 147 P. 969.

In City of Richmond v. Southern Bell Tel. & Tel. Co., supra, it was claimed that the act of Congress of July 24, 1866, which granted to any "telegraph company" accepting the provisions of the act the right to construct, maintain, and operate "lines of telegraph" over and along military and post roads, applied to telephone companies. In holding it did not, the court stated, 174 U.S. 774, 19 S.Ct. 783, 43 L.Ed. 1167: "It may be that the public policy intended to be promoted by the act of Congress of 1866 would suggest the granting to telephone companies of the rights and privileges accorded to telegraph companies. And it may be that, if the telephone had been known and in use when that act was passed, Congress would have embraced in its provisions companies employing instruments for electrically transmitting articulate speech. But the question is, not what congress might have done in 1866 nor what it may or ought now to do, but what was in its mind when enacting the statute in question. Nothing was then distinctly known of any device by which articulate speech could be electrically transmitted or received between different points, more or less distant from each other, nor of companies organized for transmitting messages in that mode. Bell's invention was not made public until 1876. Of the different modes now employed to electrically transmit messages between distant points, congress, in 1866, knew only of the invention then and now popularly called the 'telegraph.' When, therefore, the act of 1866 speaks of telegraph companies, it could have meant only such companies as employed the means then used or embraced by existing inventions for the purpose of transmitting messages merely by sounds of instruments and by signs or writings. * * *

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[36] The court found: "Plaintiff's telephone and telegraph lines include all conduits, ducts, poles, wires, cables, instruments and appliances located in, upon, over, under, along and across public roads, highways and streets, other public places and private rights of way used by plaintiff in the rendition of a communication service by means of the transmission of electrical impulses. The portions of said lines which are located in, upon, over, under, along and across public roads, highways and streets and other public places within the City of Los Angeles and elsewhere are and may be used interchangeably for the transmission by electrical impulses of telephone conversations, telegraph messages, teletypewriter messages, telephotographs, program service (including the transmission of wired music, radio and television programs), and other communications and are of the same type, kind and character as have been used since prior to 1905 by telephone companies for rendering telephone and other communication services."

"It is not the function of the judiciary, because of discoveries after the act of 1866, to broaden the provisions of that act so that it will include corporations or companies that were not, and could not have been at that time, within the contemplation of congress. * * * [I]t is clear that the courts should not construe an act of congress relating in terms only to 'telegraph' companies as intended to confer upon companies engaged in telephone business any special rights in the streets of cities and towns of the country, unless such intention has been clearly manifested. We do not think that any such intention has been so manifested. The conclusion that the act of 1866 confers upon telephone companies the valuable rights and privileges therein specified is not authorized by any explicit language used by congress, and can be justified by implication only. But we are unwilling to rest the construction of an important act of congress upon implication merely, particularly if that construction might tend to narrow the full control always exercised by the local authorities of the states over streets and alleys within their respective jurisdictions. If congress desires to extend the provisions of the act of 1866 to companies engaged in the business of electrically transmitting articulate speech,—that is, to companies popularly known as 'telephone companies,' and never otherwise designated in common speech,—let it do so in plain words."

Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co., supra, 81 Tex. 494, 17 S.W. 57, applying the rule of strict construction, held that a city ordinance which granted a wharf company the right to construct a railroad along a street and make switches to its wharves north of the street so as not to obstruct the south side of the street gave no right to construct switches on the south side of its main track on the street. In Peru Turnpike Co. v. Town of Peru, supra, 91 Vt. 295, 100 A. 679, L.R.A.1917E, 559, it was held that the charter of a turnpike company granted in 1814 which gave it the right to take tolls for "wheeled vehicles or sleighs drawn by beasts" did not give it the right to take tolls for automobiles. We do not find anything in Indianapolis Cable St. R. Co. v. Citizens' St. R. Co., supra, 127 Ind. 369, 24 N.E. 1054, 8 L.R.A. 539, that is helpful.

Sunset Tel. & Tel. Co. v. City of Pasadena, supra, 161 Cal. 265, 118 P. 796, held that prior to its re-enactment in 1905 section 536 was not applicable to telephone companies. The court applied the rule of strict construction and stated, 161 Cal. at page 277, 118 P. at page 801: "As we have said, the telephone was unknown at the time of the enactment of section 536 of the Civil Code in the year 1872. While the possibility of transmitting speech along wires had previously been suggested by scientists, no one had ever succeeded in devising a practical instrument therefor until Bell made his discovery in the year 1875. To show that the idea of such transmission of the human voice was up to that time but a dream of scientists, reference need only be made to the Telephone Cases [Dolbear v. American Bell Tel. Co.], 126 U.S. 1, 8 S.Ct. 778, 31 L.Ed. 863. Under these circumstances, our Legislature granted the right to construct *lines of telegraph,* with the necessary poles, etc., along and upon the public highways of the state. We have seen that this court has expressly recognized that, from a strict etymological point of view, telephone lines would not be included in the words 'lines of telegraph,' or telephone corporations, within the words 'telegraph corporations.' We have seen further that the circumstances at that time were such that in its common acceptation the word 'telegraph' must have meant only the kind of communication then known and in practical use under that name, entirely excluding all idea of any such thing as the direct transmission of the human voice, and that by the simple method of speaking into an instrument of such slight cost that it could be placed in every dwelling house and place of business, with the necessary result that the use of practically all of the streets would be required. It is to be remembered that the question in determining the meaning of the word 'telegraph' contained in this statutory grant is: What was in the minds of the legislators as to its meaning when they used it? No rule of construction applicable to public grants warrants the inclusion therein of privileges not embraced within the common acceptation of the language used. * * * [161 Cal. at page 279, 118 P. at page 802] Any other construction would, it appears to us, make this statutory grant include rights and impose burdens on the public that were never within the contemplation of the Legislature, and this case is a striking illustration of the wisdom of the rule that requires a grant by the public to be strictly construed in favor of the grantor." [37]

In City of Hanford v. Hanford Gas, etc., Co., supra, 169 Cal. 749, 147 P. 969, it was claimed that the constitutional grant of a franchise to use the public streets in a municipality for the purpose of supplying " 'gaslight or other illuminating light' " [38] applied to supplying gas for heat and power. The city of Hanford had granted a franchise to use the streets to supply gas for heat, light, and power, which had been accepted by the defendant. The defendant claimed it was not bound by that franchise; that it had the right to use the streets for supplying gas for heat and power under its constitutional franchise. It argued that since the same mains and laterals were used for supplying gas for heat and power as were used for supplying gas for " 'gaslight or other illuminating light,' " no additional burden was imposed on the municipality or the streets. Holding the constitutional grant did not include the use of the streets for supplying gas for heat and power, the court stated, 169 Cal. at page 753, 147 P. at page 970: "The franchise granted by the city of Hanford did not attempt to touch upon, nor deal with, defendant's rights to supply gas for illuminating purposes. Unquestionably, while the same gas may be used through the same mains and laterals, the use of gas for heat and power is a distinct and different use from its use for illumination, and it is only the right to the latter use which is protected and, so to speak, given free under the constitution. * * * If the use is different, the right to the use is different. Conceivably a corporation might be formed for the purpose of supplying a gas unfit for illumination, but eminently well suited for purposes of heat and power. Could such a company without a franchise occupy the streets for this purpose under the constitutional grant of a right to occupy the streets for the supplying of illuminating gas? If it could not, then *per contra* a company supplying illuminating gas has acquired no right to supply a gas for the other separate enumerated uses. The vital question then is: Did the defendant, in accepting this franchise from the city of Hanford, acquire anything of value? If it did, then, no element of fraud entering into the case, it is bound by its contract. We think clearly that it did. Up to the time that it acquired the right to supply gas for purposes of heat and power it had the franchise right to supply gas solely for purposes of illumination, with the added guaranty under the decisions of this court that its franchise to supply illuminating gas would not be forfeited merely because it permitted its gas to be used for these other purposes. It was not told that it had the right, and it did not have the legal right, to permit its gas so to be used. If effort had been directed to that end, this use could undoubtedly have been restrained."

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[37] See, also, Central Union Tel. Co. v. State ex rel. Falley, 118 Ind. 194, 19 N.E. 604, 610, 10 Am.St.Rep. 114; Home Telegraph Co. v. Mayer, etc., of Nashville, 118 Tenn. 1, 101 S.W. 770, 773–776, 11 Ann.Cas. 824; Southern Telephone Co. v. King, 103 Ark. 160, 146 S.W. 489, 490, 39 L.R.A.,N.S., 402.

[38] Constitution, article XI, section 19, prior to its amendment in 1911.

The question is not answered by the fact that the challenged types of communication are transmitted by electrical impulses. If that were the answer it would have been held that prior to 1905 section 536 applied to telephone corporations and to telephone lines, since telegraph messages were transmitted by electrical impulses prior to 1905. If so, the Legislature did a useless act in adding "telephone corporations" and "telephone lines" in 1905. The term "telephone lines" is not all-inclusive to embrace all types of communication transmitted by electrical impulses. The Legislature did not use language embracing future discoveries as to the use of transmitting electrical impulses. When the public policy underlying a statute requires that future discoveries be covered, it is common practice to do so by use of appropriate language. Neither can the problem be answered by treating all of the various types of communications as being of the same character, as does the city. Nor is the question answered by the fact that the same lines are used for all the various types of communications. As to any use not granted by the Legislature in 1905, the city retained control. The question is: What was in the mind of the Legislature when enacting section 536 with respect to each type of communication? In specifying telephone companies, the Legislature meant only such companies as employed the means then used or embraced by existing inventions. And the test laid down in the Richmond case [39] and in the Pasadena case [40] is: Are the lines used to transmit articulate speech—the human voice? Wires and cables are not "telephone lines" when used for other types of communication.

[17] In another view of the problem it may be asked whether plaintiff had a duty under its section 536 franchise to provide all the services it now provides other than transmission of the human voice. We have seen that it has an obligation commensurate with the privileges which it enjoys under its franchise. The services which it renders, other than transmission of the human voice, embrace the transmission of telephotographs, instrumental music, and visual images such as were unknown, and by means that were undiscovered, at the time the franchise rights were acquired. Unless plaintiff undertook to render any and all types of wire service which might develop through future discoveries and inventions, it could not reasonably claim that it acquired the right to render them. It seems clear that plaintiff in accepting its franchise did not undertake to render types of service which were not only nonexistent but unanticipated.

The principle of construction applied in the Richmond case [41] and in the Pasadena case which we are compelled to follow, does not deny to section 536 a fair and reasonable construction, nor does it withhold that which the grant was intended to convey.

In a telephone conversation the human voice is converted into electrical impulses in the instrument. The impulses are transmitted over the lines, and in some instances through exchanges, to the receiver in which they are reconverted into the human voice. In some cases, Pacific transmits telephone conversations converted into electrical impulses partly over its lines and partly by radio by means of electrical waves without the use of connecting wires. The latter service began in the United States in 1920.[42]

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[39] City of Richmond v. Southern Bell Tel. & Tel. Co., 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162.

[40] Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796.

[41] City of Richmond v. Southern Bell Tel. & Tel. Co., 174 U.S. 761, 19 S.Ct. 778, 43 L.Ed. 1162.

[18] Teletypewriter communication is the transmission of telegraph messages by use of a teletypewriter.[43] The court found that Pacific is the owner of a franchise under section 536 to construct, maintain, and operate "telegraph lines along and upon the public roads and highways" throughout the state, including areas which have been annexed to and consolidated with the city since May 19, 1905. Thus Pacific has the right and the obligation to use its lines along and upon the public highways of the city, other than within the 1905 city, for the transmission of teletypewriter messages without a franchise from the city.

[19] The transmission of telephotographs is patently not the transmission of the human voice.[44] Photographs are converted into electrical impulses which are transmitted over Pacific's lines and are reconverted into the photographs at a receiving terminal. It cannot be said that in 1905 when the Legislature used the phrase "telephone corporations" it intended to embrace corporations engaged in transmitting photographs by electrical impulses or that when it used the words "telephone lines" it intended to comprehend lines used for that purpose. Such use exceeds the limits of Pacific's section 536 franchise.

[20] Radio programs consist in part of instrumental music and in part of articulate speech in one form or another.[45] Transmission of instrumental music is not transmission of the human voice. Pacific has a franchise under section 536 to transmit over its lines those parts of radio programs which consist of the transmission of the human voice. It does not have a franchise under section 536 to transmit instrumental music over its lines.

[21] There are two phases to the transmission of a television program: the video or image phase and the audio or sound

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[42] The various types of communications in question are all transmitted by electrical impulses.

All of the equipment used in transmitting telephone messages and the various other types of communication is located on private property, with the exception of the wires through which electrical impulses are transmitted and the poles and conduits therefor located along and upon public highways and other public places.

Amplifiers and repeaters are used to amplify the electrical impulses in all of the various types of communication. Amplifiers, battery plants providing 48 to 130 volts, are used to amplify voice communication. Amplifiers requiring 120 volts alternating current are used to amplify television impulses. The amplifiers and repeaters are not located along or upon public highways or other public places.

[43] In teletypewriter message communications the message is typed on an electric teletypewriter. It comes out of the teletypewriter on a perforated strip of paper in code, which is sent through a transmitter. The transmitter sends the coded message by electrical impulses over the lines used by Pacific for voice communication to a receiving station. There the electrical impulses go into a teletypewriter and come out typed in the form of the familiar telegraph message. See In re Teletype Mach. No. 33335, 126 Pa.Super. 533, 191 A. 210.

[44] The lines used in telephotographic service are the same as those used for voice communication. The receiving equipment is provided by the customer on his premises. Any picture intelligence may be so transmitted. Photographs are also transmitted by radio and by microwave. In some instances an exposed negative comes off the terminal; in others, a direct positive. Telephotographic service began commercially in the United States about 1927.

[45] In radio programs, sometimes called "audio" programs, sound, including the human voice, is converted into electrical impulses in the plant of Pacific or in equipment of a broadcaster, and transmitted over telephone lines, the same as used for "ordinary telephone service," to a privately owned broadcasting transmitter where it is broadcast over the air to receiving sets in which the electrical impulses are reconverted into sound or into the human voice.

phase.[46] In transmitting a television program two separate transmitters are employed, one for sound, the other for image.[47] The sound phase is transmitted over different lines from those used in transmitting the image phase. Transmission of the image phase is not transmission of the human voice. Pacific is required to obtain a franchise from the city for the transmission over and along the public highways of the city of the image phase of such programs. That use exceeds the limits of its section 536 franchise. The sound phase of television programs consists in part of instrumental music and in part of articulate speech in one form or another. Pacific has a franchise under section 536 to transmit over its lines those parts of the sound phase of television programs which consist of the transmission of the human voice. It does not have a franchise under section 536 to transmit over its lines those parts of the sound phase which consist of instrumental music.

In this connection Pacific relies on Ohio Tel. & Tel. Co. v. Steen, Ohio Com. Pl., 85 N.E.2d 579, an Ohio trial court opinion. That was a proceeding in eminent domain. The company had the power to condemn land for telegraph and telephone purposes. It was claimed that in addition to the transmission of telephonic messages the line would be used for television. The court held that the right of eminent domain for telegraph and telephone purposes conferred by the Ohio statute was applicable to television. The opinion is of no value in this state. We are bound by Sunset Tel. & Tel. Co. v. City of Pasadena, 161 Cal. 265, 118 P. 796, and the test there declared.

As we read the record wired music programs do not consist in the transmission of the human voice. Instrumental music is converted into electrical impulses and transmitted over Pacific's lines used for voice communication to receiving stations where the impulses are reconverted into music. Patently the Legislature did not have the transmission of instrumental music in mind in 1905. Such use exceeds the limits of Pacific's section 536 franchise.

[22] Lines used for mobile and ship-to-shore communications clearly come within the phrase "telephone lines." The lines are used to electrically transmit the human voice.[48] A telephone transmitter is at one

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[46] The image phase is in some instances converted into electrical impulses at the point at which the picture is taken outside a broadcasting studio, as at a baseball game, and the impulses are transmitted over the same lines used by Pacific for voice communication to a central office in Hollywood, thence over its lines to a television broadcasting studio, from the studio over its lines to a central telephone office, and thence by microwave to a transmitter. In other instances the picture is taken in a studio, there converted into electrical impulses which are transmitted over Pacific's lines used for voice communication to a central telephone office, and thence by microwave to a transmitter. At the transmitter the microwaves are converted into electrical impulses and transmitted over Pacific's lines used for voice communication to the broadcasting studio where they are again converted into microwave and transmitted to television receivers in which they are reconverted into visible images. In some instances Pacific, and in others the broadcaster, transmits the image phase from the studio to the transmitter. In other instances the image phase is transmitted from the point where the picture is taken outside the studio directly to the transmitter, then to the studio for insertion of commercials, and back to the transmitter where the program is broadcast,—all by microwave.

The sound phase of the program travels all the way to the transmitter over Pacific's lines, the same lines as are used for voice communication, but over different lines from those used for carrying the image impulses.

The broadcasting equipment is provided by the broadcaster. The band of frequencies required for the transmission of the human voice may be up to two or three thousand cycles wide, whereas the band of frequencies required for television may extend up to several million cycles wide. The electrical impulses used in voice communication are one volt or less; those used in image transmission are one or two volts, peak to peak.

Television was first transmitted over Pacific's lines commercially in 1948.

[47] Warner, Radio and Television Law, § 71.

[48] Mobile and ship-to-shore communications are similar. They are telephone

end and a telephone receiver at the other end. The electrical impulses are carried part of the distance from the transmitter to the receiver by microwave. This does not alter the fact that the use made of the lines is transmission of the human voice.

We conclude that Pacific has a franchise under section 536 to use its lines over and along the public highways and other public places of the city outside the 1905 boundaries for the transmission of teletypewriter messages, those parts of radio programs and those parts of the sound phase of television programs which consist of the transmission of the human voice, and mobile and ship-to-shore communications; that it does not have such a franchise for the transmission of telephotographs, the image phase of television programs, so much of the sound phase of radio and television programs as consists of instrumental music, or wired instrumental music, and that it is required to obtain a franchise from the city to use the public highways and other public places within the city, including the areas annexed to and consolidated with the city since May 19, 1905, for such services.

The city claims that Pacific contracted away its franchise under section 536 and is estopped to deny such contract. The claim is premised on the argument that Pacific, by accepting the provisions of Ordinance 35,474, agreed to surrender at the option of the city its rights and obligations under section 536.[49] The claim is untenable.

The court found that Ordinance 35,474 was not intended by the city to require a surrender or forfeiture of any rights or obligations under section 536, and that neither Southern nor Pacific agreed to surrender any such rights or obligations.[50]

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communications with mobile units such as automobiles, trains, and ships in the near coastal waters using radio. Such communication is by conversion of the human voice into electrical impulses and their transmission, usually partly by telephone lines and partly by radio. Pacific began mobile radio telephone service in the Los Angeles area about 1947.

[49] The surrender provisions of Ordinance 35,474 read: "That said Southern California Telephone Company, its successors or assigns, shall operate its telephone system within the limits of the City of Los Angeles as said limits now or may hereafter exist solely under the rights and privileges granted by said Ordinance No. 6959 (New Series), and said Southern California Telephone Company, its successors or assigns, shall surrender, without compensation, at the option of the city, all rights acquired by it in any manner whatsoever by or through any other franchise heretofore granted and effective in any portion of the city as the same now exists, or heretofore or hereafter granted and effective in any territory outside of the limits of said city as the same now exists, and which may hereafter be incorporated in or annexed to said city, and shall surrender the whole of any such franchise, together with all rights and privileges granted thereby, and exercised thereunder, whenever the limits of said city shall be enlarged by the addition of territory through annexation or consolidation proceedings which territory is inclusive of the territory covered by said franchise. In the event said city shall exercise its option to require said Southern California Telephone Company, its successors or assigns, to surrender any of its rights or privileges under any of said franchises, as above provided, said city shall exercise the same by the adoption of a resolution of its legislative body, requiring said company to surrender the rights and privileges set forth in said resolution. Upon the adoption of any such resolution the rights or privileges therein contained shall ipso facto be and become forfeited, and said Southern California Telephone Company, its successors and assigns, shall, by the acceptance of the conditions contained in this ordinance, as hereinafter provided, be deemed to fully consent thereto."

[50] The court found: "Subsection 2 of section of Ordinance No. 35,474 (New Series) (Exhibit 'B' to the complaint on file herein) was not intended by the City of Los Angeles or its Council to require, or to grant said City an option to require, a surrender or forfeiture of any rights or obligations of Southern California Telephone Company or plaintiff under the state franchise granted said corporations or either of them pursuant to section 536 of the Civil Code, and neither Southern California Telephone Company nor plaintiff agreed or intended to agree to the surrender or forfeiture of any rights or obligations under said franchise."

[23, 24] Evidence was received, without objection, in aid of interpretation of Ordinance 35,474 and conflicting inferences may be drawn therefrom. The finding is supported by the evidence and may not be disturbed. The city says the question is one of law.[51] Assuming, without deciding, it to be a question of law and that Pacific had the power to surrender or forfeit its obligations under section 536, there are two answers to the city's claim. First: We think it obvious from a reading of Ordinance 35,474 that the option given the city to require a surrender or forfeiture of any franchise did not extend for all time but for the life of the king franchise. We find nothing in the opinion or order of the Railroad Commission which stated that Southern would operate under the King franchise, indicating that it approved relinquishment of Southern's rights under section 536. Second: The claim is answered by City of San Diego v. Southern California Telephone Co., 92 Cal.App.2d 793, 208 P.2d 27. San Diego adopted a freeholders' charter in 1889. In 1886, 1896, and 1904, Pacific's predecessors were granted franchises to use streets by city ordinances. In 1914, by Ordinance 5681, the city granted Pacific a franchise for 30 years over and along all of the public streets and places "now or hereafter existing" in the city. Pacific accepted the franchise. In 1930 Pacific, pursuant to authorization of the Railroad Commission, assigned the 1914 franchise to Southern. From 1914 to 1944 the terms of the franchise were complied with, both with respect to the territory within the city as it existed in 1914 and as to territory annexed to and consolidated with the city after 1914. On expiration of the franchise in 1944, Southern claimed it had a franchise to use all streets in the city under section 536. The city claimed that Pacific, having accepted the franchise as

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"Neither plaintiff nor Southern California Telephone Company made any representation to the City of Los Angeles, the Public Utilities Commission of the State of California or the Railroad Commission of the State of California that it had surrendered or forfeited or would surrender or forfeit any of its rights or obligations under its state franchise granted by section 536 of the Civil Code within the areas or any of the areas annexed to or consolidated with the City of Los Angeles since May 19, 1905, that plaintiff would continue after February 8, 1952, making franchise payments to said City for the right to construct, maintain or operate telephone or telegraph lines on the public roads, highways and streets and other public places within areas which have been annexed to or consolidated with said City since May 19, 1905, or that under any new franchise it might obtain from said City plaintiff would make payments computed on the same basis as payments were computed under the franchise granted by Ordinance 6959 (New Series). No declaration, act or conduct of Southern California Telephone Company or plaintiff was intended by said Southern California Telephone Company or plaintiff to lead, nor has it led, the City of Los Angeles to believe that either Southern California Telephone Company or plaintiff had surrendered or forfeited or would surrender or forfeit any rights or obligations under said state franchise or that under any new franchise it might obtain from said City plaintiff would make payments computed on the same basis as payments were computed under the franchise granted by said Ordinance No. 6959."

[51] The correct rule is stated in Overton v. Vita-Food Corp., 94 Cal.App.2d 367, at page 370, 210 P.2d 757, at page 759: "Appellant first says that we are not bound by the trial court's construction of the contract and are called upon to determine its meaning as a matter of law. Counsel cite Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, and Texas Co. v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180. This rule applies only where the trial court's decision was based solely on the terms of the written instrument. Union Nat. Bank v. Hunter, 93 Cal.App.2d 669, 673, 209 P.2d 621. This was the situation in the cases cited by counsel. The rule is otherwise where parol evidence is introduced in aid of interpretation of the contract and where the evidence is such that conflicting inferences may be drawn therefrom. In such case the rule is that a reviewing court will accept or adhere to the interpretation of a contract adopted by the trial court and not substitute another of its own. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319."

to all public streets and places "now or hereafter existing," the annexed and consolidated areas could not be segregated from the rest of the city. The court held first that Southern did not have a franchise under section 536 within the city as it existed on May 19, 1905. Rejecting the city's claim, the court stated, 92 Cal.App.2d at page 808, 208 P.2d at page 36: "We are not here concerned with the effect these matters might have had upon the contract between the parties, expressed in Ordinance No. 5681, had the defendant attempted to violate the terms of that contract during the 30-year period of its existence. This they did not do and the sole question on this appeal depends upon the situation as it existed in 1916 and thereafter, when the various annexations to the city were made. No charter provisions to the contrary existed when the amended section 536 took effect in the areas which were later annexed to San Diego. It is now clearly established that when a telephone company has acquired a state franchise through its acceptance of the offer made by section 536, as amended in 1905, with respect to a certain territory, it has a vested right which may not be interfered with by any local authority. (Citations.) This right would not be lost by subsequently acting, for a time, in compliance with a franchise issued by the city. City of Oakland v. Great Western Power Co., 186 Cal. 570, 200 P. 395." [52]

Finally, the city contends that a freeholders' charter city is not bound by the provisions of the Broughton Act.[53] There is no dispute on the point. Pacific agrees that the city is not bound by the act. The city's contention on this point is that the provisions of the judgment with respect to payments under any future franchise it may grant are erroneous. It says the judgment applies the Broughton Act and compels it to follow the method of payment prescribed by that act in any franchise it may later grant to use the public highways within the city as it existed on May 19, 1905. We do not so construe the judgment.

The judgment in this respect declares:

1. The city may not require Pacific to pay for any franchise it may obtain for that part of the city within its boundaries on May 19, 1905, any compensation based on or related to revenues attributable to plant or investment located on private property within and without the areas covered by such franchise.

2. The method of computing the payments required by the King franchise and by an agreement of January 31, 1947, between the city and Southern, would be unreasonable if applied to any new franchise covering the area as it existed on May 19, 1905; and the city may not require the same.

3. The court does not direct or order the parties to agree to any formula for computing payments in the event the city should grant a franchise to Pacific.

4. The city may not grant any franchise pursuant to Ordinance 58,200, the ordinance prescribing the procedure for granting franchises, without it first submitting such franchise for competitive bidding; and it must be awarded to the highest bidder on the basis or bases prescribed in the advertisement for bids. The only limitation the city may impose on such bidding shall be that if the advertisement invites bids on the basis of a percentage of gross annual receipts received from the use, operation, or possession of such franchise, the bid shall not be less than 2% of such gross annual receipts.

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[52] See, also, Town of Suisun City v. Pacific Gas, etc., Co., 35 Cal.App. 380, 170 P. 1078; Iowa Telephone Co. v. City of Keokuk, D.C.S.D.Iowa, 226 F. 82, 99–100; Town of Golconda v. Field, 108 Ill. 419, 427–428; Abbott v. City of Duluth, C.C. D.Minn., 104 F. 833, 837–838; Farmer & Getz v. Columbiana County Telephone Co., 72 Ohio St. 526, 74 N.E. 1078; Wright v. Glen Telephone Co., 112 App. Div. 745, 99 N.Y.S. 85; State ex rel. Larimer v. Chariton Telephone Co., 173 Iowa 497, 155 N.W. 968, 970; City of Lansing v. Michigan Power Co., 183 Mich. 400, 150 N.W. 250, 251; T. B. Townsend Brick & Contracting Co. v. Central Trust Co., 6 Cir., 187 F. 63, 70.

[53] Stats. 1905, p. 777, Public Utilities Code sections 6001–6017.

5. The city "may not require as a condition to the granting to plaintiff of a franchise that plaintiff provide said City with free telephone service."

[25] The use of public highways within the area of the city as it existed on May 19, 1905, is a municipal affair and the provisions of the city charter are controlling over general laws. City of San Diego v. Southern California Telephone Co., 92 Cal.App.2d 793, 800–803, 208 P.2d 27; City of San Diego v. Kerckhoff, 49 Cal. App. 473, 480, 193 P. 801. The charter of the city gives it the power to grant a franchise to a telephone company to use the public streets and other public places within the city.[54]

Ordinance 58,200 of the city, the ordinance prescribing the procedure for granting franchises, provides that the payment by the holder of a franchise shall be "the highest percentage of gross annual receipts received from the use, operation or possession of such franchise, permit or privilege; provided, that such percentage of gross annual receipts shall not be less than two per cent (2%) of such gross annual receipts." [55]

[26, 27] The payment by the holder of a franchise is in the nature of a toll or charge for the privilege of using the public highways covered by the franchise. City of San Diego v. Southern, etc., Tel. Corp., 42 Cal.2d 110, 266 P.2d 14; County of Tulare v. City of Dinuba, 188 Cal. 664, 670, 206 P. 983; San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal.App. 77, 82, 225 P. 304. Under Ordinance 58,200 the holder pays a percentage of the gross annual receipts "received from the use, operation and possession of such franchise." The holder of the franchise does not, as the city says, pay "a charge determined by a percentage of the *total* gross receipts derived by the company from its business within the City."

[28] The provision of the judgment that the city may not require Pacific to pay any compensation based on revenue attributable to its property located on private property, is manifestly proper. The city has no power either directly or indirectly to exact rental for the use by a public utility of its own property not located along or upon public highways or other public places. Ocean Park, etc., Corp. v. City of Santa Monica, 40 Cal.App.2d 76, 84–87, 104 P.2d 668, 879.[56]

The provision of the judgment that the method of computing payments required by the King franchise and by the agreement of January 31, 1947, between the city and Southern, would be unreasonable, is in accord with Ordinance 58,200 and is also proper.[57]

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[54] Stats.1905, pp. 980, 994, Charter, § 2, subd. 25. See Stats.1917, pp. 1686, 1691; Charter, art. 1, § 2, subd. 51.

[55] The pertinent provisions of Ordinance 58,200 are:

"Sec. 5. 1. The council shall, if it proposes to grant any such franchise, permit or privilege, advertise the fact of such application, together with the statement that it is proposed to grant the same, once in a newspaper of general circulation, printed, published and circulated in said city.

"2. Such advertisement shall state the character of the franchise, permit or privilege proposed to be granted, * * * shall state, (except in the case of a franchise granted for ten (10) years to replace a franchise about to expire), that sealed bids therefor will be opened at a stated time and place, and that the franchise, permit or privilege will be awarded to the bidder offering:

"(a) To pay to the city during the franchise, permit or privilege, the highest percentage of gross annual receipts received from the use, operation or possession of such franchise, permit or privilege; provided, that such percentage of gross annual receipts shall not be less than two per cent (2%) of such gross annual receipts; or

"(b) To pay to the city such other compensation or consideration for the use, permit or privilege as may be prescribed by the Council in the advertisement for bids and notice of sale; * * * provided, that the Council may, in said advertisement for bids and notice of sale, invite bids on any one, or all, or any part of the bases prescribed under paragraphs (a) and (b) of subsection 2, of section 5 of this ordinance.

"(c) The terms and conditions to be imposed upon the grantee on account of the use, operation or possession of such franchise permit or privilege shall be included in said advertisement for bids and notice of sale."

[56] See, also, City of Spokane v. Spokane Gas & Fuel Co., 175 Wash. 103, 26 P.2d 1034, 1035; City of Spokane v. Spokane Gas & Fuel Co., 182 Wash. 475, 47 P.2d 671, 674–675.

The judgment does not determine, as argued, that the city cannot require as the condition of a city franchise that minimum compensation be in excess of 2% if based on gross annual receipts received from the use, operation, or possession of the franchise. It does not require the parties to agree to use any particular formula or method of determining compensation should the city grant a franchise to Pacific. The provisions with respect to advertising for bids competitive bidding, award to the highest bidder, and that the only limitation the city may impose is that *if* bids are invited on the basis of a percentage of gross annual receipts received from the use, operation, or possession of the franchise, the bid shall not be less than 2% of such receipts,—are nothing more than a restatement of the provisions of Ordinance 58,200. Neither under the judgment nor under the ordinance is the city compelled to invite bids on the basis of a percentage of the gross receipts received from the use operation, or possession of the franchise. It may, as provided in the ordinance, invite bids on the basis that the holder of the franchise pay "such other compensation or consideration for the use * * * as may be prescribed by the Council in the advertisement for bids and notice of sale," or the city may invite bids on "any one, or all, or any part of the bases prescribed" in the ordinance.

[29, 30] We are of the opinion that the provision of the judgment to the effect that the city may not require that Pacific provide the city with free telephone service cannot stand. The matter of granting a franchise within the 1905 limits of the city, and within the present boundaries of the city as to the types of communication for which a franchise is required therein, is one of contract between the city and the successful bidder. In its advertisement for bids the city may impose such terms as it sees fit so long as they comply with Ordinance 58,200 and so long as they are reasonable rental for the use of the public highways and other public places. There is no reason why the city may not, as a part of the reasonable rental, include the value of telephone service furnished the city. The total of the value of telephone service furnished the city and whatever other rental is charged may not exceed reasonable rental for the use of the public highways and other public places.

The judgment insofar as it declares that Pacific's lines may be used for the transmission of telephotographs, so much of radio programs and so much of the sound phase of television programs as consists of instrumental music, the image phase of television programs, and wired instrumental music programs, and insofar as it declares that the city may not require as a condition to the granting to plaintiff of a franchise that plaintiff provide the city with free telephone service is reversed with directions to the superior court to amend its findings of fact, conclusions of law, and judgment in accord with the views expressed in this opinion. In all other respects the judgment is affirmed. The parties shall bear their own costs on appeal.

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[57] Under the King franchise, Southern, and later Pacific, paid the city 2% of their gross local telephone receipts from telephones located within the boundaries of the city as they from time to time existed, plus 2% of a portion of the gross toll receipts from the same telephones.

The agreement of January 31, 1947, between the city and Southern settled litigation as to payments under the King franchise. It provided for payment of 2% of 85% of all gross amounts charged for telephone service at telephone stations of Southern within the city and classifiable to certain accounts of the uniform system of accounts for telephone companies prescribed by the Federal Communication Commission. Payments were made under the King Franchise and the agreement until February 8, 1952, when the King franchise expired.

The court found that the payment provisions of the King franchise and of the agreement of January 31, 1947, as applied to a new franchise, would require Pacific to pay the city compensation based in part upon revenues attributable to plant on private property, both within and outside the franchise area, and plant on public property outside such area.

SHINN, P. J., and PARKER WOOD, J., concur.

125 Cal.App.2d 478

SACRAMENTO & SAN JOAQUIN DRAINAGE DIST.
v.
TRUSLOW et al.

Civ. 8226.
Sac. 6296.

District Court of Appeal. Third District. California.

May 25, 1954.

Rehearing Denied June 24, 1954.
See 271 P.2d 930.

Hearing Denied July 21, 1954.

Action by drainage district to condemn an easement on certain lands. The owner of the land, lessee, a reclamation district which had issued bonds on assessments levied against the land, and the county treasurer appeared as defendant. The Superior Court, Yolo County, McDonald, J., entered judgment from which the owner, reclamation district, and county treasurer appealed. The District Court of Appeal, Van Dyke, P. J., held that the award to the lessee of value of his term, and for his rental obligation in the future, and to the owner of the value of his reversionary interest was proper.

Judgment affirmed.

1. Eminent Domain 🔑223

The condemnation by a drainage district of a right of way to build an outlet or training levee from catch basin established by drainage district, according to specified plans, included right to borrow soil from alongside the proposed location of the levees and within the easement area and to pile and shape that soil so as to create the levees themselves, and thus the failure to make an award with reference to such soil and determination as to whether there was a taking unauthorized by law, did not amount to a failure to dispose of the material issues, since there was in fact no taking of the soil.

2. Eminent Domain 🔑155

Where owner of land on which drainage district condemned right of way to build outlet or training levy from catch basin established by district, had leased to tenant for period of years, and tenant had constructed well which was rendered useless by the improvement, owner could not complain of an award of "special damage" to tenant for destruction of well on ground that well belonged to owner as part of his fee estate and value should be paid entirely to him, since it would be assumed that whatever added value the well gave to the freehold was considered in fixing the total award payable to owner for the property taken, and the award of special damage to tenant did not lessen owner's award.

3. Eminent Domain 🔑155

In view of fact that lessee of premises of which only a portion, such as a right of way, is taken by condemnation proceedings, would not be absolved from his covenant to pay full rent for the period of the lease, the lessee is to be awarded, by virtue of loss of his estate and right to its enjoyment and continuance of personal liability, not merely the value of the term, but also a sum of money equivalent to present value of the sum of the rents payable in the future, and the lessor is to be awarded only the present value of his reversion, which he holds subject to the term created by the lease.

4. Eminent Domain 🔑157

In proceeding against owner and his lessee to condemn right of way to build outlet or training levee from catch basin established by drainage district, findings as to amount due owner for his reversion or interest, and amount due lessee as value of his unexpired term, and rental obligations for balance of his term, were sustained by the evidence.

5. Eminent Domain 🔑224

Where, upon condemnation of right o way in land subject to lease, an award wa made to owner for his reversionary interest, and to tenant for value of his unexpired term and rental obligations for balance of his term, owner was not entitled to have case reopened during period of submission before judgment to permit evidence that tenant had forfeited his lease after trial for nonpayment of rent and had assigned all his interest in the entire award, since court was bound by statute to fix the compensation and damages payable to tenant for his estate as of the date summons issued, and owner had adequate remedy at law if tenant failed to pay his rental thereafter accruing. Code Civ.Proc. §§ 1248, 1249.

6. Eminent Domain ⚷157

In obeying the statutory command that value of interest in land taken be separately determined, court is not engaged in an equitable distribution of the whole value of the property taken as between persons having undefined and unascertained claims thereto, but it is determining the value of the interest of each owner in the land taken in order that such owner might have paid over to him the respective amount to which he is entitled, without regard to amounts paid to owners of other interests. Code Civ.Proc. §§ 1248, 1249.

7. Eminent Domain ⚷205

In proceeding by which drainage district sought to condemn right of way to build outlet or training levee from catch basin, wherein motion was made pending appeal that evidence be taken touching the matter of severance damage which court had determined was more than offset by benefits resulting to land from construction of training levees, record warranted conclusion that determination that severance damages were more than offset was not based on erroneous or mistaken belief by trial judge as to the permanency of the training levees.

8. Eminent Domain ⚷152(1)

Reclamation district which had issued bonds against assessments levied on three parcels of land, including that as to which drainage district condemned an easement, resulting in benefits offsetting any severance damage, was not entitled to have portion of award set aside for principal and interest on the assessment as to the affected strip, computed on theory that assessment was uniformly distributed over the land, since assumption of uniformity was fallacious and in any event the security was not impaired because of the enhancement of value of the affected land. Water Code, §§ 51231 to 51238.

9. Eminent Domain ⚷157

A trial court has the power in a condemnation proceeding to measure the amount to be set aside to protect lienholders, and such power includes the power to find from the facts that no protection is needed, accompanied by refusal for that reason to set aside any fund at all.

10. Eminent Domain ⚷152(1)

In view of fact that bonds issued by reclamation district against assessments levied on land, as to which drainage district condemned an easement, gave to landowner, correlative to right of bondholders to have the contractual right to have the calls made and the bonds paid at stipulated maturity rate, the right to have the maturity rate observed in fulfillment of general statutory purpose that he would not be compelled to pay in advance, court would not have portion of compensation award set aside as security for the assessments, thereby requiring landowner to pay in advance, when the easement taken did not impair, but enhanced the security.

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Earl S. Patterson, William B. Borthwick, Los Angeles, and Carl E. Rodegerdts, Woodland, for appellant Truslow.

Chalmers, Cowing & Sans, Woodland, for appellant Dist.

E. L. Means and James F. Roach, Woodland, for appellants Cole & Yolo County.

Edmund G. Brown, Atty. Gen., by Walter S. Rountree, and John Morris, Deputies Atty. Gen., for respondent Sacramento & San Joaquin Drainage Dist.

Mento & Buchler, by George K. Littlefield, Sacramento, for respondent King.

VAN DYKE, Presiding Justice.

Basically, the Sacramento-San Joaquin Drainage District was created and is operated for the purpose of carrying out a general flood control project for the Sacramento and San Joaquin Rivers and their tributaries. The waters discharged into these streams at flood times are far in excess of the carrying capacity of the river channels. In the Sacramento Valley, to supplement this carrying capacity, lands have been set aside as by-passes in which the excess waters may be carried. The Yolo By-Pass is a part of this system. It takes water from the Sacramento River, carries it down westerly of the river channel and empties it back into the river at a lower point. This by-pass is in part located in Yolo County and Cache Creek empties into the by-pass area at a point in that county. This creek brings water from Clear Lake and Indian Valley lying in the westerly mountains. It is the largest sediment-carrying stream on the west side of the valley and if uncontrolled would drop its sediment in such a way as to block the operation of the by-pass. As a part, therefore, of the entire plan of handling the flood waters in the valley a settling basin for Cache Creek was selected to take the sediment out of its waters. When the waters of the creek have deposited their sediment they are admitted into the by-pass over a low levee. It was necessary in the operation of the settling basin to direct the flow of Cache Creek into the basin as the tendency of the stream was to drop its sediment quickly when its waters were slowed and thus build a ridge or elevated bed of deposits extending out across the settling basin and to the by-pass. Waters of the creek were controlled by training levees constructed so as to best utilize the capacities of the basin; as time went on two outlets were used to the limit and a third became necessary.

This action was brought to condemn a right of way to build this third outlet or throat. The district by resolution declared it was necessary that a further right of way easement be acquired for the purpose "of a diverting channel and training levees for the diverting of Cache Creek into Cache Creek Settling Basin and the taking of necessary materials therefor." It more particularly described the property sought to be taken as "an additional right of way and easement for the construction and perpetual maintenance of said channel and training levees * * * with the right to take materials for the construction thereof."

Appellant Wallace B. Truslow owned some 1,900 acres of land lying within the settling basin and generally concerning the title situation between the district and Truslow the findings of the trial court disclosed the following: In January of 1935 the district purchased from Truslow's predecessor in interest a perpetual right and easement without recourse to compensation for damage therefrom for the passage of all flood waters of the Yolo By-Pass which might from time to time inundate some 3,000 acres particularly described in the conveyance to the district and located in the settling basin. There was granted to the district rights of way for construction of levees of the flood control project, described as "(a) Right of way for construction of the westerly training levee of Cache Creek Settling Basin, said right of way being 200 feet, more or less, in width, * * *; (b) Right of way for the construction of the easterly training levee of the Cache Creek Settling Basin, said right of way being 250 feet more or less in width, * * *." Again, on January 24, 1940, Truslow's predecessor in interest conveyed to the district a perpetual right and interest without recourse to compensation for damages therefrom for the passage of all flood waters of the Yolo By-Pass which might from time to time inundate the grantor's lands. On February 23, 1940, for additional compensation Truslow's predecessor in interest granted additional easements to the district which included "a perpetual right of way and easements to build, construct, * * * and forever maintain the west training levee of the Cache Creek Settling Basin, a part of the Sacramento River Flood Control Plan of the California Debris Commission," over certain lands therein described. This conveyance included "the perpetual right and easement, without recourse to compensation for damage therefrom, * * * for the passage, retention and settlement of all flood waters of Cache Creek and Yolo By-Pass, which may from time to time inundate, * * *" the lands of the grantor.

Thereafter appellant Truslow became the owner of three sections of land within the settling basin subject to the aforesaid easements and flowage rights. By the present action, which, as we have said, was intended to provide for the construction of a third throat out of Cache Creek and into the settling basin to be situated west of the preceding two throats, the district sought to condemn an easement over 234 acres of Truslow lands. The district took immediate possession and constructed the channel and training levees.

The greater part of Truslow's lands were leased to respondent King. This lease covered 161 acres of the 234 acres lying in the easement area. His lease had four years to run. The cause was tried to the court sitting without a jury. After fixing the value of the property taken, the court separately assessed the interests therein of Truslow and King and so apportioned the total award between them. In addition the court awarded to King certain special damages. From the judgment Truslow appeals.

When the action was brought all of Truslow's lands were burdened by reclamation assessments levied by Reclamation District 2035. After levying the assessment the reclamation district issued bonds. The total of assessments underlying the bonds and constituting a lien on the lands in the district amounted to $2,264,740. None of the bonds have yet matured. The reclamation district was made a defendant in the condemnation actions, its interest being alleged to be that of the holder of assessment liens upon the property sought to be taken. The district appeared and took the position that the security of the bonds would be affected by the granting of the relief sought by the district in its action and that, consequently, some provision would have to be made to protect its interest and the interest of the bondholders. Roy E. Cole, as Treasurer of Yolo County, appeared as an interested party. The bondholders were not made parties to the suit. The trial court found, however, that the security for the payment of the lien would not be lessened, and consequently gave no relief to the district. The district and Cole have separately appealed from that portion of the judgment which so decrees.

The Appeal of Truslow

[1] Appellant Truslow attacks the entire judgment by claiming that the same is invalid for indefiniteness and failure to decide all of the issues presented in the case. More specifically he makes the following points: 1. That the district attempted to procure an easement upon Truslow's lands free and clear of the lien of the bond issue thereon and that the judgment "wholly fails to reflect the court's findings of any of the facts with regard to the bond issue and the lien thereof or the non-joinder of parties." The attack is not warranted. The court specifically found that the district was entitled to take the incorporeal interest free and clear of the lien of the assessment and bonds, basing its action upon its finding that the value of the interest taken had been more than offset by the benefit conferred by the construction of the improvement proposed (this construction had been completed before the trial was held), with the result that there had been no lessening of the security underlying the bonds. For that reason no security provisions were made with respect to the reclamation district. The court decreed that the property rights taken in the suit were free of any demands arising under the liens which had theretofore been impressed upon the land over which the easements were condemned. The propriety of this action of the court will be treated when we turn attention to the appeal of the district. We are here concerned only with the claim that the judgment did not determine things which necessarily had to be determined to dispose of all of the issues presented to the court. Truslow makes another specific claim of failure on the part of the trial court to dispose of the pertinent issues. It appeared during the trial that in the construction of the new training levees the soil necessary to construct the same was borrowed from the lands within the area of the easement. Truslow complains that this was a taking of property unauthorized by the law; that plaintiff had not even attempted to obtain title to the soil

so removed from its initial location and used in the construction of the levees. However, this claim ignores the plain allegations of the complaint and the findings of the court. The easement was in part for the purpose of constructing the training levees in accordance with the plans therefor as indicated in the pleadings. The rights taken included the right to borrow soil from alongside the proposed location of the levees and within the easement area and to pile and shape that soil so as to create the levees themselves. The right to do these things was part and parcel of that which was condemned and paid for. Truslow complains that the district could not under the law "acquire the soil upon defendant's land by way of easement." The district did not seek such a right and has not used such a right. It did seek and got the right to use the soil in order to construct the levees. The evidence does not show that any soil was removed from the easement area nor otherwise moved at all except for the avowed uses for which the easement was taken. The respondent district obtained and claimed no title to the soil itself and the effect of the judgment is not to give it any such title. We think that the trial court disposed of all the issues made and presented to it by the pleadings and by the proof.

[2] During the tenancy of respondent King he had, prior to the initiation of the condemnation action, drilled a water well from which he could irrigate some 300 acres of land, part of which lay within the easement area and the rest of which lay without. This well cost King $4,555. The court found that by the construction of the district's improvements on the easement area and the use being made of that area the usefulness of the well had been completely destroyed. It awarded King the cost of the well as "special damage", not payable out of the general award. The lease provided as to wells constructed by King that at the termination of his lease he might remove pumps and pumping machinery, exclusive of casing; and that he could not remove pump houses and engine blocks, the removal of which might impair the usefulness of the well. Truslow argues that from these provisions of the lease it is apparent the well in question belonged to Truslow as a part of his fee estate and that the value of the well should, therefore, be paid entirely to him. We are not here concerned with the propriety of the court's action in awarding "special damage" to King, representing the cost of the well paid by him. The respondent condemnor contended throughout that no allowance should be made separately by reason of the destruction of the well, but is not appealing from the award made to King. As to appellant Truslow, however, his interest in the well was not separable from his interest in the real property of which it was a part and we must assume here that whatever added value the well gave to the freehold was considered in fixing the total award payable by the respondent district for the property taken. Truslow cannot complain that the cost of the well to King was awarded to him as "special damage". This award did not lessen the award made for the property taken. Indeed, one of Truslow's witnesses on value testified that in his opinion the well was worth $5,000 and that he had taken such an amount into consideration in his estimate of the value of the easement sought to be condemned upon Truslow's property.

[3] Appellant Truslow contends that the amount of damages paid to respondent King under the findings as to the value of his leasehold interest is entirely disproportionate with the amount of damages paid to appellant Truslow as owner of the land over which the easement was taken. In fixing the value of the interests of Truslow and King in the property taken and thus the total award, the trial court applied the rule laid down in City of Pasadena v. Porter, 201 Cal. 381, 397, 257 P. 526, 528, 53 A.L.R. 679. The trial court found as a fact, and it is not claimed by appellant Truslow that the finding was not amply supported, that although the district was condemning an easement, yet the nature and use thereof were such that the entire value of the land within the easement was taken. It therefore, for the purpose of fixing damages for the taking and the apportionment of the award between the owner and his tenant, applied the same

rule which under the cited decision is applicable where a fee is condemned. The rule was stated in the opinion in that case as follows:

> "* * * According to the majority of the decisions, the taking of the entire demised property by condemnation proceedings operates to release a tenant from liability for subsequently accruing rent, but a taking of a portion only does not terminate the lease or absolve the lessee of his covenant to pay the full rent. * * * '* * * in such case the lessee would not be entitled to apportionment or an abatement of the rent for the part of the land taken, but was bound to pay rent for the whole of the premises demised. * * * If the covenant to pay rent is not affected by the proceedings and judgment of condemnation, it is clear that the lessor would be entitled as compensation only to the present value of his reversion, which he holds subject to the term created by the lease; and the lessee continuing personally liable but losing his estate, and right to its enjoyment, would be entitled to receive not merely the value of the term, but also a sum of money equivalent to the present value of the sum of the rents payable in futuro. That is, he should receive the value of his term, subject to the rent, and such further sum as would be considered a present equivalent for the rent thereafter to be paid, and the lessor would receive correspondingly less.'"

Applying this rule, the trial court found that the value of King's unexpired term fixed as of the date the summons in the action was issued amounted to $19,020; the court further found that the sum of $8,350 represented the rent still to be paid by King on the condemned land for the balance of his term. As to both Truslow and King the trial court found that neither was entitled to specific severance damages for the reason that the benefits conferred by the construction of the works in accordance with the plans as stated in the complaint exceeded the severance damage which consisted only of loss of access. The court further found that the value of all the property taken was the sum of $50,000 and that the value of Truslow's reversionary interest was the sum of $22,630. The court additionally awarded to King special damages, one item of which we have hereinabove discussed, but since these awards of special damages do not affect appellant Truslow and since the condemnor is not appealing, we need discuss them no further.

[4] It appeared from the evidence that when King rented lands from Truslow the lands were in the main what was described as a jungle, being overgrown with trees and brush. The surface of these lands was mostly irregular and much of the area had been gullied by the action of the waters of Cache Creek pouring out through the two throats and depositing sediment. By the lease King was required to clear and level the leased lands and put them in state for farming, all of which work had been done before this action was begun. King had been farming the leased land, which included the area condemned, for several years and had produced various crops, including row crops. That part of the rental which consisted of the cost of clearing and leveling had theretofore been paid so that when this action was begun the amount of rental still to be paid on the land taken was a cash rental of $12.95 per acre. Witnesses testified that due to the productivity of the soil, which the court found to be good soil, the value of King's leasehold estate for the remainder of his term amounted to $42.50 per acre per year of the four years remaining in the unexpired term. The trial court adopted these figures and the testimony supports the court's conclusion. This finding takes into consideration what amounted to a prepayment of rent through the clearing and leveling work done by King. The issue presented is wholly one of fact and since the evidence in the record supports the finding of the trial court that finding must be approved on appeal.

Finally, appellant Truslow contends that the trial court erred in refusing to reopen the case during the period of submission before judgment, to permit evidence that after trial King had forfeited his lease for nonpayment of rent and also had assigned all of his interest in the entire award.

[5, 6] The taking of evidence was concluded on January 25, 1951. The motion to vacate the submission was heard on September 17, 1951. The motion was made on specific grounds as follows: That King had made the assignment above mentioned on or about June 1, 1951; that King had failed to pay the rental of the property leased from and after November 1, 1950, failing to pay the installment which was due on May 1, 1951, in the amount of $9,203.52; that Truslow by legal action, after due notice under the lease, had terminated the lease. It was the position of Truslow that as a legal consequence of the termination of the lease King was not entitled to recover and have paid to him out of the award otherwise payable to Truslow rental accruing after termination and was not entitled to the amount of damages fixed by the court for the loss of his estate for years by condemnation, but was only entitled to recover for the loss intermediate the date the summons in the action was issued and the date of termination, to-wit, July 6, 1951. The motion was heard by the court and the minutes of the court show that during the argument counsel for King "offered to pay the rent on real property at the rate of $12.95 per acre per year for three (3) years, said amount to be paid out of the Judgment when said judgment is paid over to defendants." The minutes show that the court "denied defendant Truslow's motion to vacate submission upon the condition that defendant King pay the amount so offered." These provisions were not carried into the judgment thereafter rendered and herein appealed from and we are not informed as to the reasons therefor. We will, therefore, treat the denial of the motion as unconditional for the purposes of this appeal only since we believe that the trial court was warranted in refusing to vacate the submission. Section 1248 of the Code of Civil Procedure provides as follows: "The court * * * must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: 1. The value of the property sought to be condemned * * * and of each and every separate estate or interest therein; * * *". Section 1249 of the Code of Civil Procedure provides: "For the purpose of assessing compensation and damages the right thereof shall be deemed to have accrued at the date of the issuance of summons and its actual value at that date shall be the measure of compensation for all property to be actually taken, * * *". The court was thus statutorily bound to fix the compensation and damages payable to King for his estate for years as of the date summons issued. This statutory mandate the court obeyed and in doing so it applied settled rules hereinbefore discussed in ascertaining the value of the separate estates of Truslow and King. Neither the assignment made by King nor his failure to pay rent and the legal action taken by Truslow based thereon, under which we may assume Truslow repossessed himself of the property, were matters which could affect the assessment of compensation and damages. The entire scheme for the exercise of the power of eminent domain through action to condemn is statutory and the statutes cannot be departed from in matters wherein their commands are specific. If when the assignment was made the right to the moneys assigned and which would become payable upon final judgment in the cause belonged to King there was nothing to prevent his assignment thereof nor to justify any preventive action on behalf of Truslow. If, as it is claimed he did, King, after the date for the assessment of compensation and damages, failed to pay his rental thereafter accruing adequate remedies were afforded by the law to Truslow, including, if he chose to exercise it, the right to declare the lease forfeited for such default, of which right he elected to avail himself. But these matters occurring after the date for the assessment of values were not properly before the court in the condemnation action. The court was required, as we have said, to separately value the estates of Truslow and King and each man was entitled to receive the amount thus ascertained as his compensation for that which

he lost. The rule laid down in City of Pasadena v. Porter, supra, is a rule to be used in determining the value of the tenant's estate. The sum of the value of the separate estates makes up the total value of the property taken. But in obeying the statutory command that the value of the interests in the land taken be separately determined the court was not engaged in an equitable distribution of the whole value of the property taken as between persons having undefined and unascertained claims thereto. King was entitled, just as was Truslow, to have the value of his interest in the land taken assessed and he was equally entitled to have the sum fixed paid over to him. This amount could not be varied because of matters arising between himself and Truslow after the date as of which the assessments of value must be made. The court was therefore justified in the denial of Truslow's motion.

While this appeal was pending appellant Truslow presented to this Court a motion that it take evidence touching the matter of the trial court's findings that severance damage was more than offset by benefits resulting to the land from the construction of the training levees; that the judgment of the trial court be modified in accordance with the evidence so adduced upon a rehearing of that issue; that in the alternative the case be in its entirety reversed and remanded to the trial court for retrial in accordance with instructions as to legal issues raised upon Truslow's appeal. In support of and in opposition to the motion various affidavits were filed by the parties and depositions of witnesses were taken and supplied to the Court. We have determined that the motion must be denied and it is accordingly so ordered. We will state our reasons for this ruling.

Before this action was begun and the third throat for the influx of Cache Creek waters into the settling basin had been constructed under the easements taken there had been a use of the basin for many years and a controlling of the outflow of waters into it by two other throats successively constructed. There had first been constructed a permanent levee as distinguished from training levees which permanent levee served as a barrier against the waters of Cache Creek flowing into the lands north of the settling basin. Then there had been a pair of training levees carrying Cache Creek waters over to the northerly portion of the basin. The use of these levees resulted in a deposit of sediment six to eight feet deep in the most northerly part and gradually thinning out to lesser depths as the waters flowed southerly in the basin, dropping their lessening burden of silt as they went. When a portion of the basin had been utilized in this manner the second throat was constructed westerly of the first and the process repeated. The evidence showed that when the present training levees were constructed the lands that had been built up by the deposit of soil carried down into the basin by Cache Creek were susceptible of increased use thereof over the use possible before the fill had been made. These lands had in part been so utilized. But the periodic flow of Cache Creek through the second throat limited the period of the year during which the lands could be used. Furthermore, as the waters spread they tended to finger out over the lands through shallow and constantly shifting channels which gullied the surface and limited the use of the land. The trial court in its opinion appearing in the record said: That the construction of the new channel and its levees deprived Truslow and King of access to public highways during all the rainy months of the year, forcing the use of circuitous routes through property owned by others and increasing the distance to and from the lands, thus in effect and during the rainy season completely landlocking Truslow's property; that for these reasons the court considered the loss of access warranted severance damages in the total sum of $27,500; that from 1935 and up to and including 1949 there had been deposited on various parts of Truslow's property from four to six feet of soil, consisting of silt and sand, deposited from flood waters of Cache Creek; that this soil was properly classified as Yolo fine sandy loam carrying a Storey index rating of 100, so that, so far as the soils themselves were concerned which had thus been deposited, their character was of the very best; that these deposits covered a material part of Truslow's holdings; that the soil on the remainder was inferior to the deposited soil and contained various degrees of alkalinity; that the previous channel of Cache Creek had tended to flow in various "fingers" toward the lower end of the Truslow lands, causing many erosion gullies on the surface; that this made the land unsuitable for farming; that the construction of the new channel and training levees on the condemned lands reclaimed "all of the remainder of the Truslow lands"; that the gullies could be cleared and leveled and the entire remainder of his lands could be farmed and "will be comparatively free from floods." The court further stated that it considered the benefits thus derived by reason of the construction of the new channel and training levees far outweighed the damage by loss of access and in its opinion enhanced the value of Truslow's remaining lands by at least $50,000 so that there was no damage by severance.

In support of his motion appellant Truslow pointed to various matters appearing in the record, including the findings of the trial court which briefly reflected the matters contained in the opinion which we have above set out and asserted that from these matters and from the testimony of the respondent district's witnesses he had from the beginning been led to believe that the new channel and training levees would be permanent in nature and perpetually maintained; that, so believing, they made no attempt to show the contrary and that in effect both he and the trial court were of the impression when the evidence was concluded that the channel and training levees were of such nature; that the trial court based its findings of benefits offsetting severance damage upon this assumption of permanency of the new channel and its training levees. This belief, says Truslow and his counsel, continued until it developed, after the rendition of judgment; that the easterly training levee along the new channel was being breached by the flood waters as they flowed through the channel and the waters were again going over the lands supposed to have been reclaimed by the levee, so that the benefits found by the court to have been conferred upon the remaining lands outside the condemned lands were not being enjoyed. This matter was taken up with the respondent district and meetings were held with those representing the respondent, information was sought and obtained from the Federal authorities as to the intended permanency of the training levees and as to whether or not there was any obligation on the part of anyone to repair the levees if and when breached. The result of this was that the position was taken by the State and Federal authorities that, in effect, training levees were training levees and that these had never been intended or represented to be anything other than training levees; that in the normal use of these levees and their enclosed channel the waters would for a considerable time be discharged toward the southerly limits of the basin, gradually filling that area with deposits; that the waters so in part desilted would spread over the lower-lying portions of those lands in the basin, including the lands of Truslow, but that, being deprived of their velocity, they would not erode or gully the surface of the lands over which they flowed and, after the period of flood, those lands would emerge in shape available for agricultural use. But, said these authorities, by the very nature of the purpose of the settlement basin and by the intended and only function of the training levees, the time would come when the lower end of the easterly levee in particular would either be artificially or naturally breached and leveled so that the waters might flow out at more northerly points and ultimately the full capacity of the settling basin be thus utilized. It is the position, therefore, of Truslow and his counsel that this impermanency of the training levees, and the resultant diminishing of the beneficial effects that would have been derived from permanent levees, were matters which they were not aware of until after the trial and rendition of judgment and that their ignorance thereof was in effect induced by the noted contents of the resolution concerning the type and use of the training levees and the enclosed channel, and by the testimony of respondent district's witnesses with respect to the benefits that would be conferred by their construction.

[7] We think that it cannot be fairly said that there was any concealment of either the purpose or effect of the training levees and their enclosed channel. The resolution stated that it was necessary to condemn an additional right of way and easement "for the construction and perpetual maintenance" of a new channel and training levees, but this is far from stating or representing that the condemnor would perpetually maintain the channel and its enclosing levees. The language of the resolution defined and was intended to define the measure of the rights sought and surely did not cast and could not have been considered to have cast any contractual obligation with respect to maintenance of the works to be constructed. The complaint alleged and the trial court found that it was necessary for the respondent district to condemn such a right of way and easement, but this finding again concerns the measure of the rights to be taken. There was, of course, no statement in the complaint that there were either any severance damages to be paid or any benefits to be offset thereto. These were matters which developed when proof was made of severance damage from loss of access, and respondent district introduced proof of offsetting benefits. The trial judge who heard this case has long held his office in a county where problems of flood control and reclamation have for generations confronted the people of the region and we cannot believe that this experienced jurist did not thoroughly understand the functions of training levees and the functions of the settling basin or that he lacked any appreciation of the fact that the exercise of these functions would necessarily result in a progressive change of conditions with respect to the lands within the basin. We are unable to believe that he failed to realize and appreciate the very things of which Truslow and his counsel claim they were ignorant or that his findings as to benefits were based on a mistaken belief the training levees were any more permanent than the previous ones had been. In fact, as stated, we do not believe that evidence as to the intended use of the training levees and the settling basin, had it been specifically introduced into the record, would have advised the trial court of anything that was not already within that court's knowledge. We think, therefore, that no cause has been shown for this Court to grant any part of the motion made.

Appeal of Reclamation District No. 2035

[8] Reclamation District 2035 was joined as a defendant, the allegation in respect of it being that it claimed some interest in or lien upon the property to be taken. The district filed an answer, alleging that it had levied upon the lands within its borders an assessment for defraying the cost of construction and maintenance of general reclamation works and had thereafter issued bonds against the assessment; that thereafter refunding bonds had been issued, which were outstanding in the principal sum of $2,000,000; that these bonds would not begin to mature until January 1, 1955, and thereafter would mature serially over a period of 40 years; that the lands to be taken constituted parts of three parcels of land which had thus been assessed; that on the three assessment tracts the total of liens was the sum of $83,292.96; that one tract had been assessed at an average of $59.29 per acre, another at $65.18, and the third at $67.88. Roy E. Cole, Treasurer of the County of Yolo and ex-officio treasurer of the reclamation district, also answered, setting up the facts we have recited. Both defendants asked the same relief, viz.: that the money awarded for the easements taken up to the total amount of the assessments upon the three assessment parcels be paid to Cole as trustee for the district and the bondholders, to be kept by said trustee and used for the payment of bond principal and interest. At the trial no issue was presented as to the truth of the factual allegations in the answers. The trial court made findings conformable to these factual allegations. It was further

found that the value of the easements condemned across the three assessment tracts totaled the sum of $50,000; that the construction of the new channel and the training levees reclaimed the remainder of the parcels; that the benefits conferred by reason of such construction would enhance the value of lands in the three parcels outside the easement area by at least $50,000, i. e., by a sum greater than the award; that although the assessment liens were against all rights and interest in the property affected yet the bondholders had suffered no diminution in the value of their security and that although the security underlying the bonds had been cut down as to quantity of land by reason of the rights condemned, the improvement in the quality of the remaining land more than offset and more than compensated the loss in quantity; that the claim of the district and the treasurer against the amount awarded for the taking should be denied; and that "the rights of the * * * lienholders should not be considered on an acre basis for the reason that neither the reclamation district nor the bondholders are damaged by reason of the construction of the improvements by the plaintiff." Judgment denying any relief to the district and its treasurer was entered and they appeal.

At the trial the evidence introduced by the appellants consisted of a showing that of the three assessment parcels affected, one contained 307 acres assessed for $18,154.55, the second contained 332 acres assessed for $21,690.44, and the third contained 640 acres assessed for $43,447.97. It was further shown that of the first parcel 15.82 acres lay within the right of way condemned, of the second parcel 72.73 acres lay therein, and of the third parcel 145 acres lay therein. On the assumption that the total assessment on each parcel could be considered as having been uniformly distributed over the entire parcel, the appellants computed what they called the amounts "to be paid by the Truslow lands on the condemned portion." They thus arrived at a total to be paid on the condemned portions of the tracts of $13,612.70, to which sum, again by computation, they added the amount of interest that would accrue upon that sum at the rate of 6%, as stated in the bonds, over the period of 40 years. They came out with a total of $32,806.60, which sum they argued in the trial court and argue here, was the sum which ought to have been taken from the gross award and paid into the hands of Mr. Cole, as trustee, with power in him to apply from time to time such amounts thereof as might be necessary to meet calls against the three parcels. The basic assumption which the appellants make is fallacious. It cannot be assumed that when the viewers assessed the three parcels of land they considered as to each parcel that each unit thereof, whether it be a 10-acre unit or a 1-acre unit or a unit of still smaller area, would be equally benefited by the construction of the reclamation works. The assumption cannot be made because the statute governing the acts of the assessors in effect directs that it shall not be made. Such assessments are based upon *benefits to each tract* of land that is selected as a unit of assessment. The assessments were made under the direction of Political Code Section 3456, which section now appears in the Water Code, Sections 51231 to 51238. These sections require that assessment commissioners "assess the estimated cost of the reclamation plan upon the district land * * *." by fixing and assessing upon the district land the sum estimated to be the cost of the reclamation plan, apportioning that sum according to the benefits that will accrue to *each parcel* by reason of the expenditures of the sums of money required for the doing of the work according to the adopted plans. These parcels may and do vary in size from small parcels up to areas of 640 acres. In this case they varied from 307 acres to 640 acres. It would be rare, indeed, that a parcel of land was uniform throughout in character, fertility, drainage and all the other characteristics that go to make up the utility and the value of a parcel of land. On the contrary, it would almost always be found that parcels of land selected for assessment purposes would vary within themselves in such matters. Thus some parts would be low and ill-drained, others affected with alkalinity, while others would consist partly of sand or other inferior soil. Nevertheless, under the statutory mandate the commissioners of assessment viewing the parcel as a whole and taking into consideration the variations of these characteristics within it and comparing it with all other assessment parcels in the district must levy such a sum of money against the parcel as a unit as will meet the statutory requirements that the benefits, tract by tract, shall be proportionately equal. An assessment so levied cannot afford any foundation for the basic assumption made by the appellants. Nor was there any evidence introduced from which the trial court could arrive at an apportionment of the levy made upon each tract so that the land condemned and the land left could be found to justly bear designated portions of the total assessment. The specific relief, therefore, for which the appellants argue, that is, that the sum of $32,806.60 be taken from the total award and paid over in trust to the county treasurer could not, on the record here, be granted.

But the prayer of the answer of each of the appellants was not in harmony with the arguments as to what portion of the award should be turned over. On the contrary, the appellant district and its treasurer asked that the entire award be turned over to the treasurer up to the amount necessary to answer calls against the total assessments upon the three tracts as the bonds and their interest matured, that is, up to the sum of $83,292.96. This sum consisted, as we have said, of principal and anticipated interest. The granting of this relief could have absorbed the entire award made. Neither the owner Truslow, nor his tenant King, could have received anything.

Appellants, respecting their rights to make demands upon the money paid into court by the condemnor, refer us to text and case law involving rights of mortgagees, such as City of Vallejo v. Superior Court, 199 Cal. 408, 417, 249 P. 1084, 48 A.L.R. 610; Los Angeles Trust & Sav. Bank v. Bortenstein, 47 Cal.App. 421, 190 P. 850; 29 C.J.S., Eminent Domain, § 200, pp. 1107, 1108. We quote the following from that text:

> "* * * It is well settled, however, that where there are liens on the land taken or injured, the court may allow the condemnor to pay the award into court for the benefit of the owner and the lienholders, although the lienholders were not made parties to the condemnation proceedings. The award in such case is a substitute for the land taken, and the lienholder may have his lien satisfied out of the fund awarded and paid into court. This protection extends to judgment liens and to tax liens; and, where only a portion of the property subject to the lien is taken, the lienor is entitled to satisfy the entire amount of his lien from the award."

That the relief which appellants asked in their pleadings has been granted in like cases cannot be gainsaid. So in Boyle v. Middleburgh Realty Co., 75 Ohio App. 368, 62 N.E.2d 262, 264, it was said:

> "* * * where the state acquires by condemnation * * * a part of a tract on which the taxes have become delinquent, the amount paid by way of compensation for the land so acquired is first to be applied to the payment of all of the delinquent general taxes and there can be no apportionment of any part of such delinquent taxes to the unacquired residue."

Continuing, the court said:

> "It is obvious that no distinction can be drawn between the portion of the special assessments which have accrued and are unpaid and delinquent general taxes. The same reasons which cause us to deny apportionment in the case of liens of general taxes apply with equal force to accrued special assessments. The question then remains whether a court in distributing the fund received in a condemnation proceeding for a portion of a tract of land bearing special assessments may apportion the assessments payable in the future between the land appropriated and the residue."

After noting that a statute of Ohio authorized apportionment of taxes on land when a part of the parcel taxed is conveyed away and after stating that the statute provided the only statutory method for such apportionment, the court continued:

> "It is our opinion that the provisions of [the statute] which empower 'the authority certifying such assessments' * * * to make an apportionment of special assessments at the request of the county auditor 'whenever a portion or portions of a tract or parcel of real estate (bearing unpaid special assessments) is conveyed to another owner or other owners' can not be construed so broadly as to authorize the court to make an apportionment of the unpaid special assessment liens in this case.
>
> "Likewise, it is our opinion that the court can not base such an authority on its general equity powers. The installments of the special assessments to become due in the future are as truly liens on the benefited property as are delinquent taxes or assessments. Therefore, when a part of the property bearing special assessments is acquired by a public authority, it becomes the duty of the court in distributing money paid into court by way of compensation to pay not only the special-assessment liens already accrued but also to pay, as provided in section 5677, General Code, or to set aside a sufficient sum to pay, the assessment liens to become due in the future before making any payments from the fund to the landowner."

In Pomona College v. Dunn, 7 Cal.App.2d 227, 232, 46 P.2d 270, 272, the court, again speaking of mortgage liens, said:

> "* * * it must be conceded at the outset that the right of a mortgagee in a proper case to subject an award made to the landowner as compensation for a part of the mortgaged premises taken through the medium of eminent domain proceedings to the lien of his mortgage is not open to doubt. Under the familiar doctrine of equitable conversion, the award is considered as land, and the mortgagee is entitled so to regard it and to have recourse to it in satisfaction of the mortgage lien."

In Los Angeles Trust & Sav. Bank v. Bortenstein, supra, 47 Cal.App. at page 423, 190 P. at page 851, it is said:

> "* * * It is a well-recognized rule of equity, based upon the doctrine of equitable conversion, that when land is taken for public use, the money awarded for such lands remains, and is to be considered as, land in respect to all rights and interests relating thereto. The money, in such cases, is deemed to represent the land, and is applied in equity to discharge the liens upon it, precisely in accordance with the legal or equitable rights of creditors or incumbrancers in respect to such land."

But it cannot be said that in every case the whole award up to the total lien must be paid to the lienholder or set aside for his benefit. It stated in 18 American Jurisprudence "Eminent Domain", p. 868, sec. 235 "Mortgages", that:

> "* * * The view obtaining in a majority of jurisdictions is that, where mortgaged land is taken or damaged in eminent domain proceedings, the mortgagee is entitled *either* to the whole of the award made for the condemned land, *or to a share thereof* to the extent of his interest or damage. Thus, where the whole of the mortgaged land is taken in the proceedings, the mortgagee is entitled to the entire award or at least to so much of it as is necessary to satisfy the mortgage indebtedness. Where only a part of mortgaged property is taken, the mortgagee is entitled, generally speaking, to only so much of the award as is necessary to compensate him for his interest in the part taken." (Italics supplied.)

It is stated in 58 A.L.R. 1539 in an annotation that:

> "Where only a part of mortgaged property is taken in eminent domain proceedings, the mortgagee is entitled,

> generally speaking, to only so much of the award as is necessary to compensate him for his interest in the part taken."

After stating the above general rule, the court said in In re Dillman, 276 Mich. 252, 267 N.W. 623, 625:

> "There is no controlling case upon the latter rule in this state. In re Widening Woodward Avenue, 265 Mich. 87, 251 N.W. 379, the right of a mortgagee to participate in an award was not challenged. In Detroit, B. C. & W. R. Co. v. First Nat. Bank of Yale, 196 Mich. 660, 163 N.W. 97, where only a small part of the premises was taken, the court divided evenly; four justices denying the mortgagee the award *on the ground his security had not been impaired by the taking*; and four holding him entitled to the award on the ground a mortgagee is entitled to all the security covered by his mortgage and the court cannot release part of it on appraisal.
>
> "* * * *Under any circumstances, a mortgagee has sufficient right to the award to preserve his security against evident or established impairment*." (Italics supplied.)

As to rights in respect of taxes where property is taken in eminent domain an annotation to 79 A.L.R. 116 et seq., cites many cases and, speaking quite generally, the approach to the problem as adopted in the cases cited is about the same as in the case of mortgages and other liens, that is, that the holder of the liens is entitled to have his interest protected and for that purpose the court may resort to the gross award paid into court by the condemnor after its amount has been fixed in the proceedings.

[9] If a trial court has the power, and we think it has, to measure the amount to be set aside to protect lienholders, by the need for such protection, then this power includes power to find from the facts that no protection is needed, and to refuse for that reason to set aside any fund at all.

As we have seen, the trial court in this case, having found from the evidence that the security of the assessment liens on the parcels involved had been in no wise diminished, denied any relief to the appellants and refused to set aside any part of the award ordering the whole thereof to be paid to the landowner and his tenant. The research of counsel and this Court has not revealed any case in this State directly bearing upon the power of the trial court to refuse relief upon the grounds stated. However, we think the power exists in a proper case. In so holding we rely somewhat upon the factual situation here.

[10] The statute contemplates that, when bonds are issued against assessments spread over the lands of a reclamation district in order to obtain money to defray the cost of general reclamation works, one of the main purposes in providing statutory authority for such financing is that by the length of time over which the obligation to pay the assessments is made to run full opportunity will be given to those who own the land to meet the charges out of profits from the use thereof over the years. The bonds here involved were issued in 1936, with no principal payments required until 1955. In that year and for forty years thereafter 1/40th of the bonds or 2½% of the principal bonded indebtedness matured each year. The bonds were non-callable and were based upon a contract between the bondholders, the district and the owners of the land assessed, whereunder the rate of maturity and in general the contractual rights of the parties could not thereafter be altered, even by legislation. Hershey v. Cole, 130 Cal. App. 683, 20 P.2d 972. It is said in Hershey v. Cole that the bondholders have the contractual right to have the calls made and the bonds paid at the stipulated maturity rate. Correlative to this right is that of the landowner to have the maturity rate observed to that in fulfillment of the general statutory purpose he will not be compelled to pay in advance. We think it would be inequitable for the court to take from the owners who are otherwise presently entitled to compensation for the loss they have suffered a sufficient sum to pay the principal of the bonds outstanding,

and a further sum sufficient to defray interest charges for the full term of the bonds when, under the facts presented, the bondholders have no need for such action. We think the court here was faced with a situation where it was empowered to say, first, that the relief to be accorded the appellants in respect of the assessment liens should be measured by the need for that protection, and, next, that where the court was satisfied from the evidence no protection was needed it was within the court's power to refuse to set aside any funds for that purpose.

The motion to take evidence before this Court is denied, and the judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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125 Cal.App.2d 636

LOWENTHAL et ux. v. MORTIMER.

Civ. 19582.

District Court of Appeal, Second District, Division 1, California.

June 1, 1954.

Hearing Denied July 28, 1954.

Action was brought to recover for injuries sustained by plaintiffs when defendant's automobile ran into rear of plaintiffs' automobile when plaintiffs' automobile was slowed down for purpose of coming to a complete stop because automobiles in front of plaintiffs' automobile slackened their speed. The Superior Court of Los Angeles County, Raymond McIntosh, J., entered judgment for defendant and an order denying plaintiffs' motion for new trial, and plaintiffs' appealed. The District Court of Appeal, Mosk, J. pro tem., held that it was reversible error for defendant to introduce evidence that plaintiffs had been involved in 15 commercial lawsuits over nine year period, for purpose of showing that nervousness and irritability of plaintiffs did not result from automobile accident as contended by plaintiffs.

Judgment reversed and cause remanded for new trial.

1. Automobiles 🔑245(15)

When one motor vehicle runs into the rear of another vehicle, question of negligence is a question of fact and not of law.

2. Automobiles 🔑245(60)

When one motor vehicle runs into the rear of another vehicle, it is the province of the jury to determine the proximate cause of the accident.

3. Automobiles 🔑245(43, 81)

In action to recover for injuries sustained when defendant's automobile ran into rear of plaintiffs' automobile when plaintiffs' automobile slowed down because automobiles in front of plaintiffs' automobile slackened their speed, questions of reasonableness of speed at which defendant was driving, whether the plaintiff driving the plaintiffs' automobile gave a hand signal indicating an intention to stop, whether stop was sudden, whether defendant was driving too closely behind plaintiffs' automobile, and whether defendant was inattentive were questions of fact for jury.

4. Witnesses 🔑275(5)

In action for injuries sustained in automobile collision, wherein one of the plaintiffs testified on direct that after the accident she could not do anything at all beyond merely helping a little in the store operated by plaintiffs, it was proper for defendant's counsel to cross-examine such plaintiff concerning another lawsuit tried by her in propria persona after the automobile accident.

5. Appeal and Error 🔑1050(1)
Automobiles 🔑243(5)

Generally, evidence of previous automobile accidents is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is immaterial in determination of driver's negligence on the occasion in question and the admission of such evidence is considered prejudicially injurious.

6. Damages 🔑32

Nervousness and disturbances of the nervous system are "physical injuries" and are recognized elements of damage.

See publication Words and Phrases, for other judicial constructions and definitions of "Physical Injury".

7. Damages 🔑185(1)

Expert medical testimony is not essential to establish a person's physical condition before an injury for which recovery is sought.

8. Appeal and Error 🔑1050(1)
Damages 🔑178

In action for injuries sustained in automobile collision, wherein plaintiffs testified that accident left them nervous and irritable, it was reversible error to permit defendant to introduce evidence concerning 15 commercial lawsuits in which plaintiffs were involved over nine year period, for purpose of showing that irritability of plaintiffs could not be attributed to the automobile collision.

9. Negligence 🔑124(1)

Evidence of character of person charged with or charging a negligent act is not admissible to throw light on probabilities of his conduct on occasion in question.

10. Trial 🔑125(1)

Appeals to emotion are to be avoided in courts of law if at all possible, whether directed to sympathy or to antipathy.

11. Trial 🔑110

Cross-examiner must not inject insinuations into case for purpose of appealing to prejudices, or go outside of the issues of the case.

◆

Joseph Lowenthal and Ruth Lowenthal, in pro. per.

Parker, Stanbury, Reese & McGee, by Kenneth M. Smith, Los Angeles, for respondent.

MOSK, Justice, pro tem.

The plaintiff Joseph Lowenthal, who together with his wife owned and operated a cafeteria and delicatessen store, was driving his 1950 Nash automobile at a speed of 25 miles per hour in the middle west bound lane on Colorado Boulevard, between Allen and Parkwood Streets, County of Los Angeles, the evening of March 22, 1951. His wife, Ruth, was seated beside him in the front seat.

As he noticed cars in front of him slacken their speed, he removed his foot from the accelerator and prepared to come to a complete stop. He testified that he gave a hand signal indicating an intention to stop.

The defendant Arthur E. Mortimer was traveling directly behind the plaintiffs' vehicle at a speed of twenty-five to twenty-seven miles per hour. He was proceeding approximately fifty feet behind the Lowenthal car. He testified that the plaintiffs' vehicle stopped suddenly, that no signal was given except the lighting up of the red tail light, that he immediately applied his brakes but was unable to avoid hitting the rear of the plaintiffs' automobile.

The jury returned a verdict for the defendant, a subsequent motion for new trial was denied, and from both the plaintiffs appeal.

[1, 2] It is now well established that when one motor vehicle runs into the rear of another vehicle, negligence is a question of fact and not of law. Turkovich v. Rowland, 106 Cal.App.2d 445, 447, 235 P.2d 123; Wohlenberg v. Malcewicz, 56 Cal.App.2d 508, 133 P.2d 12. It is also the province of the jury to determine the proximate cause of an accident. Turkovich v. Rowland, supra.

Cases involving rear-end collisions are legion. Although the contention is made often that the leader alone, or the follower alone, is guilty of negligence, in general it has been held that the case as presented by each party creates a question of fact for the jury and not a question of law for the court. Donahue v. Mazzoli, 27 Cal.App.2d 102, 80 P.2d 743.

The appellant relies upon Gornstein v. Priver, 64 Cal.App. 249, 221 P. 396. The court in 64 Cal.App. at page 255, 221 P. at page 399, there held that "The mere fact that he does run down the vehicle ahead of him furnishes some evidence that he either was traveling at too high a rate of speed for a highway crowded with other vehicular travel or that he was following too closely the machine ahead of him. See O'Connor v. United Railroads, 168 Cal. 47, 141 P. 809." But it concluded that "whether in any particular case the operator of the rear vehicle is negligent if he drives his machine so as to cause a collision with the one ahead depends upon all the circumstances surrounding the happening of the accident, and almost invariably presents a question of fact for the decision of the jury * * *."

[3] The reasonableness of the speed at which defendant operated his vehicle, whether plaintiff gave a hand signal indicating an intention to stop, see Mazgedian v. Swift & Co., 22 Cal.App.2d 570, 71 P.2d 833, whether the stop was sudden, whether defendant was driving too closely behind plaintiffs' vehicle, whether defendant was inattentive, all were questions of fact.

The jury resolved those factual elements in favor of defendant. The evidence supports that finding, just as it would have supported a contrary finding.

This would be a prosaic proceeding were it not for the issue created by the calculated injection of numerous other lawsuits into testimony at the trial.

Plaintiff Ruth Lowenthal testified on direct examination that she was in the hospital for an hour after the accident and was sent home by taxi. Subsequently two additional days were spent at a hospital for spinal punctures. She did not remain away from her place of business, but set up a place to rest in the rear of the store. In July she went to bed for three weeks. She testified that after the accident she "couldn't do anything at all beyond just helping a little bit in the store when I could". On cross-examination she testified that their business required a cheerful person behind the counter, that after the accident her husband was irritable, that this caused them to worry about being able to resume their business.

[4] In cross-examining this plaintiff, counsel inquired first about another lawsuit tried by her *in propria persona* on April 26, 1951. Since the plaintiff's activities and physical limitations subsequent to the accident on March 22 were at issue, this was not an improper line of inquiry.

Thereafter counsel cross-examined plaintiff about 15 other lawsuits in which she and her husband were involved, dating from February 9, 1942 to June 29, 1951. Of the 15 suits one was in 1942, one in 1946, four in 1948, four in 1949, three in 1950 and two in 1951. Substantially all were cases of a commercial nature.

[5] There are many reported cases in this and other jurisdictions involving efforts of both plaintiffs and defendants to place before a jury evidence of past personal injury lawsuits. It is generally held that evidence of previous accidents is inadmissible in a civil action arising out of a motor vehicle accident, since such evidence is immaterial in the determination of the driver's negligence on the occasion in question. Hall v. Young, 218 Ark. 398, 236 S.W.2d 431, 20 A.L.R.2d 1207, 1210. The admission of such evidence is considered prejudicially injurious. Reid Auto Co. v. Gorsczya, Tex. Civ.App., 144 S.W. 688.

While this rule prevails in the overwhelming majority of jurisdictions, 65 C.J.S., Negligence, §§ 234, 236, pp. 1053, 1058, there are some few holding to the contrary. McGuire v. Village of Caledonia, 140 Minn. 151, 167 N.W. 425, 426, L.R.A. 1918D, 943, permitted cross-examination of a claimant as to other personal injury claims he had asserted. That fraud was a defense clearly influenced the court's conclusion. Two Ohio cases hold an exception to the general rule of exclusion of previous accidents to exist when the driver has a physical defect rendering his driving unsafe. Bachman v. Ambos, 83 Ohio App. 141, 79 N.E.2d 177; Hiller v. Shaw, 45 Ohio App. 303, 187 N.E. 130. A few jurisdictions permit exploration into other accidents on cross-examination after the driver volunteered on direct examination that he was a careful driver. Barshfield v. Vucklich, 108 Kan. 761, 197 P. 205; Harrison v. Mobile Light & R. Co., 233 Ala. 393, 171 So. 742.

But respondent has cited no authority, and we have found none, to justify informing the jury the history of plaintiffs' commercial litigation wholly unrelated to personal injuries. Respondent contended at the trial, and in his brief on appeal, that the "numerous lawsuits would tend to show a reason for their irritability which would not be attributable to this accident".

[6, 7] Nervousness and disturbances of the nervous system are classed as physical injuries and are recognized elements of damage. Taylor v. Pole, 16 Cal.2d 668, 671, 107 P.2d 614. Dryden v. Continental Baking Co., 11 Cal.2d 33, 39, 77 P.2d 833; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 P. 320, 32 L.R.A. 193. Expert medical testimony is not essential to establish a person's physical condition before an injury. Blashfield Cyclopedia of Automobile Law and Practice Vol. 10, p. 30; Republic Underwriters v. Howard, Tex.Civ.App., 69 S.W.2d 584.

But here we have no evidence of any kind, lay or expert, indicating nervousness of plaintiffs before the accident. Respondent offered the lawsuits to "tend to show a *reason*" for irritability, but wholly neglected to show the irritability. At the trial, counsel made his offer of proof, later permitted in evidence, to show a "type of life in which they have been involved, that would be distressing to any normal person, and would certainly leave a normal person in a state of nerves * * *" He did not offer to, nor did he, show that these plaintiffs were in a state of nerves before the accident. Between exposure and actual contraction lies a broad chasm that cannot be spanned by mere conjecture.

If it be contended, though respondent has not done so, that the precedent lawsuits were offered to explain plaintiffs' irritability after the accident, they would clearly be too remote in the absence of some explanatory testimony. Any causal connection between litigation tried as long as nine years before the date of this accident and nervousness subsequent to the accident seems tenuous indeed.

Courts have been wary of permitting evidence of other lawsuits even for impeachment purposes. In Grenadier v. Surface Transp. Corporation, 271 App.Div. 460, 66 N.Y.S.2d 130, the defendant bus driver filed an accident report admitting two previous accidents. On cross-examination counsel elicited admissions that the driver actually had more than two prior accidents, this for the sole purpose of attacking the credibility of the witness. Said the court, 66 N.Y.S.2d at page 131, "Whether or not that was the object of the respondent's counsel, we think that the obvious effect of such testimony was to prejudice the minds of the jurors * * *. The extent to which disparaging questions, not relevant to the issue but bearing on the credibility of a witness, may be put upon cross-examination is discretionary with the trial court. (Cases cited.) However, in the exercise of its discretion, the court must keep such cross-examination within reasonable bounds. * * * In our view, in the circumstances of this case, such testimony was improper and prejudicial." To the same effect are the following: Brownhill v. Kivlin, 317 Mass. 168, 57 N.E.2d 539; Nesbit v. Cumberland Contracting Co., 196 Md. 36, 75 A.2d 339; Harper v. Dees, 214 Ark. 111, 214 S.W.2d 788; Ryan v. International Harvester Co. of America, 204 Minn. 177, 283 N.W. 129.

[8] Introduction of the element of 15 other lawsuits could have had no effect other than to prejudice the jury against the plaintiffs. For litigiousness, in the eyes of most people, reflects more upon character than upon impairment of health.

[9] A few courts have shown an inclination to admit, exceptionally, the character of a person charged with or charging a negligent act as throwing light on the probabilities of his conduct on the occasion in question. As a matter of law, however, the doctrine is maintained in very few jurisdictions only, and has been expressly repudiated in many. See Wigmore on Evidence, Sec. 85. California is numbered among the latter. Towle v. Pacific Improvement Co., 98 Cal. 342, 33 P. 207; Carr v. Stern, 17 Cal.App. 397, 120 P. 35; Howland v. Oakland, etc., Ry. Co., 115 Cal. 487, 47 P. 255.

It is interesting to note that in Howland the plaintiff's counsel, under the guise of explaining plaintiff's nervousness on the stand, introduced evidence of another accident involving the defendant railroad. This, said the court, 115 Cal. at page 494, 47 P. at page 257, "was improper, as bringing specially and prominently into the case a fact in itself wholly irrelevant to the issues, which, in view of the nature of the action, was well calculated to excite the sympathy of the jury * * *."

[10] Appeals to emotion are to be avoided in courts of law if at all possible, whether directed to sympathy as in Howland or to antipathy as here.

In interrogating plaintiff concerning the 15 lawsuits, respondent's counsel used some inflamatory descriptive phrases. He referred to fraud in several instances, without making it clear whether appellants charged it or were charged with it. And with regard to still another lawsuit, not otherwise identified, there was this exchange:

"Q. Didn't you run into some parked cars once while you were driving a car? A. I ran into some parked cars? Not I.

"Q. Didn't you have some litigation in the Monrovia court over that accident? A. There was some litigation, but there was no proof that I had run into it and I didn't.

"Q. There was some testimony, wasn't there, by some little girls who saw it?"

At this point an objection was sustained and the jury instructed to disregard the query. Nevertheless the jury heard the foregoing, and it undoubtedly added cumulatively to the hostility ordinarily felt against one who constantly requires services of a court of law for the adjustment of life's problems.

[11] The cross-examiner must not inject insinuations into the case for the purpose of appealing to prejudices, or go outside of the issues of the case. Blashfield Cyclopedia of Automobile Law and Practice, supra, p. 41. Note the case of Hill v. Ross, 198 Minn. 199, 269 N.W. 396, 398, in which reference, in cross-examination of a doctor, to a lumbo-sacral sprain as "a 'litigation back'" caused a reversal.

The principle involved here is not concealment of facts from the jury, but confinement to the issues involved in this one lawsuit. Neither the character, good or bad, of the plaintiffs nor their objectionable traits, if any, should be permitted to confuse the questions of liability and damages.

Illustrative of collateral issues that might be raised if the 15 other lawsuits could properly be introduced is an exposition to a lay jury of the nature of plaintiffs' business operations and the lease problems, collection difficulties, and contract interpretations of a commercial enterprise that result in litigation. To negative any inference of unreasonable contentiousness, plaintiffs would be entitled to attempt an adequate explanation.

If we were to hold that a businessman is to be penalized in a personal injury case because of precedent commercial litigation, we would be jeopardizing the rights of a trial lawyer who may be injured in an accident, or a physician who may have sued to collect on accounts, or insurance company and title company and collection agency representatives and the numerous others who are frequently subjected to the vagaries of legal proceedings.

Then, too, were other lawsuits allowed in evidence to show a reason for irritability, we would be flinging the gates wide open to discussion of the 1001 other environmental aggravations that contribute to human nervousness in this modern complex society. That may come about in our jurisprudence some day, but when it does, trials will be interminable.

Since the evidence here would support verdicts for either plaintiffs or defendant, it is possible that the injection of other litigation into this case was not prejudicial. However, the contrary appears more likely.

The judgment is therefore reversed and the cause remanded for a new trial. The purported appeal from the order denying motion for new trial is dismissed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

125 Cal.App.2d Supp. 892

KELLY v. KELLY.

No. 52177.

Appellate Department, Superior Court,
Stanislaus County, California.

May 17, 1954.

Claim and delivery action by former husband against former wife to recover piano and bench, which former husband allegedly gave possession of to wife to enable parties' daughter to take piano lessons, but which former wife maintained was made subject of gift to her by former husband. The Municipal Court, Modesto Judicial District, Leslie K. Floyd, J., entered judgment for former wife and denied former husband's motion for new trial, and former husband appealed. The Superior Court, Appellate Department, Halbert, J., held that evidence was sufficient to sustain judgment for former wife.

Judgment affirmed, and attempted appeal from order denying new trial dismissed.

1. Courts 🔑190

Rules of law applicable to appeals to other state appellate courts apply with equal force to appeals from the municipal court to the Superior Court, Appellate Department.

2. Appeal and Error 🔑994(3)

Where witnesses differ, power and duty to determine conflict rests with trial court, and its decision is final in such matters.

3. Gifts 🔑49(1)

In claim and delivery action by former husband against his former wife for recovery of piano and bench, which former husband allegedly put in possession of former wife for sole purpose of enabling parties' daughter to take piano lessons, but which former wife maintained was given to her by former husband, evidence was sufficient to sustain judgment for former wife.

4. Appeal and Error 🔑110

Only those orders or judgments specifically set forth in Code of Civil Procedure provision listing appealable orders and judgments are appealable, and, therefore, denial of motion for new trial is not an appealable order. Code Civ.Proc. § 983.

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Hawkins & Hawkins, Modesto, for appellant.

Muir J. Woolley, Dep. Dist. Atty., Modesto, for respondent.

HALBERT, Judge.

This is an action in claim and delivery. The plaintiff and appellant is the former husband of the defendant and respondent. Plaintiff, by this action, seeks to recover a piano and bench from the defendant. Plaintiff, contends that he permitted the defendant to take possession of the piano and bench in order to enable the daughter of the parties to take piano lessons, but that he did not at the time of the delivery of the piano and bench to her intend, and in fact has never intended, to make a gift of the piano and bench to the defendant. The defendant contends that the plaintiff made a gift of the piano and bench to her. The trial court rendered judgment in favor of the defendant.

Plaintiff has failed to direct our attention to any error of law which he claims was committed by the trial court. His entire argument is based upon the theory that the trial court was wrong in believing the defendant. While different in fact, this is tantamount to the legal argument that the evidence is not sufficient to support the judgment of the trial court.

[1] The rules of law which apply to appeals to other appellate courts of this state apply with equal force to appeals from the Municipal Court to this court. Mastrofini v. Swanson, 114 Cal.App.2d Supp. 848, 850, 250 P.2d 764.

[2, 3] Plaintiff's statement in lieu of the reporter's transcript asserts as a fact that the defendant testified that the plaintiff said that he would buy a piano and bench for her; that he did purchase the piano and bench for her; and that he never

told her that he was giving her the piano and bench temporarily. Under these circumstances, the most favorable thing that can possibly be said on behalf of the plaintiff is that there is a conflict in the evidence. Even if conflicting, the evidence must be resolved in favor of the defendant. Pewitt v. Riley, 27 Cal.2d 310, 163 P.2d 873; In re Estate of Isenberg, 63 Cal.App.2d 214, 146 P.2d 424; Grant v. Scott, 114 Cal.App.2d 728, 251 P.2d 25. To state the matter in another way, the rule is that where witnesses differ, the power and duty to determine the conflict rests with the trial court, and its decision is final in such matters. This rule is laid down in Lovelady v. Sacramento City Lines, 102 Cal.App.2d 28, 226 P.2d 722, 723, where the court at page 29 pertinently notes, in connection with the rule, that

> "It appears futile to repeat this statement which, though it runs through the decisions like a monotonous refrain, seems never to reach the consciousness of attorneys for appellants."

Furthermore, a motion for a new trial was made in this case, and the trial court, after considering the motion, denied it. This, we believe, confirms the fact that the trial court was satisfied with its original determination of the issues, and intended to do just what it did in this case.

[4] The plaintiff has attempted to appeal from the trial court's order denying his motion for a new trial. Only those orders or judgments specifically set forth in Code of Civil Procedure, § 933 are appealable (4 Cal.Jur.2d 719). The denial of a motion for a new trial is not listed as an appealable order, so plaintiff's attempted appeal from this order must be dismissed.

The judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed

CHAMBERLAIN, J., concurred.

HAWKINS, J., deeming himself disqualified, did not participate in this decision.

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125 Cal.App.2d Supp. 894

AZVEDO
v.
BENEVOLENT SOC. OF CALIFORNIA et al.

KELLY
v.
BENEVOLENT SOC. OF CALIFORNIA et al.

C. A. 51437.

Appellate Department, Superior Court,
Stanislaus County, California.
May 20, 1954.

Action by administratrix of estate of beneficiary of life policy to collect proceeds thereof, in which the mother of deceased insured filed cross-complaint to recover such proceeds. The Municipal Court of Modesto Judicial District, Stanislaus County, Floyd, J., entered judgment in favor of the mother, and the administratrix appealed. The Superior Court, Appellate Department, held that evidence was insufficient to sustain finding that the beneficiary predeceased the insured.

Judgment reversed and cause remanded.

1. Insurance ⟹665(1)

In action by administratrix of estate of beneficiary of life policy to collect proceeds thereof, in which the mother of deceased insured filed cross-complaint to recover such proceeds, evidence was insufficient to sustain finding that the beneficiary predeceased the insured.

2. Insurance ⟹589

Under statute providing that, when both insured and beneficiary are dead, policy proceeds will be distributed as if beneficiary had predeceased the insured if "there is no sufficient evidence that they have died otherwise than simultaneously", quoted condition must be met precisely, and if there is any sufficient evidence that either party survived the other, even when the deaths occur at substantially the same time, the statute is inapplicable and question of survivorship must be determined as any other fact. Probate Code, § 296.3.

3. Insurance ⟹589

Where both insured and beneficiary are dead, mere difficulty in determining which one survived does not justify court in abandoning the task and seeking shelter under the protecting arms of the simultaneous death statute. Probate Code, § 296.3.

4. Insurance ⟹665(1)

In action by administratrix of estate of beneficiary of life policy to collect proceeds thereof, in which the mother of deceased insured filed cross-complaint to recover same proceeds, evidence established that insured and beneficiary could not have died simultaneously, and thus precluded the application of the simultaneous death statute. Probate Code, § 296.3.

5. Death ⟹5

The purpose of the Uniform Simultaneous Death Act is to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable and equitable rules applicable to the ever-increasing number of cases where two or more persons have died under such circumstances that there is no sufficient evidence to indicate that they did otherwise than simultaneously. Probate Code, § 296.3.

◆

Gilbert Moody, Turlock, for appellant.

Hoover & Lacy, Modesto, for respondent.

PER CURIAM.

The Court feels constrained by the unusual facts of this case and the questions of law involved to state its reasons for reversing the judgment and remanding the case for a new trial.

The cause was tried by the Court without a jury and the evidence was not reported. The record on appeal includes (inter alia) an engrossed statement of the evidence, Findings of Fact, Conclusions of Law, and Judgment. Plaintiff appealed upon the customary grounds, but has presented only two:

First—Insufficiency of the evidence to justify the decision and judgment;

Second—That the judgment is against law.

In considering the first ground, the Trial Court's engrossed statement of the evidence will be set forth verbatim. A short preliminary statement of some details shown by the exhibits but not included in the statement are necessary for its clarification.

It appeared that one Gussie Mathews and her nephew, Anthony Mathews, resided together and had taken into their home a minor child, Sylvia McKinney, the daughter of Doris Kelly. All three are now dead, as will appear from the statement of the evidence. On September 4, 1945, the Benevolent Society of California issued its policy of insurance on the life of Sylvia McKinney, then four years old, in the sum of $1,000, with "Anthony Mathews, Godfather" as named beneficiary, and he paid the required premiums thereon to the date of Sylvia's death. The contest is essentially between the administrator of Anthony Mathews' estate and Doris Kelly, Sylvia's mother, each claiming the benefits under the policy.

Both parties concede that if Sylvia McKinney predeceased the named beneficiary, Anthony Mathews, his administratrix, the plaintiff, is entitled to the benefits; but that if Anthony predeceased Sylvia in fact, or if the evidence indicates simultaneous death of the insured and the beneficiary within the provisions of Section 296.3 of the Probate Code, the parents, heirs, or personal representative of Sylvia McKinney would be entitled thereto. Defendant Doris Kelly claims to be Sylvia's sole heir.

The trial court's engrossed statement of the evidence is as follows:

"The following is a narrative statement of the oral proceedings on the trial of the above-entitled action:

"It was stipulated that Sylvia M. McKinney is dead; and that Anthony Mathews is dead; and that Marianna Azvedo is Administratrix of the estate of said Anthony Mathews, deceased (having succeeded one Mathias as special administrator); that the premiums on the insurance policy involved were paid by Anthony Mathews during his lifetime; that Doris Kelly, also known as Mrs. T. M. Kelly, is natural mother of Sylvia M. McKinney, decedent. That

Sylvia M. McKinney and Sylvia McKinney Mathews are one and the same. That said policy of life insurance is in effect.

"Al Hedin was called as a witness and testified that he is, and has been for some years, Captain in the Turlock Police Department; that on Sunday, March 23, 1952, he was asked to go to the home of Anthony Mathews in Turlock, California, and make an investigation. When he entered the house, he stated he found the bodies of three persons later identified as Anthony Mathews, Sylvia M. McKinney, and a woman called Gussie Mathews. He described and diagrammed the house and stated that he found the girl, Sylvia M. McKinney, dead in bed in the back bedroom. She was dressed in her night clothes. The bed covers were partially thrown off her body. One bullet had penetrated her head.

"Anthony Mathews was lying fully clothed with his head in the open doorway of the adjoining bedroom. He was lying face down; his forehead had been bruised; there was one shot which had penetrated his chest in the shoulder region and from his back.

"The party known as Gussie Mathews was lying fully clothed in the center bedroom with a revolver in her hand. The four or five shots had been made from this revolver. There was another pistol on the dresser in this room from which one shot had been fired.

"Several bullet marks were found in the living room in which Anthony Mathews' body lay.

"Al Hedin was asked for his opinion as to whether Anthony Mathews or Sylvia M. McKinney had died first. The counsel for Doris Kelly objected to an expression of his opinion and the objection was sustained by the Court.

"E. K. Elliott was called as a witness also by plaintiff and testified that he had been a police officer for the City of Turlock for many years; that he also appeared at the Anthony Mathews house on Sunday, March 23, 1952, and gave the same evidence as given by officer Al Hedin.

"Harry Hilliard was called as a witness by plaintiff and testified that he was at the Mathews premises on Friday, March 21, 1952, and talked with Gussie Mathews; that she appeared very nervous and did not permit him in the house. Harry Hilliard was an employee of the City of Turlock, and was making a water survey at the time.

"Dr. J. K. Ransom, County Coroner and physician and surgeon, was called as a witness by plaintiff and testified to the same physical arrangements as testified by officers Al Hedin and E. K. Elliott. He also stated that the death of Sylvia M. McKinney was caused by one shot and the nature of the wound was such as to cause instant death; that Anthony Mathews had apparently been stunned by a blow on the forehead, possibly from a bullet, and that the cause of death was the shot in the chest region which had entered from his back in the shoulder area, but this type of wound did not cause death instantaneously; that there was evidence of a struggle in the living room and evidence that other shots had been fired which did not find their mark in Anthony Mathews; that, in his opinion, Sylvia M. McKinney died before Anthony Mathews did, otherwise there would be too many things to explain away, such as the instantaneous death of the girl, Sylvia M. McKinney, her peaceful position in bed, the several shots and apparent struggle between Gussie Mathews and Anthony Mathews in the living room. When asked by the Court if he could tell which one died first, he stated that he could not. He also stated that if anyone said that Anthony Mathews died first, there were too many arguments to explain away.

"Through this witness, the respondent offered in evidence the following documents: The coroner's verdict concerning Sylvia M. McKinney (respondent and cross-complainant's Exhibit A), and the death certificate for Sylvia M. McKinney marked Exhibit C, both documents showing that Sylvia M. McKinney probably died on March 20, 1952, or March 21, 1952; the coroner's verdict concerning Anthony Mathews, marked cross-complainant's Exhibit B, and the death certificate for Anthony Mathews marked as cross-complainant's Exhibit D, both documents showing that Anthony Mathews probably died March 20, 1952, or March 21, 1952."

Upon that evidence the Trial Court found specifically and as a matter of fact that Anthony Mathews (the beneficiary) predeceased Sylvia McKinney (the insured), and therefore entered judgment against the administratrix of Anthony Mathews' estate and in favor of Doris Kelly, as mother and sole heir at law of Sylvia McKinney.

[1] We will consider first the sufficiency of the evidence to support that finding as one of fact. The evidence does not indicate that any one other than the three deceased persons had any part in this tragedy. There is no evidence from which it can even be inferred that Sylvia killed herself or either of the others. There is no evidence that Anthony killed Sylvia, but if he did he must have survived her. Therefore any attempt to support the finding must begin with the assumption that Gussie killed Sylvia. There is no evidence to support any inference that Anthony met his death otherwise than at the hands of Gussie. And assuming as we must to support the finding, that Gussie killed Sylvia, the evidence indicates a sequence of events and an appreciable interval between the deaths of Sylvia and Anthony. But after diligent search we are unable to find even a scintilla of evidence that Sylvia was still living when Anthony was killed. As the Coroner stated, every reasonable inference appears to be to the contrary. There being no evidence whatever to support the Trial Court's finding, it cannot be sustained by the rule applicable to findings on conflicting evidence, for there is no conflict.

But the respondent contends that the judgment should be affirmed because the facts bring the case within the purview of Sec. 296.3 of the Probate Code, which is a part of the Uniform Simultaneous Death Act, and reads as follows:

"§ 296.3. (Insured and beneficiary.) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary."

[2, 3] When both the insured and the beneficiary are dead, that section prescribes with precise particularity the condition upon which the policy proceeds will be distributed as if the beneficiary had predeceased the insured, and the condition is that *"there is no sufficient evidence that they have died otherwise than simultaneously"*. That this condition must be met precisely has been frequently declared. In Thomas v. Anderson, 96 Cal.App.2d 371, 215 P.2d 478, 482, after reviewing the evidence, the Court declared: "We conclude that there was sufficient evidence to support the court's finding that there was an interval of time between the deaths of Mr. Thomas and Mr. Sturgeon and that they did not die 'simultaneously' within the meaning of section 296.2 of the Probate Code." (Secs. 296.2 and 296.3 are analogous.) In that case the interval was extremely short, but the Court expressly overruled the claim that the condition would be met if the deaths occurred at *"approximately the same time."* In re Di Bella's Estate, 1950, 199 Misc. 847, 100 N.Y.S.2d 763, affirmed 279 App.Div. 689, 107 N.Y.S. 2d 929, it was held that an interval of one second between the deaths would render the section inoperative. In Sauers v. Stolz, 1950, 121 Colo. 456, 218 P.2d 741, 742, the Trial Court attempted to apply the simultaneous death statute by making a specific finding " 'that there is no sufficient evidence that said persons, Edna M. Doyle and W. E. Doyle, died otherwise than simultaneously'." But the reviewing Court found evidence in the record indicating that although both died from the same calamity, Mr. Doyle's pulse was discernible for a moment or two after Mrs. Doyle's had ceased, and declared the statute inapplicable and reversed the judgment. In re Cruson's Estate, 1950, 189 Or. 537, 221 P.2d 892, 20 A.L.R.2d 219, is the reverse of Sauers v. Stolz. In the Cruson case, the Trial Court found that the husband had survived, but the reviewing Court declared that finding to be without evidentiary support and reversed the Trial Court upon the ground that there was no sufficient evidence that

the husband and wife died otherwise than simultaneously and the simultaneous death statute was applied. To the same general effect, examine the cases cited in In re Cruson's Estate, the annotations thereto in 20 A.L.R.2d 235, and Uniform Laws Annotated, Vol. 9A, page 265, and the 1953 Cumulative Annual Pocket Part thereof.

The cases cited also hold with remarkable uniformity that if there is any sufficient evidence that either party survived the other, even when the deaths occur at substantially the same time, the statute is inapplicable and the question of survivorship must be determined as any other fact. No case has been found indicating that mere difficulty in determining which one survived justifies the Court in abandoning the task and seeking shelter under the protecting arms of the simultaneous death statute. In Sauers v. Stoltz (supra) the trial court was reversed because it attempted to do so.

[4] Referring now again to the Trial Court's engrossed statement of the evidence, we cannot find in it anything indicating even a remote possibility of simultaneous death. On the contrary, the evidence shows beyond any reasonable doubt that they could not have so died. This is not a catastrophe which befell both Anthony Mathews and Sylvia McKinney at the same instant of time and from which both perished from the identical cause, which is the typical case for the application of the simultaneous death act. All the evidence indicates that they died as the result of two separate and distinct acts, two separate shots from a deadly weapon. The evidence of a struggle of some considerable duration between Gussie and Anthony, ending in his death, when considered with the evidence relating to Sylvia's death and the location of her body and the surrounding conditions, dispels every inference of simultaneous death except upon the fantastic theory wholly without evidentiary support that after wounding Anthony by a shot which did not produce instant death, Gussie killed Sylvia at the very instant when Anthony expired. Every reasonable inference from the evidence is that one of them survived the other. There is both sufficient and abundant evidence that, to quote again the words of the Statute, "they have died otherwise than simultaneously", and therefore the conditions specified by the Statute have not been met. Furthermore, it should be noted that there is nothing in the record to indicate that the Trial Court arrived at its judgment by applying that Statute.

[5] The purpose of the Uniform Simultaneous Death Act is to supplant the former arbitrary and complicated presumptions of survivorship with effective, workable, and equitable rules applicable to the ever-increasing number of cases where two or more persons have died under such circumstances that there is no sufficient evidence to indicate that they have died otherwise than simultaneously. See note to In re Cruson's Estate, 189 Or. 537, 221 P.2d 892, 20 A.L.R.2d 236, Par. 1. It therefore occupies a very narrow field, and the conditions for its application are meticulously stated and with precise particularity. If it had been intended to apply under any other conditions, they could have been easily specified. The extension of its field urged by the respondent would in effect be adding to the statute other conditions which the legislative authority has seen fit to omit, and would be judicial legislation.

For the reasons stated, we therefore conclude that the findings and judgment of the Trial Court are not supported by either the evidence or the law, and the judgment is reversed and the cause remanded for a new trial.

42 Cal.2d 816

GROSS

v.

SUPERIOR COURT OF LOS ANGELES COUNTY et al.

L. A. 23046.

Supreme Court of California.
In Bank.
May 25, 1954.

Proceeding for writ of mandate ordering Superior Court and county clerk of Los Angeles County to prepare a clerk's and reporter's transcript of proceedings leading to order re-committing petitioner to institution as a sexual psychopath. The Supreme Court, Carter, J., held that an appeal from order re-committing petitioner to institution as a sexual psychopath could be prosecuted under statute allowing appeals from special orders, and petitioner was entitled to transcripts prepared at state's expense under statute providing for transcript fees in criminal cases to be paid out of county treasury.

Peremptory writ of mandate allowed. Alternative writ discharged.

Edmonds, J., dissented.

Prior opinion 252 P.2d 416.

1. Mental Health ⚷444

Sexual psychopathy proceedings are special proceedings of a civil nature which are collateral to the criminal case.

2. Mental Health ⚷449

In the absence of statutory provision denying the right to appeal, from sexual psychopathy proceedings an appeal may be taken by virtue of general provisions of statute allowing appeals in special proceedings. Code Civ.Proc. § 963, Welfare and Institutions Code, §§ 5517, 5519.

3. Mental Health ⚷449

Original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding and subsequent orders made under statute regulating commitment of sexual psychopath and subsequent determinations affecting him would be appealable as special orders after final judgment. Code Civ.Proc. § 963, Welfare and Institutions Code, §§ 5517, 5519.

4. Mental Health ⚷444

A proceeding under the sexual psychopathy laws is of a criminal nature so as to entitle defendant to have a clerk's and reporter's transcript of the proceedings leading to order re-committing him to institution prepared at state expense. Code Civ. Proc. § 963; Government Code, § 69952, Welfare and Institutions Code, §§ 5517, 5519.

◆

Ellery E. Cuff, Public Defender, Los Angeles County, under appointment by the Supreme Court, and Arthur J. Jaffe, Deputy Public Defender, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux and John B. Anson, Deputy County Counsel, Los Angeles, for respondents.

CARTER, Justice.

On March 17, 1948, Walter Gross, petitioner here, pleaded guilty in a criminal prosecution to a violation of section 288 of the Penal Code (lewd and lascivious conduct with a child under 14 years of age); he also admitted prior felony convictions, burglary, sodomy and lewd and lascivious conduct with a child for which he served prison terms. He requested probation and pending hearing thereon and passing of sentence, proceedings were instituted pursuant to statute, Welfare & Institutions Code, § 5500 et seq. to have it determined that he was a sexual psychopath. Proceedings in the criminal case were suspended. After a hearing thereon Gross was adjudged on July 7, 1948, to be a sexual psychopath and ordered confined to Camarillo State Hospital to be returned to court for further proceedings when his cure had been effected. The medical experts at that hearing stated that there was probably no chance of rehabilitation and that he should be permanently removed from society. He escaped from Camarillo, was captured and confined in the Mendocino State Hospital. On July 21, 1952, he filed in the superior court a "Motion for Subpoena and Writ of Attachment." The motion was denied on July 23, and he appealed. On September 18, 1952, he filed in the superior court what he called a "Motion for Subpoena and Writ of Attachment" in which he claimed that he was no longer a menace to society but the superintendent of Mendocino State Hospital refused to so certify. Pursuant to section 5519 of the Welfare & Institutions Code, the court requested the superintendent's opinion as to whether he was still a sexual psychopath, and on the superintendent's report that he was, the court ordered him returned to the court for further proceedings. At those proceedings the medical experts reported he was still a sexual psychopath and a menace to society and there was little hope for his recovery. On December 15, 1952, the court found in accordance with the experts' reports and ordered him committed to the Department of Mental Hygiene for placement at Terminal Island where he now is. His appeal from the July 23, 1952, order of denial was dismissed by the District Court of Appeal on January 26, 1953. People v. Gross, 115 Cal. App.2d 502, 252 P.2d 416. (The facts above recited are taken from the opinion on that appeal.) The appeal was dismissed on the ground that Gross had had a hearing on the determination of his then condition which resulted in the December 15th order.

Gross also moved to vacate and set aside the sexual psychopathy proceedings which the court denied on November 17, 1952. He appealed from that order. That appeal was dismissed in the same decision on the ground that it was an interlocutory order and therefore not appealable, whether the psychopathy proceedings be treated as criminal or civil; that the order of December 15, 1952, was the final order in the case. The District Court of Appeal states in its opinion that no appeal was taken from the December 15th order and that it was the final judgment in the case, but it appears that an appeal was taken therefrom within time on December 24, 1952. He also requested a clerk's and reporter's transcript of the proceedings leading to that order. His request for the transcripts was denied by the clerk of the superior court and he now seeks in this proceedings a writ of mandate ordering the clerk and court to prepare the transcripts.

Respondents assert that petitioner is not entitled to the transcripts because no appeal lies from the order; he cannot appeal *in forma pauperis* as he seeks to do nor have the transcripts prepared at the state's expense.

[1-3] The proceedings which lead to the order of December 15th were taken under section 5519 of the Welfare & Institutions Code which provides that after a person who has been committed to the Department of Mental Hygiene as a sexual psychopath has been confined for not less than six months the court may on its own motion or on motion by the person committed, require the superintendent of the hospital to send a report to the court of his opinion as to whether (a) the person "has recovered from his sexual psychopathy to such an extent that in the opinion of the superintendent the person is no longer a menace to the health and safety of others, or (b) has been treated to such an extent that in the opinion of the superintendent the person will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others, or (c) has not recovered from his sexual psychopathy, and in the opinion of the superintendent the person is still a menace to the health and safety of others, * * *." Welfare & Institutions Code, § 5517. After receipt of the report the court may order the return of the person to the court for a hearing as to whether he is still a sexual psychopath. The hearing shall be conducted substantially the same as the original proceedings committing the person. If after the hearing the judge finds "* * * that the person has not recovered from his sexual psychopathy and is still a menace to the health and safety of others, he shall order the person returned to the Department of Mental Hygiene under the prior order of commitment for an indeterminate period, or, if the opinion of the superintendent of the state hospital was * * *" that he has not recovered from his sexual psychopathy and in the opinion of the superintendent is still a menace to others the judge may order the person's recommitment for an indeterminate time. Thereafter, "A subsequent hearing

may not be held under this section until the person has been confined for an additional period of six months from the date of his return to the department." Welfare & Institutions Code, § 5519. Finally, "If the court finds that the person has recovered from his sexual psychopathy to such an extent that he is no longer a menace to the health and safety of others, or that he will not benefit by further care and treatment in the hospital and is not a menace to the health and safety of others, the committing court shall thereafter cause the person to be returned to the court in which the criminal charge was tried to await further action with reference to such criminal charge." Welfare & Institutions Code, § 5519. It thus appears that after a person has been committed as a sexual psychopath he may have his condition reascertained at intervals of not less than six months. The redetermination would be a proceeding after the original commitment substantially affecting the rights of the party and the original order of commitment. On that basis the December 15th order could be appealable under section 963 of the Code of Civil Procedure which provides that an appeal may be taken from a superior court "judgment" entered in a "special proceeding" and "any special order made after final judgment". Sexual psychopathy proceedings are special proceedings of a civil nature which are collateral to the criminal case. People v. Howerton, 40 Cal.2d 217, 253 P.2d 8; People v. McCracken, 39 Cal. 2d 336, 246 P.2d 913; In re Keddy, 105 Cal. App.2d 215, 233 P.2d 159; People v. Gross, supra, 115 Cal.App.2d 502, 252 P.2d 416. In the absence of statutory provision denying the right to appeal, an appeal may be taken by virtue of the general provisions of section 963 allowing appeals in special proceedings. See Morton v. Broderick, 118 Cal. 474, 50 P. 644; People v. Bank of San Luis Obispo, 152 Cal. 261, 92 P. 481; In re Herman, 183 Cal. 153, 191 P. 934. In People v. Barnett, 27 Cal.2d 649, 166 P.2d 4, we were considering an appeal from a judgment of conviction and from the trial court's order refusing to hold a hearing to determine whether defendant was a sexual psychopath. We said that the latter order was not appealable "under the circumstances of this record," meaning that the matter could be reviewed on the appeal from the judgment of conviction and sentence. There was no order finding one way or the other whether defendant was a sexual psychopath and commitment or not accordingly. The case is thus not in point. While there is no provision in the Welfare & Institutions Code for an appeal in sexual psychopath proceedings as there are for some of the other proceedings there authorized, we do not believe that is an indication that the general provisions on appeal, Code Civ. Proc. § 963, do not apply. It would thus appear that the original order of commitment as a sexual psychopath is appealable as a final judgment in a special proceeding and that subsequent orders made under section 5519 would be appealable as special orders after final judgment.*

[4] On the question of having the record prepared at the state's expense section 69952 of the Government Code provides: "In criminal cases in which the court specifically so directs, the fee * * * for a transcript * * * shall be paid out of the county treasury * * *". The proceeding is not strictly a criminal case as above seen yet it is to be noted it has some of the features pertinent to such cases. The state is defendant's opponent. The one sought to be declared a sexual psychopath is entitled to bail pending determination. In re Keddy, supra, 105 Cal.App. 2d 215, 233 P.2d 159; In re Rice, 105 Cal. App.2d 493, 234 P.2d 180; In re Morehead, 107 Cal.App.2d 346, 237 P.2d 335. He is entitled to be present at the hearing and if

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* We do not know whether there has been a judgment of conviction pronounced in this case. All we know is that Gross pleaded guilty to violating section 288 and then proceedings were suspended. If there were a judgment of conviction it might well be that the December 15th, 1952, order would be appealable under subdivision 3 of section 1237 of the Penal Code which states that an appeal may be taken by "defendant" from a judgment of conviction or "any order made after judgment, affecting the substantial rights of the party."

he has no counsel the court may appoint one for him or order the public defender to serve. Welfare & Institutions Code, § 5511. His liberty is at stake. Since those things are matters pertaining to the protection and rights of a person similar to one involved in a criminal case we believe he falls within the terms of section 69952 of the Government Code, supra. See In re Paiva, 31 Cal.2d 503, 190 P.2d 604; People v. Smith, 34 Cal.2d 449, 211 P.2d 561.

Let the peremptory writ of mandate issue as prayed. The alternative writ is discharged.

SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., and BRAY, J., pro tem., concur.

EDMONDS, Justice (dissenting).

Under section 69952 of the Government Code it is clear that the state must bear the expense of preparing the record on appeal only in "criminal cases." This section is substantially the same as the provisions of former section 274 of the Code of Civil Procedure, which this court construed in In re Paiva, 31 Cal.2d 503, 190 P.2d 604, and People v. Smith, 34 Cal.2d 449, 211 P.2d 561. Although each of those cases was concerned with a specific application of section 274, both of them recognized that it applies only to criminal cases.

However, neither decision is authority for holding that the present proceeding is a "criminal case", nor may such a conclusion reasonably be supported by the applicable statutes and decisions. The appeal here being considered is from an order made four years after Gross pleaded guilty to the charge of having violated section 288 of the Penal Code and in a proceeding commenced by him solely for the purpose of securing a judicial determination that he no longer is a sexual psychopath.

All of the decisions which determine the nature of a proceeding under the sexual psychopathy laws hold that it is of a civil nature (People v. McCracken, 39 Cal.2d 336, 346, 246 P.2d 913, 918, ["the entire statutory procedure being civil in nature rather than penal"]; People v. Howerton, 40 Cal.2d 217, 219, 253 P.2d 8, 10, ["The proceedings under section 5512 of the Welfare and Institutions Code are of a civil nature."]; In re Keddy, 105 Cal.App.2d 215, 217, 233 P.2d 159, 161, ["A proceeding provided for by section 5501 of the Welfare and Institutions Code is a proceeding civil in nature, not criminal * *"]; People v. Gross, 115 Cal.App.2d 502, 505, 252 P.2d 416, 418, ["Sexual psychopathy proceedings being civil in nature * *"]). Unless and until those decisions are overruled the present appeal is not in "a criminal case" and the trial court properly declined to order a preparation of the transcript at the expense of the state.

For these reasons, I would deny the writ.

42 Cal.2d 858

PEOPLE v. BALDWIN.

Cr. 5512.

Supreme Court of California.
In Bank.
May 28, 1954.

Defendant was convicted of first degree murder. The Superior Court, San Bernardino County, Archie D. Mitchell, J., entered judgment, and defendant appealed. The Supreme Court, Schauer, J., held that evidence was sufficient to sustain conviction for first degree murder.

Judgment and order denying motion for new trial affirmed.

1. Homicide 🔑253(1)

Evidence was sufficient to sustain conviction for first-degree murder.

2. Constitutional Law 🔑271

Requirements of due process do not contemplate ascertainment of precise mental processes of jury as to confessions but do require that the Supreme Court go behind the verdict to extent of making its own determination whether confessions have been coerced.

3. Criminal Law 🔑1158(4)

In determining whether confessions have been coerced, the Supreme Court does not weigh evidence as trier of fact but accepts as true that portion of evidence of coercion which is uncontradicted.

4. Criminal Law 🔑519(4)

A confession is involuntary, even though induced by statements made by one without actual authority or control over defendant, if such inducing statements are made to defendant in presence of those who have such authority and under circumstances from which accused can infer that statements have official sanction.

5. Criminal Law 🔑520(1)

Mere fact that some one has made statements which might improperly induce confession will not necessarily vitiate subsequent confession if it is shown satisfactorily that the statements did not induce or contribute to inducing the confession.

6. Criminal Law 🔑531(3)

In homicide prosecution, evidence was not sufficient to establish that defendant's confessions were involuntary.

7. Criminal Law 🔑823(1)

In homicide prosecution, giving of instructions that jury was to disregard any knowledge concerning penalty prescribed by law for punishment of offense charged but that jury had duty of determining whether death penalty or confinement in state prison for life should be inflicted was proper in view of other instructions given. Pen.Code, § 190.

8. Criminal Law 🔑1166½(12)

In homicide prosecution, where trial judge had, after insistent and repeated questioning of state witness as to his state of mind toward defendant, attempted to curtail such line of questioning, but defense counsel continued to question witness upon such subject, trial judge's statement that defendant's counsel had already asked witness that question 700 times was not prejudicial to defendant. Code Civ.Proc. § 2044.

9. Criminal Law 🔑656(5)

In homicide prosecution, wherein trial judge stated that defense counsel had asked state's witness 700 times if he were "mad" at defendant and that "I do not want to reflect upon the integrity of this witness", quoted phrase did not constitute judge's vouching for witness' integrity in view of fact that judge added that it was jury's job to determine that.

10. Witnesses 🔑291

Where, in homicide prosecution, trial judge refused to permit re-cross-examination of deputy sheriff concerning certain conversations with defendant on ground that defense counsel had already exercised opportunity to cross-examine witness as to his original testimony on direct examination and could examine him then only as to new matter which had been brought out on re-direct examination, judge was properly controlling order and manner of examination.

11. Criminal Law 🔑717

Where, in homicide prosecution, defense counsel, in his final argument to jury, neglected to state the applicable law completely, trial court correctly stated that he was going to instruct jury as to what law was and ruled that defense counsel should refrain from telling jury what his idea of law was.

12. Criminal Law 🔑717

It is for judge to decide and instruct jury as to questions of law and he can refuse counsel permission to argue the law, even though counsel has right to argue facts pertinent to the law.

13. Criminal Law 🔑1169(5)

Where, in homicide prosecution, prosecuting attorney, in questioning defendant concerning prior convictions of felony for purpose of impeachment, asked defendant whether he had been convicted of two violations of the Articles of War, and defendant admitted such convictions, but prosecuting attorney requested that matter be stricken from record after defense counsel asked prosecuting attorney whether he was prepared to show that the two offenses were felonies, and jury was instructed to disregard defendant's testimony as to such convictions, asking of such questions was not prejudicial to defendant.

Charles E. Ward, San Bernadino, for appellant.

Edmund G. Brown, Atty. Gen., and Norman H. Sokolow, Deputy Atty. Gen., Los Angeles, for respondent.

SCHAUER, Justice.

Defendant pleaded not guilty to a charge of the murder of Jack Arnold. At the trial the evidence included confessions which defendant claims were coerced. A jury found him guilty of murder of the first degree, and defendant appeals from the ensuing judgment which imposes the death penalty and from an order denying his motion for a new trial. We have concluded that the record shows no miscarriage of justice and that the judgment and the order denying defendant's motion for new trial should be affirmed.

Facts Educed at the Trial

Defendant arrived in Barstow, California, on January 28, 1953. He went to Judge Art Manning, a justice of the peace and former deputy sheriff whom defendant had known for about three years, and asked assistance in establishing himself in the community. Judge Manning permitted defendant to stay at the Manning ranch, furnished him with food, and aided him to obtain employment at another ranch.

On the morning of February 2, 1953, before defendant's employment at the other ranch was to begin, Judge and Mrs. Manning as usual went to their respective places of employment, leaving defendant alone at the ranch. Defendant then put the following property of Manning into Manning's pickup truck: a deputy sheriff's field jacket and badge, handcuffs, a bag containing coins, a .38 calibre Smith and Wesson special revolver, a .45 calibre Smith and Wesson revolver, a .45 calibre Army Colt, boxes of .38 and .45 calibre ammuition, and two submachine guns. Defendant drove the truck east from Barstow on Highway 91 for several miles; then the truck "gave out." Defendant, wearing the deputy sheriff's jacket and badge, signaled to the driver of a passing station wagon. This driver was Jack Arnold, who was a stranger to defendant but a friend of Judge Manning. Arnold stopped; defendant represented that he was a deputy sheriff; and at defendant's request Arnold permitted defendant to ride with him.

Arnold was not seen again by any witness except defendant until February 5, when deputy sheriffs who were searching for him found his body buried beneath a pile of rocks in a canyon on the desert. He had been shot five times through the back of the head and neck with a .38 calibre Smith and Wesson special revolver.

According to the assertedly coerced confessions defendant acted alone throughout the series of criminal events herein described. Defendant testified, however, as follows: About three days after his arrival in Barstow, defendant met one George Potter by chance in a tavern. Defendant had become acquainted with Potter in 1950 when both were prisoners in San Quentin. When they met in Barstow, Potter asked defendant whether he could obtain any guns and stated that guns could be sold in Las Vegas. Defendant and Potter arranged to meet at Manning's house on February 2, take Manning's guns to Las Vegas, sell them and divide the proceeds. On February 2 Potter came to the Manning house, participated in the theft of Manning's property, and accompanied defendant in Manning's truck and thereafter in Arnold's station wagon. After defendant and Potter entered the station wagon Potter took the .38 calibre revolver. When the station wagon stopped off the highway Potter ordered defendant to exchange shoes with him and ordered Arnold to walk up the canyon. After Potter and Arnold were out of sight defendant, who remained at the station wagon in possession of the two submachine guns (at least one of which was loaded) and the two .45 calibre revolvers, with boxes of .38 and .48 calibre cartridges, heard shots. Potter returned to the station wagon and said that he had shot Arnold in the leg and left him in the canyon so that he could not pursue them. Potter hid in the back of the station wagon and kept a gun in his hand while defendant drove to Nevada. There Potter vanished.

Defendant then drove from Nevada to Pennsylvania. Before he reached Pennsylvania defendant erased Arnold's name from the registration slip of the station wagon and typed in his own name.

On February 9, 1953, a Pennsylvania police sergeant who had the station wagon listed on his "hot sheet" observed defendant driving it and arrested him. Defendant was wearing Manning's deputy sheriff's jacket and badge; he also had in his possession Manning's handcuffs and revolvers, one of his submachine guns, and the altered registration slip for the station wagon. Defendant was held in a Pennsylvania jail and questioned by federal and Pennsylvania authorities. According to the testimony of the Pennsylvania sergeant, shortly after defendant's arrest he was told that the owner of the station wagon had been found "murdered" on the desert. Defendant, however, testified that he did not learn of the killing until February 12, when California authorities told him of it.

On February 11, California authorities arrived in Pennsylvania, talked with defendant, and defendant told them that he had found the station wagon parked by the road and had taken it without having seen the owner. On February 12, defendant made a statement, similar to his subsequent testimony at the trial, in which he attributed the shooting of Arnold to Potter. The California officials then took defendant to San Bernardino.

On the morning of February 14, deputy sheriffs took defendant to the canyon where Arnold had been killed. At this time defendant stated that he did not wish to see Judge Manning. After visiting the scene of the homicide, defendant and two deputies drove to Barstow. There by chance they encountered Judge Manning, who was with a constable in the constable's car. At the suggestion of Manning and the constable the two cars were driven about a mile and a half outside Barstow and stopped at the side of the road. It was then that the asserted coercion, consisting of statements by Manning in the substance and under the circumstances hereinafter detailed, occurred. Prosecution witnesses testified that the interview of February 14 between defendant and Manning took place in the open country, rather than in the sheriff's office, because at the time the office was crowded and did not permit privacy.

After the two cars stopped beside the road, Manning came to the deputies' car and sat in the back seat beside defendant. Defendant was wearing handcuffs and leg irons. Manning repeatedly said that defendant had betrayed him and had shot Arnold and defendant repeatedly denied having shot him. Manning called defendant foul names and wept, and defendant also began to weep. The officers described Manning variously as "slightly" angry, "pleading," and "hurt." There is no evidence that Manning made any direct threat in the hearing of the officers; he did say to defendant, "I wish you and I were alone on the desert. * * * I would pull your flesh from your bones with my bare hands." Defendant said to Manning and the deputies, "write out anything and I will sign it if it will make Art [Manning] feel better," and they replied that they wanted only the truth. After this interview had continued for about 20 minutes, with further accusations by Manning and denials by defendant, defendant stated that he wished to talk with Manning alone. The officers walked a short distance away so that they could not hear the conversation between defendant and Manning. Defendant then orally confessed to Manning that he, acting alone, had killed Arnold and taken his station wagon. Manning called the officers to their cars and the entire party drove to Manning's house, where defendant wrote and signed a confession which describes the homicide and concludes with the statements, "My reason for this is because of Art Manning," and "The above statement was freely made by me," followed by defendant's initials and the signatures of the officers and Manning.

The testimony of defendant as to the circumstances inducing his above mentioned confessions of February 14 is not consistent. It is in essential part as follows: In the officers' presence Manning said, "'if I could get you over here—'and he pointed to some trees farther over—'I would tear the skin from your body piece by piece,'" and defendant believed this statement. But defendant then asked to speak to Manning alone because "Mr. Manning seemed to be becoming more hysterical all the time and I thought if I could talk to him maybe I could get him to believe me." After defendant and Manning were out of the officers' hearing Manning said, "I know you killed that old man and you are going to tell me the truth if I have to take you over here and beat it out of you." Defendant believed this statement, falsely confessed because of his resultant fear, and made the written confession "the way Judge Manning told me to write it.

Manning testified that he made no threats toward defendant. There is prosecution evidence that after defendant and the deputy sheriffs had left Manning at his home on February 14, defendant said, "I feel a lot better. I am glad I got it off of my chest, that is the least I can do for Art Manning after what I have done to him. If it was just you guys I never would have told you this story. When I told Art that story and signed the confession I knew I was going to the gas chamber."

Defendant's conversations with the officers on the afternoon of February 14 continued as they drove from the Manning ranch to Barstow and then from Barstow to San Bernardino; defendant said that he had done "a cold blooded thing" and repeated his confession. On February 16 in the San Bernardino jail a deputy showed defendant Manning's .38 calibre revolver and defendant said that he thought it was the gun with which he had shot Arnold; the deputy showed defendant pictures of Arnold and defendant said that that was the man he had shot.

Defendant testified variously, as to his confessions, that "I may have said anything because I was scared"; that he ceased being "scared" after he reached the county jail on the afternoon of February 14; that he had never ceased to fear Judge Manning; and that he did not cease to fear immediate danger until he entered the courtroom on June 1, 1953.

As to the vanished or non-existent George Potter, a clerk from San Quentin testified that he had searched the prison records, particularly those from 1920 until the time of trial, and found no indication that there had been an inmate with that name or alias.

Sufficiency of the Evidence

[1] Defendant contends that the evidence, without the assertedly inadmissible confessions, is insufficient to support the verdict. He suggests that the jury should have given more credence than they did to the portion of his testimony which seeks to cast responsibility for the killing on Potter. The peculiar circumstances of the asserted Potter's chance appearance in Barstow at the time of defendant's arrival there, his disappearance in Nevada just after the killing, and the absence of his name from the records of San Quentin, where defendant claims to have met him, together with other facts tending to impeach defendant, fully justified the jury in rejecting the whole of defendant's testimony as to Potter.

If defendant's testimony as to Potter is rejected or partially discounted, it then appears from the remainder of defendant's own testimony and from undisputed evidence of physical facts that defendant had a motive to steal Arnold's vehicle; that by misrepresentation that he was a deputy sheriff he obtained a ride with Arnold; that defendant, armed with the .38 calibre revolver, forced Arnold to walk to a place concealed from the highway, shot him repeatedly in the back, and buried him, then took the station wagon to flee from the scene of the homicide. From these circumstances the conclusion that the killing of Arnold was murder of the first degree, committed in the perpetration of robbery, is almost inescapable.

Admissibility of Evidence of Defendant's Confessions

Defendant urges that his confessions were obtained by methods so at variance with state and federal standards of fundamental, constitutional fairness that their use in evidence requires a reversal. There is no claim that the conduct of anyone other than Judge Manning was coercive; defendant does not suggest that any officer who was connected with the investigation or prosecution of the case at any time used force or any improper persuasion.

The trial court in its treatment of the confessions followed accepted California procedures (see People v. Gonzales (1944), 24 Cal.2d 870, 876–877, 151 P.2d 251) which were materially similar to those used by the New York trial court in Stein v. People of State of New York (1953), 346 U.S. 156, 170–174, 73 S.Ct. 1077, 97 L.Ed. 1522. In the Stein case the United States Supreme Court specifically considered the propriety of such procedures and upheld a death sentence.

The procedures in the lower court here were as follows: First the trial judge in the presence of the jury heard conflicting evidence as to the voluntariness of the confessions and made a preliminary determination that they were freely made and therefore admissible in evidence. The judge's statement of his entirely proper reasons for this determination is quoted in the margin.[1] After the trial judge made his initial factual determination that the confessions were admissible, their voluntariness was again passed upon by a trier of fact, this time the jury, which like the judge had the opportunity to observe the witnesses. The judge left to the jury, under proper instructions, the questions whether confessions were made, whether they were freely given, and whether they were true; he further instructed the jury that they could not consider a confession unless they found that it was voluntary.[2] On defendant's motion for new trial the judge again considered and rejected defendant's arguments that the confessions were coerced and that their use violated due process.

[2, 3] It is true that this reviewing court cannot ascertain, either from the general verdict alone or from the record as a whole, how the jury answered the factual question whether the confessions were voluntary. Either the jury may have decided that the confessions were voluntary and true and relied on them to convict defendant, or (a more difficult mental feat) they may have decided that the confessions were involuntary, then disregarded them and based their verdict solely on the other, legally sufficient (and in itself overwhelmingly convincing) evidence of guilt. The requirements of due process do not contemplate ascertainment of the precise mental processes of the jury as to the confessions. (Stein v. People of State of New York (1953), supra, 346 U.S. 156, 177–179, 73 S.Ct. 1077.)

But due process does require that this reviewing court go behind the verdict to the extent of making our own determination as to whether the confessions were coerced. In making this determination we do not weigh the evidence as a trier of fact. Rather, we accept as true that portion of the evidence of coercion which is uncontradicted. (People v. Millum (1954), 42 Cal.2d 524, 267 P.2d 1039, and United States Supreme Court decisions there cited.) As appears from the statement of facts (270 P.2d 1032) there is some evidence tending to show psychological coercion, but there is practically no such evidence which is not contradicted. Manning's testimony that he made no threats to defendant must be understood as contradicting the implication of threats derived from the testimony that he used abusive language. Defendant's testimony that he was in fear of Manning and confessed because of such fear is contradicted by defendant himself; for example, after defendant had assertedly believed and been frightened by Manning's extravagant statement that if Manning were alone with defendant he "would tear the skin from [defendant's] * * * body," defendant nevertheless asked to be alone with Manning; according to other testimony of defendant he confessed to "make Art feel better" and to relieve defendant's own feeling of guilt. The record considered in its entirety overwhelmingly tends to show that defendant's confessions were true and were made because defendant felt that "that is the least I can do for Art Manning after what I have done to him."

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[1] Prior to admitting the confessions in evidence the trial judge, outside the presence of the jury, said as to the asserted coercion of defendant, "The remarks that were made by Judge Manning reflected, in my mind, merely his distress of mind and hate, which is contempt, for the defendant and obviously were not made for the purpose of inducing the defendant to confess. On the contrary, they were such as would deter any person from making a confession or an admission at all, they would arouse resentment in most people's mind and the only evidence of any alleged threat * * * came from the defendant. I don't credit his testimony in the slightest degree."

[2] The jury were told, "If the jury concludes that a confession was not made voluntarily, it is the duty of the jury to entirely disregard the same and not consider it for any purpose."

[4-6] It is urged on behalf of defendant that because Manning's statements can be construed to be of a threatening rather than a pleading nature and were made either in the immediate presence of the officers who had defendant in custody or while they were within call, we are bound to hold that as a matter of law the confession which followed was coerced. We recognize that a confession is involuntary even though it is induced by statements made by one without actual authority or control over the defendant, if such inducing statements are made to defendant in the presence of those who have such authority and under circumstances from which the accused can infer that the statements have official sanction. (People v. Rogers (1943), 22 Cal.2d 787, 805, 141 P.2d 722; People v. Silvers (1907), 6 Cal.App. 69, 72-74, 92 P. 506; People v. Piner (1909), 11 Cal.App. 542, 553, 105 P. 780.) But the mere fact that someone has made statements which might improperly induce a confession will not necessarily vitiate a subsequent confession if it is shown satisfactorily that in truth the statements did not induce or contribute to inducing the confession. Accordingly the cited cases have no application here, where it appears from any reasonable construction of defendant's own conduct and acts at the time of his initial confessions, as established by his testimony at the trial, that he was not acting in fear of Manning or the custodial officers.

Instructions which Concern the Jury's Choice of Penalty

The jury were instructed that "It is the duty of the jury to decide whether the defendant be guilty or not guilty of the offense charged considering all the evidence submitted to you in the case. It is not for you to consider the penalty prescribed for the punishment of the offense at all. If you are aware of the penalty prescribed by law it is your duty to disregard that knowledge. In other words, your sole duty is to decide whether the defendant is guilty or not guilty of the offense with which he is charged. The question of punishment is left wholly to the Court except as the law circumscribes its power."

Thereafter the jury were instructed that "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life * * *. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

The quoted instructions considered independently and out of context appear to be irreconcilably inconsistent, and the first quoted instruction, so considered, would be fatally inconsistent with section 190 of the Penal Code, which provides in material part that "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same." It is also noted that in a death penalty case it has been held that the giving of the instruction that the jury were not to consider the penalty was "grave and manifest error" which required reversal. (People v. Sainz (1912), 162 Cal. 242 247, 121 P. 922.) In the Sainz case, however, this court pointed out that the error of the isolated instruction that the jury should not consider the penalty was nowhere averted or cured by other instructions, and particularly noted that "Nowhere was the jury told what alternative punishments for murder in the first degree the law has prescribed, nowhere were they told that the decision as to which of the two punishments should be inflicted was a high duty imposed by law upon them."

[7] Here the court properly told the jury, "you are to consider all the instructions as a whole, and are to regard each in the light of all the others." If the charge is so considered it appears that the portion of the instructions quoted 270 P.2d 1034, which directs the jury not to consider the penalty should be construed as applicable only to that stage of their deliberations where they were concerned with the basic issue of the guilt or innocence of the defendant. It was only after the jury had resolved the issue as to guilt, with the many questions necessarily involved in the determination of that issue, that the provisions of the law of this state as to the penalty for murder of the first degree became relevant. Viewing the instructions as a whole, the jury must have understood that at this latter stage of their deliberations, if they reached such stage, they were to be guided by the instructions that "If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. * * * In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

Other Contentions of Defendant

Defendant states generally that throughout the trial the judge harrassed defense counsel and expressed disbelief of the defense. A reading of the transcript discloses no such conduct on the part of the trial judge. Defendant particularly urges that the trial judge in effect deprived defendant of his right to cross-examine the witness Manning. The trial judge did, after insistent and repeated questioning of the witness by defendant's counsel as to his state of mind toward defendant, curtail this line of questioning, but he did so in the exercise of his power to control interrogation. (Code Civ.Proc. § 2044.)

[8, 9] Even after the trial judge indicated that this line of interrogation should cease, defense counsel continued to question the witness on the subject. The trial judge then said, "Let us not take all day on that subject, you have already asked him that seven hundred times if he [the witness Manning] were mad [at defendant] * * and I do not want that to reflect upon the integrity of this witness, that is the jury's job to determine that." While the statement that the question had been asked "seven hundred times" was a gross exaggeration, it was provoked by the undue persistence of defense counsel and by reason of the very obviousness of its character could not, in the light of all the circumstances, have been prejudicial. The further statement that "I do not want that to reflect upon the integrity of this witness" should not have been made but it does not appear to be, as defendant asserts, an indication that the judge himself was vouching for the integrity of the witness; he added, "that is the jury's job to determine that."

[10] Defendant complains that the trial judge refused to permit cross-examination of a deputy sheriff as to certain conversations with defendant. The matters complained of occurred on re-cross-examination. The trial judge pointed out that defense counsel had already had and exercised the opportunity to cross-examine the witness as to his original testimony on direct examination, and ruled that counsel could examine him as to new matter which had been brought out on re-direct examination. It appears that the judge was not improperly limiting the scope of examination but rather was properly controlling its order and manner.

[11, 12] Defendant asserts that the judge erred to his prejudice by curtailing his argument to the jury that the written confession should not be considered because it was involuntary. After defendant's counsel had argued that Manning's

conduct preceding the confession was coercive, counsel said, "if you believe that those threats were made and that they were threats, * * * then you may not consider for any purpose this purported confession. That is the law." The court said, "I am going to instruct the jury as to what the law is and I will ask you to refrain from telling the jury what your idea of the law is." This ruling was correct. Defense counsel neglected to state the applicable law completely. And it was for the judge to decide and instruct the jury as to questions of law; he could refuse counsel permission to argue the law, although counsel had a right to argue facts pertinent to the law. (People v. Chessman (1951), 38 Cal.2d 166, 188, 238 P.2d 1001.)

The prosecuting attorney in questioning defendant as to prior convictions of felony for the purpose of impeachment asked whether he had been convicted of two violations of the Articles of War. Defendant admitted such convictions. Defendant's counsel asked the prosecuting attorney whether he was prepared to show that the two offenses were felonies. After discussion of the matter outside the presence of the jury, the prosecuting attorney moved to strike any reference to violations of the Articles of War. The motion was granted and the jury were instructed to disregard defendant's testimony as to the two convictions.

[13] Defendant now asserts that the asking of the questions as to the convictions prejudiced him in the eyes of the jury. He makes no effort to show that the offenses were not felonies. Rather, he argues that the prosecuting attorney's motion to strike reference to such convictions showed that he had acted in bad faith when he originally asked about them. No bad faith and no prejudice appear. The prosecuting attorney had available in the trial court a certified record of the convictions and citations to federal cases and statutes as to whether the offenses were felonies. But it appears that he decided not to risk an adverse ruling on the possibly close question whether the convictions could be used for the purpose of impeachment, and therefore at his request reference to the matter was stricken from the record.

For the reasons above stated, the judgment and the order denying the motion for new trial are affirmed.

SHENK, EDMONDS, CARTER, TRAYNOR, and SPENCE, JJ., concur.

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125 Cal.App.2d 419

TALIAFERRO v. TALIAFERRO.

No. 15866.

District Court of Appeal, First District, Division 2, California.

May 24, 1954.

Rehearing Denied June 23, 1954.

Hearing Denied July 21, 1954.

Action against former husband to recover arrears in payments under provision of property settlement agreement for monthly payments for support of plaintiff and minor children, wherein defendant filed cross-complaint for declaratory relief and counterclaim for overpayments. The Superior Court, Contra Costa County, Jordan L. Martinelli, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Kaufman, J., held that language of agreement and the evidence supported findings that provision for monthly support payments constituted part of division of property and not alimony and that under agreement plaintiff was entitled to such payments for life regardless of subsequent marital status.

Judgment affirmed.

1. Husband and Wife 🔑**278(1)**

Code provision relative to power of court in divorce action to award support for wife and minor children placed no limitations upon right of husband and wife to contract with each other, and husband for adequate consideration may voluntarily contract with wife to give support beyond that for which he is strictly obligated. Civ. Code, § 139.

2. Divorce ⚷245(4), 309

Final decision that property settlement agreement was not merged in interlocutory or final decree of divorce and that therefore court was without jurisdiction to modify terms of agreement was res judicata on question of power of court to modify provision of agreement by which husband agreed to pay wife stated sum per month for support of herself and minor children.

3. Declaratory Judgment ⚷384

The purpose of an action for declaratory relief is to obtain an interpretation of a contract and a decree in such a case provides only for a determination of the purposes intended by the instrument and not for a modification of its terms.

4. Husband and Wife ⚷279(1)

Language of written property settlement agreement by which husband and wife divided community property and released all claims for support and maintenance as husband or wife or otherwise and evidence as to understanding and construction of agreement by parties supported findings that provision that husband pay wife stated amount per month for support of herself and minor children on the first of each and every month thereafter constituted part of division of property and did not provide for alimony and that under such provision wife was entitled to specified payments so long as she lived regardless of subsequent marital status, but had waived a portion of payments and consented to reduction thereof when children or either of them did not live with her.

5. Husband and Wife ⚷279(1)

Property settlement agreement, under which wife was to receive one-half of proceeds of any realty sold but had no right to force a sale of any realty, in effect gave husband a life estate in wife's share of the community property.

6. Appeal and Error ⚷1048(1)

Sustaining objection to questions asked witness was not prejudicial error, where trial court subsequently overruled the objection and permitted almost identical question to be asked witness.

7. Husband and Wife ⚷279(1)

Incorporation of property settlement agreement into divorce decree would not in itself establish that provision in agreement for monthly payments for support of wife and minor children was an alimony provision and not a division of property.

8. Husband and Wife ⚷279(2)

Where property settlement agreement appears to be an integrated agreement, provisions therein for monthly payments for support of wife and minor children cannot be modified contrary to terms of agreement.

9. Payment ⚷63(1)

In action against former husband to recover arrears under provision of property settlement agreement for specified monthly payments for support of plaintiff and minor children, defendant's denial of every allegation of paragraph of complaint in which payment to specified date was alleged put the matter of payment to such date in issue and court could properly make findings as to such payment notwithstanding admissions as to such payment contained in complaint.

10. Appeal and Error ⚷882(19)

In action against former husband to recover arrears in payments under provision of property settlement agreement for monthly payments for support of plaintiff and minor children, wherein defendant filed counterclaim for overpayment, computing amount owed by husband under agreement and credits to be set off against such amount from a date more than one year prior to date to which, according to complaint, specified monthly payments had been made in full, was not prejudicial to defendant, where defendant acquiesced in such method of computation and immediately introduced checks to show overpayments during period in question.

◆

E. A. Taliaferro, in propria persona, San Pablo.

Masterson, Bernheim & Sugarman, Richmond, for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of the Superior Court of Contra Costa County in favor of plaintiff in the sum of $5,862.29. Plaintiff's complaint alleged a written contract, a property settlement agreement and a breach thereof by defendant. Defendant's answer admitted the execution of the contract, but denied the breach. Defendant cross-complained for declaratory relief asking an adjudication that defendant was not liable to plaintiff for any payments under paragraph Seventh of the settlement agreement since the date of the wife's remarriage. The cross-complaint also alleged overpayments under the agreement and asked for an accounting and judgment for defendant for the excess payments. Plaintiff's demurrer to the cross-complaint having been overruled and her motion to strike granted only as to a part thereof, she filed an answer to the cross-complaint. Her answer admitted the allegations of the cross-complaint to the effect that the Superior Court of Contra Costa County in a prior action (No. 29810) had made an adjudication that said property settlement agreement was not merged in the interlocutory or final decrees of divorce entered in that action, and that it was without jurisdiction to order a modification of the terms of the property settlement agreement. Plaintiff's answer also denied any overpayment under the settlement agreement.

Dorothy Taliaferro, plaintiff and respondent, had on September 7, 1943, filed suit for divorce against her husband, Eugene Taliaferro, defendant and appellant herein. On December 1, 1943, they entered into an agreement dividing their property. Provision Fifth of the agreement provided that the community property of the parties be divided in the following manner: the auto wrecking, repairing, and new and used parts business was to remain under the management and control of the husband and he was to be entitled to all profits therefrom; the value of the business and premises on which it was located was agreed to be $20,000, and in the event of a sale of the business the wife was to receive $10,000 for her interest therein; the husband was to pay the taxes and assessments on the real estate of the parties and pay off all liens when due, and was to receive all rentals therefrom. Each party was entitled to receive one-half of the price from the sale of any real estate made after the date of the agreement as well as one-half of the proceeds of any pending contracts for the sale of realty.

Paragraph Sixth of the agreement provided that the custody of the two minor daughters be given to the wife with visitation rights to the husband. Paragraph Seventh, which gives rise to the present controversy, reads as follows:

"The husband agrees to pay the wife the sum of Three Hundred and Fifty Dollars ($350.00) per month for the support of herself and the two minor children of the parties beginning on the 1st day of December, 1943 and continuing in monthly installments on said 1st day of each and every month thereafter."

During all negotiations leading up to the signing of the agreement the wife was advised by counsel who drew up the property settlement. The husband was also represented by counsel in the negotiation and execution of this agreement. Both the interlocutory decree of divorce dated January 3, 1944 and the final decree made and entered on January 10, 1945, approved and made a part of each order the property settlement agreement of December 1, 1943.

An order to show cause in re contempt was issued in April 1945 and hearings were continued from time to time until July 20, 1945. In January 1946 another order to show cause was issued and continued from time to time. Appellant testified that at the hearing he was held in contempt and ordered to pay up, which he did. It is to be observed that at the time it was generally held that both judgment remedies and contractual remedies were available to enforce a property settlement agreement. Gummerson v. Gummerson, 14 Cal.App.2d 450, 58 P.2d 394; 39 Cal.Law Rev. 250.

On April 1, 1947 the eldest daughter of the parties, Janet Taliaferro, married and respondent apparently acquiesced in a reduction in the monthly payments to the extent of $75. The trial court found that there had been a voluntary modification on the part of plaintiff from $350 per month to $275 beginning January 1, 1947.

On April 18, 1947 respondent married Louis Finn. There is a dispute as to when appellant learned of respondent's remarriage, appellant contending that he first had proof of it in May 1948, whereupon he stopped making monthly payments for her support. Respondent testified that appellant knew of her marriage, that she lived ten blocks from appellant, that he called on their daughter in respondent's home when Mr. Finn was present, and that at times Mr. Finn even worked for appellant.

After May 1948 no further payments were made by appellant under the Seventh paragraph of the agreement with the exception of $800 which was paid by appellant during 1948 for the support of the younger daughter in a convent boarding school. Appellant did advance sums of money to respondent during that period which he insisted must be considered as advances against her share of future sales of real property and not as support payments. The parties stipulated that these payments might be credited against the judgment in this action.

In March 1949, appellant made a motion to modify the final decree of divorce in Action No. 29810, and on June 23, 1949, the Superior Court of Contra Costa County made an order modifying said decree by striking out paragraph Seventh of the property settlement agreement. On July 6, 1949, respondent filed a motion to vacate the order of June 23, 1949, and on September 16, 1949, the court made an order vacating the order modifying the final decree, the court having determined that the "Property Settlement Agreement * * * was not merged in the interlocutory and final decrees of divorce * * * and that this court therefore is without jurisdiction to make an order modifying the terms of said property settlement agreement. * * *" The court was led to reverse itself because of the case of Shogren v. Superior Court, 93 Cal.App.2d 356, 209 P.2d 108, which had been decided on August 17, 1949. There was no appeal from the order vacating the order of modification.

On September 29, 1949, respondent filed the present action demanding payment of arrears under paragraph Seventh of the property settlement agreement.

The trial court found that by reason of the evidence and stipulation of the parties that plaintiff was entitled to receive $275 per month for specified periods and $200 per month for other specified periods; that defendant was entitled to certain set-offs and credits; that certain allegations of the complaint were true; that certain allegations of the answer were untrue; that there was an actual controversy requiring the court to pass on the cross-complaint; that certain allegations in the cross-complaint were true, others untrue, and that the Seventh paragraph of the property settlement agreement was a part of the division of the community property of the parties and was not alimony; that under the Seventh paragraph plaintiff was entitled to receive payments for life irrespective of her subsequent marital status, that plaintiff had waived a portion of the payments and had consented to a reduction thereof. The court found that up to and including September 1952, $16,500 was due under paragraph Seventh, and that appellant was entitled to credits of $10,637.71. Judgment was therefore rendered in favor of respondent in the sum of $5,862.29.

[1] Appellant contends that the husband's obligation to continue support payments to the wife automatically terminated upon her remarriage by virtue of the provisions of Sec. 139 of the Civil Code. Sec. 139 deals with the power of the court in a divorce action to make an award of support for the wife and children of the marriage. When the property settlement herein was made (1934) that section contained the following provision: "Upon the remarriage of the wife, the husband shall no longer be obligated to provide for her support but such remarriage shall not affect his duty to provide for the maintenance of the children of his marriage." In 1951 that provision was amended to read: "Except as other-

wise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon remarriage of the other party." Appellant contends that we must regard Sec. 139, Civil Code as it read in 1943 as written into the contract, and that strong public policy demands that support be terminated upon remarriage. Sec. 139 places no limitations upon the rights of husband and wife to contract with each other as they please, and if the husband for adequate consideration contracts to give support beyond that for which he is strictly obligated, he has the right to thus freely contract with his wife. This is not being imposed upon him by the power of the court, but is something which he undertakes voluntarily, and in the present case, with advice of counsel.

Appellant relies upon Cohen v. Cohen, 150 Cal. 99, 88 P. 267, Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53, and McClure v. McClure, 4 Cal.2d 356, 49 P.2d 584, 100 A.L.R. 1257. In Rosson v. Crellin, 90 Cal. App.2d 753, 203 P.2d 841, where it was held that even though a court granting a divorce is powerless by reason of Sec. 139, Civil Code, to compel a husband to provide support for his wife after her remarriage, the husband's unqualified agreement to do so will be enforced if it is part of the property settlement agreement or is otherwise supported by a valid consideration. There, as here, it was argued that the property settlement agreement was qualified by Sec. 139, and that an agreement providing for support after remarriage was against good public policy. The court pointed out that though not "obligated" he had agreed without qualification as a part of a transaction in which property rights were settled, to make monthly payments during the wife's lifetime. The court distinguished the Cohen, Atlass and McClure cases, supra, as cases relating to support ordered by the court and not involving the construction of property settlement agreements.

Appellant contends that a close study of all the California cases leads to the conclusion that this case belongs in the category of cases such as Hough v. Hough, 26 Cal. 2d 605, 160 P.2d 15, where the provisions for support are severable and subject to modification by the courts. Also cited is Dexter v. Dexter, Cal.App., 253 P.2d 999, which held that the parties therein made an equal division of their community property plus an agreement for support and maintenance. Since appellant's brief was written, however, Dexter v. Dexter has been decided by the Supreme Court, 42 Cal. 2d 36, 265 P.2d 873, 877. The decision distinguishes the Hough case as one in which it had become res judicata that the payments there involved were alimony and not an integral part of a property settlement. The case holds that "In the absence of an order for the payment of alimony in the interlocutory decree * * * or a reservation of jurisdiction to make such an order in the future, the court cannot, after the interlocutory decree has become final, add a provision for alimony or modify the amount of payments ordered pursuant to a property settlement agreement." See also Finnegan v. Finnegan, 42 Cal.2d 762, 269 P.2d 873.

[2] Because of the decision of the Superior Court of Contra Costa County in case No. 29810, holding that the property settlement agreement was not merged in the interlocutory or final decree of divorce and therefore said court was without jurisdiction to modify the terms of the property settlement agreement, it is res judicata that there is no power in the court to modify the support provision. The court held that it had no power to modify, but it made no interpretation of the meaning of the terms of the property settlement agreement. The order was denied without prejudice. Whatever appellant's obligations are must be determined from the terms of the property settlement agreement, and cases dealing with the power of the court to modify support provisions are entirely irrelevant.

Appellant has by his cross-complaint sought declaratory relief, that is, a determination by the court as to what his rights and duties are under the terms of the property settlement agreement. He did not ask reformation of the contract. He did not claim that the contract mistakenly expressed an intent different than that agreed upon. He did not attack the validity of it in any way, but simply asked for a declaration of rights and duties thereunder, alleging that he is not now obligated and for a long time past had not been obligated to pay plaintiff anything under paragraph Seventh of the agreement by reason of her remarriage and the changed circumstances of the children, that the amounts provided in that paragraph were by way of alimony and maintenance while plaintiff remained unmarried and were not by way of settlement of community or other property rights between the parties.

The trial court found in Finding 13 that an actual controversy existed as to the interpretation of the written agreement, that certain allegations were true except the clause "and further and separately to provide for alimony for wife until her death or remarriage" and that "said agreement was made a part of the order of the court." (Finding 14) The court also found (Finding 15) that the agreement and "particularly provision Seventh thereof, was made for the purpose of providing for a division of the community interest in the properties of the parties and to provide for their rights therein and for no other purpose whatsoever, and that said agreement and provision Seventh thereof was not entered into for the purpose of providing for alimony and maintenance of the plaintiff while she remained unmarried, or otherwise, and was not a provison inserted therein providing for the support of the minor children; that by reason of said provision Seventh * * * plaintiff became entitled to receive from the defendant the sum of $375.00 per month for life, irrespective of marital status; but that the right to receive the whole of said sum * * * when the children * * * or either of them, do not reside with plaintiff, has been defined, limited and reduced by acquiescence and waiver of the plaintiff in manner as hereinbefore set forth in these findings."

One of the introductory recitals of the agreement is that "it is the mutual wish and desire of said parties that a full and final adjustment of all their property rights, interests, and claims be had, *settled and determined* by said parties *in this agreement.*" And paragraph First states that *"each party* is *hereby released and absolved from any and all obligations and liabilities* for any future acts and duties of the other, and each of said parties hereby releases the other from any and *all liabilities, debts, or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects* except as hereinafter provided."

[3] It is settled that the purpose of an action for declaratory relief is to obtain an interpretation of a contract, and a decree in such a case provides only for a determination of the purposes intended by the instrument, and not for a modification of its terms. Putnam v. Putnam, 51 Cal.App.2d 696, 699, 125 P.2d 525; Flynn v. Flynn, 103 Cal.App.2d 91, 96, 229 P.2d 5. The language of provision Seventh provides support in the sum of $350 to be paid to the wife for herself and the minor children from December 1, 1943 "and continuing in monthly installments on said 1st day of each and every month thereafter."

[4, 5] If there is no ambiguity in the language of the agreement, then the trial judge's finding of the meaning of the contract is adequately supported. The document purports to make a final adjustment as of its date of all property rights, interests and claims, it releases the parties as to any future acts and duties, *including all claims for support and maintenance,* and it is to settle their rights *in all respects* unless it is otherwise therein provided. If the wife is to be paid $350 per month for each and every month thereafter, the only reasonable interpretation is that she is to be so paid as long as she lives. Respondent points out that the parties immediately gave up certain rights which ordinarily they would have had during the interlocutory period—the right to share in later acquired property, the right to share in the estate of the other. The wife agreed upon

a valuation of her half share of the business when and if it should be sold; she agreed to the receipt of all rentals from the real property and all profits from the business by the husband. She was to be entitled to receive one-half the proceeds of any realty sold, but she had no right to force a sale of any of it, hence in effect she gave the husband a life estate in the wife's share of the community property. Buttlar v. Buttlar, 71 N.J.Eq. 671, 65 A. 485. Paragraph Ninth provided that in any divorce suit "the respective property rights and interests of the parties shall be fixed and determined" by the terms of this agreement. At the time the agreement was made, the wife's complaint in divorce demanding $500 per month support for herself and $100 per month for the child was already on file.

In Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873, where the support and maintenance provision was very similar to that herein, except that it was expressly stated that it was to terminate on the wife's remarriage, the court held that since it was part of an agreement by which the parties expressly stated that they intended finally to settle both their property rights and duties with respect to support and maintenance and each waived any claim to maintenance except as expressly provided for therein, that it would be contrary to the clearly expressed intention of the parties to hold that the provision for monthly payments constituted a separable agreement for alimony subject to the continuing jurisdiction of the court to modify. The court noted that such payments are of a dual nature designed to discharge the obligation of support and thus have the indicia of alimony, but to the extent that they represent a division of the community property, or constitute an inseparable part of the consideration for the property settlement, they are not alimony and cannot be modified by the court.

If, on the other hand, it can be said that the writing requires extrinsic proof of the intention of the parties, then it would be error to deny the evidence offered in proof thereof. Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 161 P.2d 217, 162 A.L.R. 747; Flynn v. Flynn, supra. There may be some ambiguity in paragraph Seventh since it provides for support of *minor* children for each and every month thereafter.

[6] Appellant contends that the court erred in sustaining objection to certain questions in regard to the intent of the parties in executing this agreement. Counsel asked respondent if there was any discussion regarding the property settlement agreement at which she was present as well as Mr. Taliaferro. The court first sustained the objection, but after an extended discussion, stated that he had misconstrued counsel's statement, and then overruled the objection, hence no prejudice resulted from this ruling. Counsel then asked if the matter of the division of property was discussed, and the court sustained an objection on the ground that it was foreign to the issue. The issue was, of course, the meaning of paragraph Seventh dealing with support. She was then asked if there was a discussion about the amount for her support and the support of the children to which she replied in the affirmative. Counsel then asked "And there was also a discussion about how the property should be divided, was there not?" to which she replied, "Yes." When he then asked if those matters were discussed as separate items, respondent's counsel objected, but the court overruled the objection. It is therefore clear that no prejudice resulted from sustaining an objection to an almost identical question which was later allowed.

Counsel for appellant attempted to introduce into evidence affidavits signed by respondent when she instituted contempt proceedings against appellant in an effort to collect the $350 per month. The court had indicated that he would allow them to show her state of mind, or her understanding of the meaning of the $350 provision. But when the affidavit was read, and it simply recited that a certain property settlement agreement provided for the payment of $350 a month, the court decided that it had no probative value, that it was of no value for purposes of impeachment. When counsel offered it in evidence he stated that he wished to prove that plaintiff and her attorney regarded the agreement as part and parcel of the divorce decree, the purpose being to show that it should have all the attributes of a divorce decree providing for alimony, so that the alimony would fall upon remarriage of the plaintiff. The court then said (and it is this language which appellant criticizes as showing the court's erroneous theory):

"Well, I think that's stretching things to the breaking point, myself. The decree is not before the Court. I may be quite wrong, * * * but it seems to me that that, and many other offers in this trial, would be highly proper if this were a proceeding in which the decree of the court were primarily before the Court, either in contempt proceedings or to have the decree amended or modified, or if it were a suit for reformation of the contract, something of that sort."

[7, 8] Appellant's theory at the trial appeared to be that to prove the paragraph Seventh was a support provision in the nature of alimony he must show that the property settlement agreement was intended to have been incorporated in the decree. But recent cases make it clear that the fact of incorporation alone would not prove that paragraph Seventh was an alimony provision and not a division of property. Dexter v. Dexter, 42 Cal.2d 36, 265 P.2d 873; Fox v. Fox, 42 Cal.2d 49, 265 P.2d 881. In Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865, it is said that where the property settlement agreement appears to be an integrated agreement the provisions for monthly payments cannot be modified contrary to its terms.

Appellant says that the court's theory of the case prevented him from getting in evidence to show that "the agreement between appellant and respondent was in its nature by virtue of their words and actions and all surrounding circumstances intended to be and construed by them to be a severable agreement containing an independent provision for support." Appellant does not, however, give any further transcript references to show wherein the court erred in its rulings. On page 152 of the transcript the court said to appellant's counsel, "I urge, I say repeatedly, that the meaning of that contract and the so-called support clause must be gleaned from what the parties said, did, thought and understood about it, and not what some attorney thought about it. It's their contract. The attorneys are strangers to the contract. The rights are between them, and nobody else. It's a question of interpretation." The trial judge then permitted appellant's counsel to cross-examine respondent at length as to her understanding of the $350 monthly payments, whether they were in the nature of alimony or property. She testified that she never considered them alimony, did not believe that they could be cut off if she remarried, that she considered that they were income coming to her from rentals of the properties and the automobile parts business. She stated that she had built the business with appellant. Respondent was questioned as to how she had reported this sum in her income tax returns, and she stated that it was reported just as income. The tax accountant who prepared her return was brought in, and testified he had put down the source of this income as "alimony", that he secured the information from respondent. Appellant's bookkeeper was also brought in to testify that when respondent called for her checks she referred to them as "alimony".

Appellant testified that when his daughter Janice came to live with him he was allowed to deduct $75 from the alimony each month for her support as a result of his conversation with respondent. After Jacqueline came to live with him, respondent agreed, he said, to deduct $75 for her support, leaving him owing her $200 per month. In May 1948 he stopped paying respondent anything on account of the paragraph in the agreement providing for her support. That was the first time he had been able to prove she had remarried, as she had continuously denied it on many occasions. He then testified to his attempt to secure modification of the decree, and that before that he had been brought into court in contempt proceedings.

It is therefore clear that the trial court admitted abundant evidence of the intention of the parties as to the meaning of provision Seventh. The evidence was conflicting, and even though respondent's conduct in acquiescing in the reduced payments when her daughters did not reside with her, might strongly favor an interpretation that she regarded the provision as one for support only and not in the nature of a property provision as well, still there is testimony of hers which supports the trial judge's finding that she was entitled to the $350 per month for life but had waived it to the extent of $75 for each daughter when they were not with her.

[9] Appellant contends finally that the court committed reversible error in making essential findings contrary to the admissions of the pleadings of respondent herself. It is true, as appellant contends, that respondent alleged that defendant performed under paragraph Seventh of the contract from the date of its execution until the first day of May 1948. Respondent also testified that appellant was paid up in full to May 1, 1948. Appellant's answer denied each and every allegation of the paragraph of the complaint in which payment to May 1, 1948 was alleged. Thus the matter was put in issue. Therefore the cases cited by appellant to the effect that findings contrary to admissions made by the pleadings are erroneous are not in point.

[10] A counterclaim for overpayments was alleged in defendant's answer. It was necessary for the court to have some starting point in order to calculate the alleged overpayments. Appellant testified that at the time of the contempt proceedings he paid up in full, and had an opportunity of presenting all credits claimed at that time. He was not in arrears for the remainder of 1946. Therefore January 1, 1947, was taken as a starting point to calculate the amount which appellant owed under paragraph Seventh and the credits which were to be set off against the amount due. Appellant and his counsel apparently were agreeable to this procedure, as his counsel immediately asked to introduce the 1947 checks to show that appellant had overpaid the amount owing for that year. In his reply brief, appellant asks how defendant can be expected to come into court and be prepared to prove that he has faithfully made all his payments from January 1, 1947 up to May 1, 1948 when the complaint alleges that he was paid in full to May 1, 1948. Appellant has shown that no prejudice resulted, first because he acquiesced in this method of computation, and second, because he evidently was prepared, since as noted above, his counsel asked at once to introduce the 1947 checks that he might show overpayment. There is clearly no merit in this contention.

It is our view that the judgment of the trial court finds ample support in the evidence and the law applicable thereto and that there is no prejudicial error in the record.

Judgment affirmed.

NOURSE, P. J., and DOOLING, J., concur.

125 Cal.App.2d 613

JOHN PAUL LUMBER CO.

v.

AGNEW et al.

Civ. 8389.

District Court of Appeal, Third District, California.

May 28, 1954.

Rehearing Denied June 22, 1954.

Hearing Denied July 21, 1954.

Action to quiet title. The Superior Court, Del Norte County, S. F. Finley, J., rendered judgment for plaintiff corporation and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that evidence was sufficient to support findings that persons who had signed deeds to corporation's property, purportedly on behalf of corporation, were neither de jure officers nor de facto officers.

Judgment affirmed.

1. Corporations 🔑289

A person is an "officer de facto" or "director de facto" where he is in possession of the corporate office and exercising the duties thereof under color of right, but fails of being an officer or director de jure by reason of ineligibility, irregularity in his election, or failure to qualify as required.

See publication Words and Phrases, for other judicial constructions and definitions of "Officer De Facto" and "Director De Facto".

2. Corporations 🔑289

In corporation's action to quiet title to certain real estate, deeds to which had been signed by persons purportedly acting on behalf of corporation, evidence supported finding that persons who signed deeds were neither officers de jure nor officers de facto.

3. Principal and Agent 🔑175(3)

Whether an agent's act is binding upon his principal does not necessarily depend upon the existence of authority in the agent at time act was done, for an agency may be created, or an authority conferred, by subsequent ratification, but matter of ratification is controlled by specific code sections. Civ.Code, §§ 2309, 2310, 2312.

4. Corporations 🔑404(1)

To authorize conveyance of corporation's property by persons who are neither de jure nor de facto officers, it is necessary to create an agency, authorized in writing.

5. Corporations 🔑426(6)

A corporation's ratification of an alleged agent's unauthorized sale of its property can only be effected through a resolution of its board of directors when duly assembled. Civ.Code, §§ 2309, 2310.

6. Estoppel 🔑121

Findings, in corporation's action to quiet title to certain real estate, deeds to which had been made by persons purporting to act on behalf of corporation, were not subject to claimed infirmity in failing to make a sufficient finding on pleaded defense of estoppel.

7. Estoppel 🔑119

Questions of existence or nonexistence of estoppel are questions of fact.

8. Estoppel 🔑118

In corporation's action to quiet title to real estate, deeds to which had been made by persons purporting to act on behalf of corporation but who were neither de jure nor de facto officers nor authorized to act, evidence on issues, among others, of whether grantees had made adequate investigation of these persons' authority and whether the corporation had been abandoned was sufficient to support finding that corporation was not estopped to deny validity of deeds. Stat.1927 Wis. § 180.08.

9. Estoppel 🔑52

Four things are essential to application of doctrine of equitable estoppel; (1) the party to be estopped must be apprised of the facts (2) he must intend that his conduct shall be acted upon or so act that party asserting the estoppel has a right to believe it was so intended, (3) other party must be ignorant of the true state of facts, (4) other party must rely upon the conduct to his injury.

Brobeck, Phleger & Harrison, San Francisco, George J. Raymond, Smith River, for appellant.

Falk & Falk, Eureka, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and respondent, John Paul Lumber Company, a Wisconsin corporation, brought this action against Samuel A. Agnew, defendant and appellant, to quiet title to certain timber lands in Del Norte County. It also asked that the court declare void and order cancelled of record certain deeds on which appellant relies as vesting title in him. It was the theory of respondent that, although these deeds purported to be those of the corporation, they were executed in its behalf by persons without authority to convey its lands. Appellant's position was, first, that these deeds had been executed by de jure officers of the corporation, duly authorized; second, that if those who executed the deeds on behalf of respondent were not de jure officers then they were de facto officers with authority to convey respondent's lands; third, that respondent had ratified the acts of those assuming to act for it; and, fourth, that respondent was estopped to deny the validity of those acts.

John Paul Lumber Company was organized about 1890; it acquired timber lands in Wisconsin, in Florida and in California. It actively operated for many years and when its Wisconsin timber was exhausted it changed the main scene of its operations to its Florida holdings. In Florida it did not actively operate but became a holding corporation, and the activities of its stockholders thereafter were carried out through numerous corporations, one of which, the East Coast Lumber Company, was organized to cut the timber held by the John Paul Lumber Company in Florida. Respondent never actively operated in California.

John Paul was the original founder of the respondent and was succeeded in the management of corporate enterprises by his two sons. The varied businesses which the founder and his sons after him engaged in were family affairs, and it is apparent from the record that all the stock was closely held within that group. The Florida operations did not prosper. The East Coast Lumber Company suffered such financial reverses that during the depression years it went into receivership and was eventually liquidated. A. G. Paul and R. H. Paul, the sons of John Paul, and their respective families owned the stock of the various corporations and the stock of respondent in a proportion of about one-half to one family and one-half to the other, and A. G. Paul and R. H. Paul came to be the managing directors of the corporate activities. During this Florida period which extended over many years respondent was practically an inactive company—its single function being to own properties which the other corporations used in their businesses. Under the financial reverses which the Paul families suffered, the Del Norte County lands held by the respondent company became tax delinquent. This first occurred in 1926, and at that time the directors of respondent were R. H. Paul; his son, R. H. Paul, Jr.; A. G. Paul; his son, A. G. Paul, Jr.; and one T. R. Guerry. The corporation records show that in July of 1927 Guerry resigned as secretary and director, and one T. R. Bowen was elected in his stead to both offices. In January, 1928, the stockholders elected the following directors: A. G. Paul, R. H. Paul, T. R. Bowen, R. H. Paul, Jr., and F. C. Paul. T. R. Bowen became secretary-treasurer. These offices were held by him until May 20, 1929, when he resigned both offices and went to South Carolina where he lived for about seven years. A. G. Paul, Jr. was appointed director and secretary-treasurer to succeed Bowen. In January, 1930, A. G. Paul, Jr., resigned as director and as secretary-treasurer, Marie L. Paul being elected to the office of director. So from the corporate records it appears that after January of 1930 neither A. G. Paul, Jr. nor T. R. Bowen were officers of the respondent. A. G. Paul, Jr., left Florida, went to Canada and then moved to Oregon where he lived for many years. There were neither director nor stockholder meetings of respondent corporation after January, 1930, and until October of 1947, just before the filing of this action.

The deeds by which the lands of respondent were conveyed to appellant, some conveyances being direct to him, others being made ostensibly to third parties but for appellant's benefit, were executed by A. G. Paul, Jr., signing as vice president, and T. R. Bowen, signing as secretary. The first and the last two deeds in the series of seven by which the lands in question were conveyed were executed by A. G. Paul, Jr., as vice president. The other deeds purported to be executed for him by his wife, acting as his attorney in fact and signing his name as vice president. Upon this record the court found that these deeds were not executed by de jure officers of the corporation.

There was testimony that T. R. Bowen, a distant relative of Marie L. Paul, wife of A. G. Paul, Sr., had been employed by the East Coast Lumber Company as an accountant and general handyman; that he had never had any part in the management of respondent corporation and had owned none of its stock. He, himself, testified that he handled no affairs of the respondent since his resignation as director and secretary in 1929 until 1944. By this time he was again residing in Florida near the place where respondent's affairs had been handled up to the time when it became inactive, and it appears that he became the principal actor in the transactions whereby, in 1944, the Del Norte County lands of respondent were conveyed to appellant. His activities in connection with the affairs of the respondent corporation, however, were limited to the making of the deeds to respondent's Del Norte County lands and to the receipt of the moneys paid therefor, which moneys he first deposited in bank and then transferred to his account as executor of the will of A. G. Paul, Sr., who had died in 1943. This estate was subsequently distributed to Marie L. Paul, widow of decedent. Bowen handled no other affairs for the company; indeed, the company had long been completely inactive, and remained so until action was taken preparatory to filing this suit. As to A. G. Paul, Jr., who, with Bowen, purported to act for the corporation in the execution of the deeds, he had had no connection whatever with any of the affairs of respondent from 1930, when he had left Florida, until the execution of the first deed. At that time he was in the navy. While on a short leave he visited Watertown, Florida, which town had been the site of operations of the John Paul Lumber Co., where his mother, Marie L. Paul, resided. At that time he saw certain correspondence having to do with Del Norte County lands, and coming from individuals who wanted to buy the properties. He talked with Bowen about the matter, told him he knew nothing about such matters, and asked Bowen if he (Paul) had any connection with respondent. Bowen told him that he was the vice president, and acting in that belief he later executed the first of the series of deeds, and the last two. His wife, to whom he had given a general power of attorney, commonly given by members of the armed services, executed the other deeds, purporting to act under this power of attorney and signing her husband's name as vice president of respondent.

Respondent's Del Norte County lands, as we have stated, became tax delinquent in 1926. They had later been tax deeded to the state and had remained in that status. In April, 1944, a Mr. Puter, who resided in the general area in which the lands were located and who was by occupation a searcher of titles, made application to the Del Norte County Supervisors for the public sale of these lands. Other applications may likewise have been made. The supervisors responded by advertising the sale for July 3, 1944. Puter wrote a letter to the respondent company at Watertown, Florida, and this letter came into the hands of Bowen. In the letter Puter stated that the lands would be sold for taxes; that he had other holdings of his own near these lands; that he wanted to buy the lands and would pay $1 an acre for the respondent's equity of redemption. It was, of course, apparent that if the lands were not to go to public sale they would have to be redeemed before the advertised date of sale, and that meant the payment of considerable sums of money to discharge the tax liens and prevent the divestiture of respondent's interest. It actually took approximately $9,000 to clear all the land of taxes. Bowen, purporting to act for respondent, authorized Puter to redeem the lands at Puter's cost, and purported, also, to give respondent's option to Puter to purchase the redeemed lands at the offered price. From time to time the lands were redeemed and conveyed to Puter. It is unnecessary to state in detail the series of transactions that followed. It is enough to say here that the lands were redeemed, appellant furnishing the money for that purpose and paying, in addition, the $1.00 per acre for respondent's equity of redemption. Bowen's testimony was that in all of these matters he acted in the honest belief that he was the secretary of respondent and was acting for its benefit. As to A. G. Paul, Jr., his testimony was to the effect that his assumption to act as vice president of respondent was based wholly upon Bowen's statements to him that he did hold such office. He said he knew nothing of the details of the various transactions by which the company's property was conveyed to appellant, and that for almost the entire period during which these transactions were taking place he was serving in the navy in distant theaters. In explanation of the actions of the two men in assuming that they had authority to convey away the respondent's lands, it was shown that the records of the respondent, and especially the minute book of director and stockholder meetings, had been lost around 1930, when a fire destroyed the building in which they had been kept, and had remained lost until in 1947 when some of these records, including the minute book, were found. In the interim none of the members of the Paul families were shown to have known anything about these records having escaped destruction in the fire.

The deeds obtained by or for appellant were all quitclaim deeds in form and were dated and executed as follows:

Deed dated June 10, 1944, executed by A. G. Paul, Jr. and T. R. Bowen, as vice president and secretary, respectively;

Deed dated July 21, 1944, executed by Bowen as secretary, and Margaret F. Paul, wife of A. G. Paul, Jr., who signed as his attorney in fact, his signature purporting to be that of vice president of respondent;

Deed dated July 28, 1944, again executed by Bowen and by Mrs. Paul as attorney in fact for A. G. Paul, Jr.;

Deed dated September 15, 1944, executed by Bowen and by Margaret F. Paul as attorney in fact for A. G. Paul, Jr.;

Deed dated October 29, 1945, executed by Bowen and by Mrs. Paul as attorney in in fact for A. G. Paul, Jr.;

Deed dated May 7, 1946, executed by A. G. Paul, Jr., as vice president, and Bowen, as secretary;

Deed dated August 27, 1947, executed by A. G. Paul, Jr., purporting to act as vice president, and Bowen, purporting to act as secretary.

It is not seriously contended by appellant that Bowen and A. G. Paul, Jr. were de jure officers when they assumed to act for respondent, and certainly such a contention could not be sustained in view of the trial court's findings based upon the corporate records and the testimony we have narrated. We, therefore, without further discussion, pass on to the matter of their having been de facto officers.

[1] A de facto officer of a private corporation is defined as being one who has the reputation of being the officer he assumes to be in the exercise of the functions of the office, and yet is not a good officer in point of law; and as one who is in possession of an office and discharging its duties under color of authority. (Fletcher Cyclopedia Corporations, Perm.Ed., Vol. 2, § 373.) "A person is an officer or director de facto where he is in possession of the office and exercising the duties thereof under color of right, but fails of being an officer or director de jure by reason of ineligibility, irregularity in his election, or failure to qualify as required." 19 C.J.S., Corporations, § 740, headnote. Says Fletcher, supra, section 374: A solitary exercise of power, even under color of title, will not constitute the party an officer de facto. To constitute such officer one must be in actual possession of the office and be exercising and discharging its functions and duties. He must hold office under some degree of notoriety, and exercise continuous acts of an official character. Says the author: "whether two claimed de facto officers are in possession and exercising the powers of their office, and claiming to hold such offices under color of an election, are questions of fact for the trial court." (See, also, 13 Cal.Jur.2d "Corporations", § 294.)

[2] In support of their contention that A. G. Paul, Jr., and Bowen were de facto officers of respondent and that respondent, therefore, is bound by that which these men did, appellant argues as follows: From April of 1944, when Puter began the first of the negotiations which resulted in the conveyance of respondent's land, until October of 1947, when steps were taken in the reestablishment of respondent as a corporation of Wisconsin, in good standing, these men claimed to be officers of respondent. During that time seven deeds were executed under their authority and the proceeds disposed of. This was the whole of the corporation's business during the period and no one else purported to act in its behalf. No one else claimed to be an officer of the corporation. Paul and Bowen believed they were officers, and this belief was shared by almost everyone concerned with the corporation. Marie L. Paul, widow and beneficiary of the will of A. G. Paul, Sr., believed these men were officers

and likewise so did other members of the Paul families, who, among themselves, owned all of the stock. A county probate judge in Florida, who took acknowledgments to a number of the deeds, must have shared the belief that these men were the officers they purported to be. The cashier of a bank in Lake City, which is near Watertown, testified that Bowen had opened an account in his bank for John Paul Lumber Company; that it was the cashier's opinion that Bowen was then secretary and treasurer of respondent, and that, again in the cashier's opinion, Bowen was known as such around Lake City and Watertown. In the case of Bowen, he once had been the officer which he purported to be when he signed the deeds. The negotiations for these deeds began in 1944, and from then on until the discovery of the minute book in October of 1947, A. G. Paul, Jr., claimed to be vice president, and Bowen claimed to be the secretary-treasurer of respondent and no one protested their claim, and they purported to act on behalf of respondent in those capacities. Their acts covered a period of three and one-half years during which time they carried on all of the corporation's business, and those to whom they conveyed the property accepted them as the officers they claimed to be. Appellant argues further that these two men were generally accepted within the corporation as the officers they claimed to be, and that the stockholders and surviving de jure officers knew of the acts of these men and believed them to be authorized.

We are presented here with the familiar situation where the trier of fact might have upheld appellant's contention by deciding that A. G. Paul, Jr., and Bowen were de facto vice president and secretary of respondent, but it is equally apparent that the trier of fact was not compelled to do so; in short, that the evidence, taken as a whole did not amount to proof as a matter of law that these two men were de facto officers. The trial court had held, upon substantial if not imperative evidence, that these two men were not de jure officers. Each of them had, about 15 years before, resigned the only offices they had ever held and left the scene of respondent's operations. There is evidence that neither had ever conducted any affairs of respondent in an executive capacity until they began acting as officers of respondent in 1944. Bowen had returned to the vicinity of Watertown, but A. G. Paul, Jr., had not appeared there except temporarily, and never did he go there with any purpose of conducting any business as an officer of respondent. Aside from the inferences that might be drawn from the testimony of the county probate judge and the bank cashier, there was no proof that Bowen had been acting as an officer of respondent before these transactions took place, and there was no proof of any specific thing that he had done which would have justified the expressed opinion of the judge and the cashier. The corporation had done no business from 1930 until these conveyances were made, and it is going far to describe the transactions ending in the conveyances as amounting to the conducting of the corporation's business. Rather, it was in the nature of a liquidation proceeding, motivated probably by belief on the part of Bowen that unless these lands were conveyed they would be lost and that it was better under the circumstances that a little should be gotten while that could be done. There seems to be no reason not to credit Bowen with having acted in what he believed to be the best interests of the Paul families. But the trial court could have disbelieved, in view of his departure from Florida and his resignation from the offices he held in respondent corporation back in 1929, that he thought he was, in 1944, an officer. As to A. G. Paul, Jr., there is testimony that any belief he may have had that he was an officer of the corporation derived solely from what Bowen told him when he got him to sign the conveyances which he did sign. The trial court could have concluded from the whole of the evidence that these two men were mere usurpers who knew, or certainly should have known had they made any inquiry or sought to revive their own memories, that they had no authority to convey away the lands of respondent. The finding of the trial court that they were not de facto officers is supported by the evidence, and is beyond attack on appeal.

[3] Appellants further contend that if A. G. Paul, Jr., and Bowen were neither de jure officers nor de facto officers of respondent, yet their acts in conveying respondent's property were ratified by respondent.

> "Whether an agent's act is binding upon his principal does not necessarily depend upon the existence of authority in the agent at the time the act was done, for an agency may be created, or an authority may be conferred, by a subsequent ratification as well as by a precedent authorization." (2 Cal. Jur.2d, "Agency", § 75.) (See Civil Code, § 2312.)

However, the manner of ratification is controlled by specific code sections.

> "An oral authorization is sufficient for any purpose, except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Civil Code, § 2309.

> "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or where an oral authorization would suffice, by accepting or retaining the benefit of the act, with notice thereof." Civil Code, § 2310.

[4, 5] A. G. Paul, Jr., and Bowen, having been neither de jure nor de facto officers of respondent, it was necessary to the creation of an agency in them to convey respondent's land that they be so thereunto authorized in writing. Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252; Blair v. Brownstone Oil etc. Co., 168 Cal. 632, 143 P. 1022. There is no claim and could be none on this record that there was any precedent authorization by the respondent, and this brings into play the provisions of Civil Code Sections 2309 and 2310, that any ratification must have been by formal action evidenced by writing. A corporation's ratification of an alleged agent's unauthorized sale of its property can only be effected through a resolution of its board of directors when duly assembled. Salfield v. Sutter County L. I. & R. Co., 94 Cal. 546, 549, 29 P. 1105; Blair v. Brownstone Oil etc. Co., supra. We are not here concerned with the exception to the general rule mentioned in Jeppi v. Brockman Holding Co., 34 Cal.2d 11, 17–18, 206 P.2d 847, 9 A.L.R.2d 1297, holding that the rule is not applicable where an act requiring written authorization is performed by an executive officer of a corporation. As we have already seen, the trial court properly found that the men purporting to act for the respondent were neither de jure nor de facto officers thereof and had no authority in fact or in law to represent the corporation. We hold that respondent never ratified the deeds executed in its name and that the court's finding that there had been no ratification must be upheld.

[6] Finally appellant contends that respondent is estopped to deny the validity of the conveyances which it seeks to avoid. This of course presents a different issue from that of ratification. The defense of estoppel was pleaded, and the first argument of appellant in support of this point of his appeal is that the court made no finding upon the issue. This is not so. The finding was general, but we think it was sufficient, in the absence of any request by appellants for a more complete finding. The court found:

> "That at the time that the deeds * * * were executed neither A. G. Paul, Jr., nor T. R. Bowen were either de jure or de facto officers of the plaintiff, John Paul Lumber Co., a corporation; that in executing the deeds in question they * * * acted without office or authority and their acts in executing said deeds are not binding on the plaintiff, John Paul Lumber Co., a corporation; that there is no basis for a finding of ratification of their acts by the plaintiff, nor were there present the elements of estoppel against the plaintiff; and that all of said deeds are null and void * * *."

[7–9] The foregoing contains a sufficient finding upon the defense of estoppel in the absence of any request for findings more in detail. Questions as to the existence or nonexistence of estoppel are questions of fact for determination of the trial court. Parke v. Franciscus, 194 Cal. 284, 228 P. 435; Assets Corporation v. Perrin Properties, Inc., 48 Cal.App.2d 220, 228, 119 P.2d 375. We think that here again the evidence on the question of estoppel was in conflict, and that the decision of the trial court that estoppel had not been made out is conclusive on appeal. We have already recited some of the evidence applicable to this issue of estoppel. Additional evidence is presented by the record. Mr. Puter, who dealt with Bowen and other members of the respondent corporation was a title man. Mr. Quinn, an attorney at law, was acting for appellant throughout as appellant's counsel. These men knew that they had no assurance or representation from anyone other than Bowen until after nearly all of the deeds in question had been executed that Bowen had any authority whatsoever, or that he was an officer de jure or de facto of respondent. Their first communication was addressed to respondent and answered by Bowen, and in his answer, acting no doubt under the pressure of the emergency portrayed in Puter's opening letter to respondent, he purported to bind the corporation to the granting of an option to Puter for the purchase of the lands. Mr. Quinn and Mr. Puter knew that respondent was a Wisconsin corporation, and if they were not familiar with the basic corporation laws of Wisconsin, such information was readily available. Had they inquired they would, for instance, have discovered that respondent, back in 1927, had failed to make an annual report required by Wisconsin law, Rev.Stats. § 180.08, and the Secretary of State of Wisconsin had declared a forfeiture of its corporate rights and privileges. A letter to the Secretary of State of Wisconsin would have disclosed these matters and would have further disclosed that the forfeiture had never been lifted. When Bowen began to deal with them, asserting himself to be the secretary and stating that A. G. Paul, Jr., was vice president, they made no inquiry as to whether or not they were such officers or as to whether or not they had authority to convey respondent's land. They proceeded to act in redeeming lands and paying the small purchase price per acre without further inquiry. The reason for this may be found in Puter's answer when he was asked as a witness why he and his associates did not let the lands go to auction and bid them in. His reply was that if the lands had gone to auction "these big operators there would have bid the property up to a pretty high price. It would have been sold." After the first deed had been executed by Bowen and A. G. Paul, Jr., the four deeds following in point of time were executed by Bowen and by Margaret Paul as attorney in fact for A. G. Paul, Jr. As we read the record it is not even claimed that either Puter or Quinn believed that if Paul, Jr.'s signature was necessary as vice president he could delegate the signing of it to his wife through power of attorney. More than this, they were informed by Bowen that all of the men of the Paul families were in the armed forces and not available; but that there did exist this document executed by A. G. Paul, Jr., general in form and constituting his wife as attorney in fact. Without going further it can be said that from the beginning there were such indications that these deeds coming through were unauthorized, that neither Puter nor Quinn nor appellant in his turn relied or could justifiably have relied upon any representation concerning the authority of the signors of these deeds. These men seem to have taken a calculated risk. The trial court could have so determined. Appellant argues at length that the stockholders of the respondent had abandoned the corporation; that Marie L. Paul, by direct holdings and through inheritance of her husband's shares of stock, had been in fact the manager of the corporation, and that she knew of the acts being taken by A. G. Paul, Jr., and Bowen; that up until the time the corporate records were discovered those members of the Paul families who were stockholders and who knew at least something of what was happening, believed that Bowen and Paul, Jr., were authorized to do what they did and made no objection to their doing it; that the corporation received and retained the purchase price of the land and was not, by the judgment of the court, required to refund it. (That the respondent corporation received the purchase price rests upon testimony that Bowen first received it, then deposited it in an account he opened in the name of respondent for that purpose in the Lake County Bank, and then paid it into the estate of A. G. Paul, Sr., where it was received in payment of a debt which Bowen said the respondent owed to A. G. Paul, Sr. It should be added that appellant's funds used to redeem the lands from tax liens were by the judgment ordered to be paid into court for his benefit and there is no contention advanced that this was not done and that these funds are not available to him.) Appellant refers also to testimony that J. A. Paul, son of A. G. Paul, Sr., and brother of A. G. Paul, Jr., returned from the service late in 1945 and thereafter, acting as he said solely upon information given him by Bowen that his brother and Bowen were officers of the corporation, was instrumental at the request of appellant and his associates in bringing about the execution of two further deeds by his brother. A number of other matters reflected in the evidence are also noted in appellant's arguments on this matter of estoppel, but we think it unnecessary to relate them in detail. So far as estoppel is concerned these argued matters do no more than raise a conflict as to the existence of the various elements of estoppel. It has been said that four things are essential to the application of the doctrine of equitable estoppel. First, the party to be estopped must be apprised of the facts; second, he must intend th his conduct shall be acted upon, or so a that the party asserting the estoppel h a right to believe it was so intended; thir the other party must be ignorant of th true state of facts; and, fourth, he mu rely upon the conduct, to his injury. Cit of Los Angeles v. Babcock, 102 Cal.Ap 571, 283 P. 314. The trial court was n bound to hold that the respondent corpor tion, through any of its actual de jure off cers, is to be charged with making repr sentations to appellant concerning the a thority of those who purported to execut deeds in its behalf. To the knowledge an belief of the corporation's officers, neithe appellant nor those who acted for him kne anything about it. Actually, if they relie at all upon anything emanating from any one purporting to represent responden they went upon nothing and could hav gone upon another other than Bowen's rep resentations. Later on when J. A. Pau took action he told Mr. Quinn that all h knew about the authority of A. G. Paul Jr., and Bowen was hearsay and he testifie that his information came from Bowe alone. The factual finding of the tria court that respondent is not estopped t set up the invalidity of the deeds purportedly executed in its name finds ample sup port in the record.

The judgment is affirmed.

PEEK, and SCHOTTKY, JJ., concur.

Hearing denied; TRAYNOR an SCHAUER, JJ., dissenting.